

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT**

A20140010912

UNDER Section 79 of Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Whirinaki 3 (formerly known as
Whirinaki No 1 Section 2F2C)

AND HENARE TONGARIRO PUAWAI
RATIMA
Applicant

Judgment: 19 August 2015

RESERVED JUDGMENT OF JUDGE C T COXHEAD

Introduction

[1] This decision deals with an application for costs filed by Henare Ratima. Mr Ratima is the Chairperson of the Whirinaki 3 Ahu Whenua Trust (“the Trust”). He seeks an order for costs incurred by the trustees in responding to an application for a judicial conference filed by Reginald Emery.

[2] Mr Emery’s application for a judicial conference was concluded on 5 September 2014.¹

[3] The trustees now seek costs in relation to that application. Costs are sought on the basis that the s 67 application was ill founded and lacking in sufficient detail. The trustees seek mileage costs for their travel to attend the judicial conference and legal costs totalling \$1,945.29.

[4] On 13 February 2015 I issued a direction to the parties requesting submissions as to whether the Court has jurisdiction to award costs in relation to a s 67 judicial conference. Those submissions have now been received.

Background

[5] On 14 July 2014 Mr Emery filed an application requesting a judicial conference to address matters raised between him the Trust. Those matters relate to land that was formerly the site of Rangatahi College in Murupara. The college was closed on 27 January 2013.

[6] The judicial conference, requested by Mr Emery, was held on 5 September 2014. Mr Emery complained that the trust has failed to provide him with information relating to the return of the former school site. During the judicial conference I indicated that a formal request should be made to the Trust seeking that information. I also directed that a copy of the request for information be filed with the Court.

[7] I indicated to Mr Emery that the request should be specific and should be made by a beneficiary of the Trust. Mr Emery is not a beneficiary of the Trust. I also signalled that

¹ 105 Waiariki MB 11 (105 WAR 11).

the cost for printing the information should be paid for by the person requesting the information. I then concluded the conference. Elizabeth Emery, a beneficiary of the Trust, subsequently made the formal request for information from the Trust.

Issues

[8] The issues for determination are:

- (a) Does the Court has the jurisdiction to award costs following a judicial conference; and
- (b) If the Court does have jurisdiction, whether costs should be awarded.

Submissions for the trustees

[9] Counsel for the trustees submits that Mr Emery's application while purporting to be an application for a judicial conference, in reality, encompassed matters that would more properly be advanced under ss 231 and 238 of Te Ture Whenua Māori Act 1993 ("the Act").

[10] Counsel argues that while s 67 is a procedural provision, applications are able to be made under s 67 of the Act. Counsel says that the ambit of s 67 is wide and allows the Court to make a number of consequential orders or directions.

[11] Counsel relies upon the approach set out in the Māori Appellate Court decision of *Samuel v Matauri X Incorporation*.² Counsel submits that the jurisdiction of the Court to award costs is unlimited. Counsel points to s 79(1) which she says enables the Court to make an order that it thinks just for any proceedings or any matters incidental or preliminary to any proceedings.

[12] Counsel further submits that the s 67 application was poorly framed and was a preliminary step in a procedure that has not been advanced as a result of the s 67 conference.

² *Samuel v Matauri X Incorporation* (2009) 7 Te Taitokerau Appellate MB 261 (7 APWH 261).

[13] Counsel says that the trustees made their position known to Mr Emery and engaged in good faith and at cost. Counsel submits that the Trust has no funds but has incurred costs as a result of a premature and inappropriate application. Counsel maintains that the trustees have always been willing to report to the appropriate persons but says Mr Emery was not such a person.

[14] In summary, Counsel for the trustees submits that Mr Emery's application was not successful, the trustees have been put to costs and costs should follow the event.

[15] The trustees seek costs involved in attending the judicial conference. Terrence and Ruku Nelson claim \$400.40, Rangi Anderson claims \$100.10, Emma Calman claims \$100.10 and Henare Ratima claims \$344.19. These claims total \$944.79. The trustees also seek legal costs of \$1,000.50 including GST. The total costs sought are \$1,945.29.

Submissions filed in response

[16] Mr Emery provided a letter to the Court dated 6 March 2015, in response to the costs application. Mr Emery submits that he should not have to pay the costs of the trustees who attended the judicial conference. Mr Emery says that he, on a number of occasions, has requested information from the trustees regarding whether his whānau consented to the Trust representing them on matters concerning the former school site. He says that it was only after he had exhausted all avenues that he resorted to filing his Court application.

