I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Land Court of New Zealand
Waiariki District

A20170006751

WĀHANGA *Under*	Sections 79, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Motuaruhe 5D Block
I WAENGA I A *Between*	JOSEPH KINGSNORTH Te Kaitono *Applicant*
ME *And*	CAROLINE CRAWFORD, JENNIFER CRAWFORD AND COLLEEN HIGGINS AS TRUSTEES OF THE HARIATA KINGSNORTH WHĀNAU TRUST Te Kaiurupare *Respondent*

Nohoanga: *Hearings*	On the papers (Heard at Chambers)
Kanohi kitea: *Appearances*	L Hemi for Applicant J Pou for Respondents
Whakataunga: *Judgment date*	6 May 2020

TE WHAKATAUNGA Ā KAIWHAKAWĀ C T COXHEAD
Judgment of Judge C T Coxhead

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Hei tīmatanga kōrero - Introduction

[1] On 24 October 2018 I issued my judgment regarding the ownership of a house situated on Motuaruhe 5D Block and determining whether the applicant, Mr Joseph Kingsnorth, was entitled to any equitable relief. I held that the house was owned by Hariata Kingsnorth, Joseph's late wife. Additionally, I held that Joseph did have an equitable interest in the house and was entitled to be compensated for his contributions to the it. I ordered the estate of Hariata Kingsnorth to pay compensation of $20,000.00 to Joseph.[1]

[2] The applicant now seeks an order for costs against the respondent and Māori Land Court Chief Registrar.

Kōrero whānui – Background

[3] The applicant, Joseph Kingsnorth, claimed ownership of a house on the Motuaruhe 5D land block. He resided there for more than 30 years with his late wife, Hariata Kingsnorth. The respondents, the Hariata Kingsnorth Whānau Trust, also claimed an interest in the house.

[4] Motuaruhe 5D Block, the block the house is located on, is Māori freehold land and is administered by the Motuaruhe 5D Ahu Whenua Trust. There are 24 owners in the land, including the whānau trust. Hariata is both a beneficiary and the tupuna of the whānau trust. The applicant is not an owner in the land. No occupation orders have been granted and no previous determination of ownership had been made in relation to the house.

[5] Hariata Kingsnorth originally acquired the house with her first husband Kingi Crawford and continued to live in it periodically throughout her life, particularly in the last years of her life. Based on the evidence, I found Hariata was the rightful owner of the house and an order was made pursuant to s 18(1)(a) determining ownership of the house accordingly.

[6] I determined that in light of Hariata's marriage to the applicant, their long occupation of the house together, and his significant contributions to the house, that the applicant had an equitable interest in the house and was therefore entitled to equitable relief by way of

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1 *Kingsnorth v Crawford – Motuaruhe 5D Block* (2018) 199 Waiariki MB 203 (199 WAR 203).

compensation. I ordered the estate of Hariata Kingsnorth to pay the compensation of $20,000.00 to Joseph.

[7] Since the house was owned by Hariata Kingsnorth and succession to Hariata had not yet occurred, I stated that if those entitled to succeed to Hariata wished to vest the house in the whānau trust, an application together with consents could be filed within one month and the orders could be made accordingly. I note that no such application was filed.

[8] The applicant now seeks an award of costs against the Hariata Kingsnorth Whānau Trust. The applicant is seeking orders for the respondents to pay $8,000.00 towards his legal costs, plus disbursements of $1,075.43 for the valuation report on the house and Court-related disbursements. The applicant is additionally seeking an order of $4,438.78 against the Registrar of the Court, or alternatively for the Court to make a grant of special aid to the applicant in that amount.

Ko te hātepe ture o te tono nei - Procedural history

[9] As stated earlier, my substantive judgment in this matter was issued on 24 October 2018.

[10] The applicant originally filed submissions regarding costs on 30 January 2019. However, it was subsequently brought to counsel's attention that the respondents were in receipt of special aid from the Māori Land Court Special Aid Fund. As such, counsel requested extra time to file amended submissions. I granted counsel's request on 2 May 2019 and gave him three weeks from when he received my minute to resubmit on costs, and the respondents three weeks from the day the applicant resubmitted their submissions to file their response.[2]

[11] On 24 June 2019 counsel for the respondents filed a memorandum submitting that the time for filing submissions had lapsed and that no order of costs can be made for want of an application. Counsel for the applicant filed a response requesting an extension to file costs submissions on 28 June 2019. I granted the extension and directed counsel for the respondents to file a response by 1 October 2019.[3]

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2 211 Waiariki MB 137 (211 WAR 137).
3 215 Waiariki MB 265-266 (216 WAR 265-266).