[17] Mr Emery further states that following the judicial conference on 5 September 2014 he has written to the Trust on behalf of his aunty, Elizabeth Emery, and himself requesting minutes of both owner/beneficiary meetings and trustee meetings. Mr Emery says that he has still not received any information from the Trust.

[18] Mr Emery also sought to raise a number of other matters which are not specific to the costs issue and as such are not necessary to address in this decision.

[19] In summary Mr Emery submits that he believes the Court action could have been avoided if the Trust had only agreed to sit down and discuss his issues.

The Law

[20] Section 79 of the Act provides the Court with a broad jurisdiction to grant costs in any proceedings:

79 Orders as to costs

- (1) In any proceedings, the Court may make such order as it thinks just as to the payment of the costs of those proceedings, or of any proceedings or matters incidental or preliminary to them, by or to any person who is or was a party to those proceedings or to whom leave has been granted by the Court to be heard.

[21] That the Court has a wide discretion to award costs is undisputed.³ The general principle is that costs should follow the event.⁴

[22] Section 67 of the Act provides:

67 Powers of Judge to call conference and give directions

- (1) For the purpose of ensuring that any application or intended application may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as the Judge thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.
- (2) At any such conference, the Judge presiding may do all or any of the following things:
- (a) With the consent of the applicant, amend the application to give better effect to the applicant's intention:
 - (b) Settle the issues to be determined:
 - (c) Give directions as to service, and as to the public notification of the application and any hearing:
 - (d) Direct by whom and by what time any notice of intention to appear, or any statement in reply, shall be filed:
 - (e) Direct the filing of further particulars by any party:

³ *Samuels v Matauri X Incorporation* (2009) 7 Te Taitokerau Appellate MB 261 (7 APWH 261). see also *Nicholls v Nicholls - Part Papaaroha 6B Block* [2011] Māori Appellate Court MB 64 (2011 APPEAL 64); *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184); *Manuirirangi v Paraninihi ki Waitotara Incorporation* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64) and *De Loree v Mokokoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249).

⁴ *Ibid.*

- (f) Direct further research by any party, or by the Registrar from the Court records:
 - (g) Direct the filing by any party of any valuation, land use, or other report that may assist the Court in determining any matter in issue:
 - (h) Fix a time by which affidavits or other documents shall be filed:
 - (i) Exercise any powers of direction or appointment vested in the Court or a Judge by the rules of Court in respect of applications of the class with which the Judge is dealing:
 - (j) Give such consequential directions as may be necessary:
 - (k) Fix a time and place for the hearing of the application.
- (3) Notwithstanding any of the foregoing provisions of this section, a Judge may, at any time before the hearing of an application has been commenced, exercise any of the powers specified in subsection (2) of this section without holding a conference under subsection (1) of this section.

[23] In *Karena v George – Karaka Huarua A and B* the Māori Appellate Court discussed the ambit of s 67 as follows:⁵

Under section 67(1)/93 a conference is part of a preliminary process aimed at ensuring that an application is managed and eventually determined in a convenient and expeditious manner. To enhance that purpose, the Court is given various powers of direction as are set out in section 67(2)/93; none of those matters list the making of final orders or dismissal as jurisdictional options that may be pursued during such conferences.

While we tend to the view that the powers set out in section 67/93 are not exclusive, a Judge is limited to making directions in keeping with the tenor and intent of the section. There is no mention of a power to make an order. This is consistent with section 41/93, which requires every order to be pronounced orally in open Court.

A conference is not a hearing in open Court. The parties are not required to be ready to proceed or to put forward their cases. Admittedly, it serves to bring the parties together and there is always the possibility that discussion may bring about agreement. In such case, the Court has no power to make an order but it may be appropriate for the Judge, with the consent of the parties, to convene a hearing and deal with the matter under Rule 11 of the Maori Land Court Rules 1994. Even then, the notice requirements are still reasonably onerous. In other cases, where orders are proposed during a conference, the requirements as to notice may render it necessary for a hearing to be set down and formally notified.

⁵ *Karena v George – Karaka Huarua A and B* (2002) 6 Taitokerau Appellate Court MB 32 (6 APWH 32).

Does the Court have the jurisdiction to award costs following a judicial conference?

[24] It is clear that costs can be awarded for s 67 conferences held as part of determining a substantive application. For example, where an application is sought per s 67 and s 238 of the Act, the s 67 judicial conference would be a matter incidental to the s 238 proceeding. Any costs which are sought per s 79, would be determined upon the determination of the s 238 substantive proceeding.