[12] Counsel for the applicant filed their amended submissions on 28 June 2019. Counsel for the respondents filed their response, opposing an award of costs, on 12 November 2019.

Ngā kōrero a te Kaitono - Applicants' submissions

Award of costs against the respondents

[13] Counsel for the applicant submitted that an award of costs against the respondent is appropriate for the following reasons:

(a) Being compensated for the contributions to the house was the outcome the applicant sought from the outset in bringing the substantive application and he was therefore successful.

(b) An invitation to negotiate a resolution of the substantive issue through the payment of compensation to the applicant was presented to the whānau trust. The respondents declined to respond with any offer of settlement or engage in any meaningful negotiation.

(c) It was never the wish of the applicant to proceed to a Court hearing but due to the initial letter inviting the respondents to negotiate compensation being declined simultaneously with the respondents' instructing counsel to defend the application and a notice of intention to appear being filed with the Court, it was inevitable.

(d) No application has been made by the respondents to vest the dwelling in the whānau trust, nor has the trust provided any indication that it intends to comply with the Courts order to compensate the applicant.

[14] Counsel for the applicant submitted that they only sought costs from the respondent for their legal costs prior to the special aid being granted on Friday 11 May 2018.[4] They argued that, as a result, the rule that costs only be granted in exceptional circumstances against a party in receipt of special aid did not apply. Counsel cited *Rolleston v Moore* to

[4] 187 Waiariki MB 47 (187 WAR 47).

support the applicant's position.[5] As hearing took place on Tuesday 15 May and Wednesday 16 May 2018, counsel submitted that the only events which were not included in their calculations for the costs sought were the actual hearing hours themselves and the final closing submissions.

[15] Counsel submitted that $10,000.00 represented a fair assessment of the proportion of total costs that could be attributed prior to the respondent being granted special aid and that $8,000.00 is a fair and reasonable contribution to that sum. Counsel recognised that 80% was at the upper end of costs, however submitted that it is a fair and reasonable contribution given the circumstances of the case.

[16] While the substantive matters were being addressed, an urgent interim injunction was sought by the applicants to prohibit one of the respondents and her son from entering on to the property until the substantive issue has been resolved.[6] Counsel submitted that this required an additional significant amount of time to prepare and file. Counsel submitted that the applicant was also successful in this interim injunction application, as well as in relation to the substantive matter before the Court.

Award of costs against the Chief Registrar of the Māori Land Court

[17] Counsel for the applicant argued that the parties being unaware of the grant of special aid funds to the respondents was the fault of the Court, as they failed to notify counsel. Counsel submitted that this failure to notify deprived the applicant of the opportunity to temper his instructions if he wished to do so, had he known that any subsequent application for costs would be subject to the exceptional circumstances provision.

[18] Counsel for the applicant therefore argued that the Court should consider making an award for costs against the Chief Registrar, or alternatively should grant special aid for the work undertaken by counsel after the special aid was granted to the respondents. This

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5 *Rolleston v Moore – Lot 1 Deposited Plan South Acukland 52401 and Onganinga No 1C No 1 Block (2016) 133* Waikato Maniapoto MB 39 (133 WMN 39) at [72]-[74].

6 175 Waiariki MB 10-23 (175 WAR 10-23) - As a result of tensions between the parties, an interim injunction was issued on 20 November 2017, preventing Caroline Crawford, daughter of Hariata Kingsnorth and a trustee of the Hariata Kingsnorth Whānau Trust, and her son Pararaki Waititi, from entering the house and curtilage area until further order of the Court.

included the actual hearing time and the preparation of the closing submissions, which counsel stated came to a total cost of $4,438.78. Counsel submitted that such an award of costs or grant of special aid is fair and reasonable given the circumstances and the prejudice caused to the applicant.

Ngā kōrero a ngā Kaiurupare - Respondents' submissions

[19] The respondents oppose any award of costs. Counsel for the respondents submitted the following:

(a) The applicant was limited in his success in the substantive judgment. The substantive case was an application for ownership of the house, not just compensation, and possessory rights were not found to rest with the applicant.

(b) The respondents did respond to the initial letter from the application, regarding a number of matters ancillary to the application that the respondent sought clarity around. The correspondence between the respondent and applicants highlights tensions that were growing around the efforts of the applicant, which were seen as exclusory.

(c) The extent to which the applicant sought compensation was not made clear until the hearing. There is no evidence that a settlement offer was made by the applicant and this is therefore not a case where the respondents unreasonably refused a settlement offer.

(d) In the absence of the estate of Hariata being administered, there is no clarity as to who the potential beneficiaries of the estate are and as such it is impossible to know what debts the estate has or what claims there are to any of the property within it. The applicant is a potential beneficiary of the estate and as such he could have applied to the Court in accordance with the substantive judgement.

[20] Counsel for the respondents argued that the circumstances of *Rolleston v Moore*, which counsel for the applicant used to support their outcome sought with regards to the

special aid funding, are not applicable to this case.[7] The application for special aid was made and granted to apply retrospectively and to cover the attendances that had occurred prior to the application being made. The respondents were therefore supported by the special fund for the entirety of the proceedings. Counsel therefore submitted that the requirements to achieve a costs award, as set out in the applicant's submissions, are not met insofar as they apply to the respondents. Counsel argued that if the Court does determine the costs are appropriate, all such costs should be paid out of the special fund, not by the respondents. On the strict basis of responding to the submissions applying for costs, counsel submitted that the application as it related to the whānau trust must fail.

[21] Further, counsel submitted that jurisprudence has moved away from the position set out in the Māori Land Court's Special Aid Practice Note that exceptional circumstances must exist for costs to be awarded against a party in receipt of special aid.[8] The Māori Appellate Court in *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* recently found the receipt of special aid to be merely a relevant factor to be taken into account on a case-by-case basis, rather than a condition to be achieved.[9] Counsel highlighted that the minute granting special aid sets out the assistance was provided due to impecuniosity and ineligibility for legal aid.[10] The granting of special aid for these factors is therefore relevant to the exercise of discretion to be employed in this instance.

[22] Counsel stated that the applicant was awarded compensation not against the respondents but against the estate of Hariata Kingsnorth. Counsel submitted that as such, any success that the applicant might have achieved was not at the expense of the respondents. The Court found that the house is not owned by the whānau trust, and therefore the trust is not liable to compensate the applicant. Counsel stated that there had never been a claim, in equity or other, by the applicant against the whānau trust. Therefore, counsel submitted that it could not be said that the respondents were necessarily unsuccessful and nothing is owed by them to the applicant as a result of the judgment. As such, counsel submitted that an order of costs is not appropriate.

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7 *Rolleston v Moore – Lot 1 Deposited Plan South Acukland 52401 and Onganinga No 1C No 1 Block (2016) 133* Waikato Maniapoto MB 39 (133 WMN 39).

8 Māori Land Court of New Zealand: Practice Note – Special Aid Fund – Appointment of a Barrister of Solicitor, 31 May 2012.

9 *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* [2019] Māori Appellate Court MB 652 (2019 APPEAL 652).

10 187 Waiariki MB 47 (187 WAR 47).

Te Ture - The Law

[23] The general approach to an award of costs is settled. The relevant principles were set out in *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*.[11]

[24] In the determination of costs there is a two-stage approach, the first question being should costs be awarded? If the answer is yes, then the Court moves to consider the quantum.[12]

[25] The following general principles apply when deciding whether to award costs:[13]

(a) The Court has an unlimited discretion to award costs.

(b) Generally, costs follow the event.

(c) It may be inappropriate to award costs if it would frustrate the Court's role to facilitate amicable relationships between parties often connected through whakapapa. However, if litigation has been pursued in a manner akin to civil litigation, then the starting point will be that costs are appropriate.

[26] Then, in relation to quantum, the following general principles apply:[14]

(a) The Court has a broad discretion as to quantum,

(b) Quantum should reflect a reasonable contribution to costs actually and reasonably incurred.

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11 *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238) at [11]-[13].

12 *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [9].

13 *Karepa v Te Riini – The Kikorangi and Kareti Whānau Trust* (2016) 144 Waiariki MB 3 (144 WAR 3), citing *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [10].

14 See, for example, *Nicholls v Trustees of the WT Nicholls Trust – Part Papaaroha 6B Block* [2014] Māori Appellate Court MB 2 (2014 APPEAL 2) at [8] also in *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [13].

(c) A reasonable contribution will seldom be as low as 10 per cent, but an 80 per cent or 90 per cent contribution will seldom be reasonable.

(d) The Court should consider what is just in the circumstances, having regard to a range of factors including the nature and course of the proceedings, the complexity of the arguments, the importance of the issues, the successful party's degree of success, the time required for effective participation, the parties' legal situation, the parties' conduct and sense of realism and whether the proceedings were informal or akin to civil litigation.

(e) If a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and helpless claim or defence – this may justify a more liberal award of costs.

[27] The Māori Appellate Court in *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* confirmed the principles summarised in *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*. Additionally, the Appellate Court considered the issue of whether costs should be awarded where there is a grant of special aid. The Appellate Court considered that a grant of special aid is relevant to both stages of the inquiry on costs, being whether costs should be awarded, and if so, in what amount. They considered an inflexible rule, or set of criteria, should not apply. Instead, a grant of special aid is a relevant factor to be taken into account on a case-by-case basis. They held that the means and conduct of the party in question are highly relevant. However, these are relevant factors, rather than threshold factors, for the Judge to consider in the exercise of his or her discretion.[15]

[28] In *Samuels v Matauri X Incorporation* the Court recognised that while there is some guidance to be had from the principles set out in other cases, the Court must come to its own view as to the costs to be awarded in any particular case depending on all the circumstances of that case.[16] This was also confirmed by the Appellate Court in *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust.*

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15 *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* [2019] Māori Appellate Court MB 652 (2019 APPEAL 652) at [30].

16 *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [32].

[29] I adopt these principles and apply this approach.

Kōrerorero - Discussion

Which party was successful?

[30] Counsel submitted that compensation for the contributions to the house was the outcome the applicant sought from the outset in bringing the substantive application and he was therefore successful. This is in part correct. The substantive case was an application for ownership of the house, not just compensation, and possessory rights were not found to rest with the applicant. He was unsuccessful in his claim for ownership in the house. He was successful in that I held he did have an equitable interest in the house and was entitled to be compensated for his contributions to it. Therefore, the applicant was limited in his success in the substantive judgment. Further, he was not successful in his claim against the respondents. He was successful with regards to the Hariata Kingsnorth estate. The applicant was awarded compensation not against the respondents but against the estate of Hariata Kingsnorth. The success the applicant achieved was not at the expense of the respondents.

[31] The respondents, the Hariata Kingsnorth Whānau Trust, also claimed an interest in the house. They were unsuccessful in that claim. However, they were successful in their opposition to the applicant's claim for ownership in the house. Further, the respondents were successful in that they owe nothing to the applicant as a result of the judgment.

[32] In my assessment both the applicant and the respondents were in part successful and both in part unsuccessful. Therefore, as between them costs should lie where they fall.

Should costs be awarded against the respondents given they were aided?

[33] Even if I had found that the applicant was successful in all aspects of his claim I do not think that this is a situation where the respondents should pay costs.

[34] As the Māori Appellate Court in *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* found the receipt of special aid is to be a relevant factor to be taken into account on a case-by-case basis, rather than a condition to be achieved.[17] The grant of special aid is relevant to both stages of the inquiry on costs, being whether costs should be awarded, and if so, in what amount.

[35] In this situation the respondents were granted special aid because of their impecunious situation and ineligibility for legal aid. In my view they acted reasonably and advanced a case, where they were in part unsuccessful and in part successful. On that basis I would also consider that an award of costs is not appropriate against the respondents who were assisted with their funding from the Māori Land Court Special Aid Fund.

Award of costs against the Chief Registrar of the Māori Land Court

[36] As noted above counsel for the applicant argued that the parties being unaware of the grant of special aid funds to the respondents was the fault of the Court, as they failed to notify counsel. Counsel submitted that this failure to notify deprived the applicant of the opportunity to temper his instructions if he wished to do so. Counsel for the applicant therefore argued that the Court should consider making an award for costs against the Chief Registrar, or alternatively should grant special aid for the work undertaken by counsel after the special aid was granted to the respondents.

[37] Firstly, the respondents were supported by the special fund for the entirety of the proceedings - not part of the proceedings. Second, the applicant was not an interested party to the special aid application and therefore the Court or the respondent was not required to notify the applicant of the application.

[38] Those factors coupled with the fact that the applicant was in part successful and in part unsuccessful are in my view good reasons to decline the request for an award of costs against the Chief Registrar of the Māori Land Court.

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17 *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* [2019] Māori Appellate Court MB 652 (2019 APPEAL 652).

Kupu Whakatau - Decision

[39] The application for costs is dismissed.

I whakapuaki i te 10.00am i Rotorua-nui-a-Kahumatamoemoe te 6 o ngā rā o Haratua te tau 2020.

C T Coxhead
JUDGE