[25] What is unclear, however, is whether costs can be awarded where an application for a s 67 conference is made to the Court and no other substantive proceedings result from the conference. That is to say, whether a s 67 conference is either a “proceeding” or “matters incidental or preliminary to proceedings” for the purposes of s 79 of the Act.

Are s 67 conferences either a proceeding or matters incidental or preliminary to proceedings?

[26] There are no Māori Land Court or Māori Appellate Court decisions that discuss this issue. I also note that Te Ture Whenua Māori Act 1993 does not define “proceedings”. As such, it is useful to examine the jurisdiction of the civil courts to award costs.

High Court Context

[27] “Proceeding” is defined in the High Court Rules as:⁶

any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application.

[28] An interlocutory application is defined as:⁷

an application made in accordance with [rule 7.19](#) or [7.41](#).

[29] **Rule 7.19 to 7.41 concern matters such as the filing of affidavits and applications made without notice. They provide for matters to be dealt with prior to a substantive proceeding and do not specifically include judicial conferences. As such judicial conferences are not excluded from the High Court definition of “proceeding”.**

⁶ High Court Rules, r 1.3.

⁷ Ibid.

[30] The High Court Rules do not in fact provide for judicial conferences at all. Rather, applications are required to be processed under a case management system. Under r 7.2 a judge can hold a case management conference and give directions concerning the determination of the proceedings. The Judge may also hold issues conferences to refine the issues and may also order a pre trial conference to consider matters regarding how a trial is to be conducted.⁸ Rule 7.79 gives a Judge the ability to, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations.

[31] The High Court Rules provide for costs to be determined at the discretion of the Court.⁹ Costs can be awarded if they relate to costs of a proceeding; or are incidental to a proceeding; or are a step in a proceeding. Schedule 3 of the High Court Rules sets out the reasonable time allocations for proceedings. The various conferences set out above are listed in that schedule.

[32] As such, the High Court has the jurisdiction to award costs in relation to the various types of conferences set out above. These conferences although set out under different rules are broadly similar to the powers set out in s 67 of the Act.

Māori Land Court context

[33] In the Māori Land Court context s 67 judicial conferences are used frequently in many different forms. Sometimes the judicial conference will be for setting timetabling directions towards a hearing or directing the filing of further particulars. Other times the judicial conference will be more involved and may lead to the settling of the issues to be determined.

[34] Ms Bennett has contended that in reality the application encompassed matters that would more properly be advanced under s 231 or s 238 of the Act. However, the fact remains that the application was for an s 67 judicial conference only. It was dealt with on

⁸ High Court Rules, rr 7.5 and 7.8.

⁹ High Court Rules, r 14.1.

that basis. It was completed on that basis. There were no other proceedings in the nature of s 231 or s 238 applications.

[35] In this case Mr Emery sought a judicial conference to obtain directions from the Court as to how to obtain information from the Trust. Both parties attended the judicial conference and made submissions on the matter. Parties presented evidence, which is not uncommon in these situations. One of the parties had sought legal advice. Directions were made and the judicial conference was concluded as the issues to be determined were settled.

[36] I therefore consider that this Court has a wide discretion to award costs including costs associated with a s 67 judicial conference. I further find that an application for a s 67 judicial conference is a proceeding for the purposes of s 79 of the Act.

[37] I am satisfied that the Court has the jurisdiction to award costs in this case. Mr Emery's application for a judicial conference was accepted, a judicial conference was held, both parties attended the judicial conference, made submissions on the matter, presented evidence, and the Court made directions and the issues to be determined were settled.

Should costs be awarded?

[38] Having determined that the Court does have the jurisdiction to make a costs award, the remaining issue is whether the Court should make an order for costs and if so what amount.

[39] In light of the circumstances of Mr Emery's application and the conduct of the parties I am of the view that costs should lie where they fall. Both parties were in part successful. Mr Emery and the Trustees both received clarification on how to deal with Mr Emery's desire to obtain information from the Trust. The matters between the parties could have been dealt with far more effectively had the trustees simply informed Mr Emery of their requirements for requesting information from the Trust.

[40] Having regard to the role this Court has in facilitating amicable, ongoing relationships between parties involved together in land ownership I find that an award of costs is inappropriate.

Outcome

[41] The application for costs is dismissed.

Pronounced in open court 12.30 pm at Rotorua on the 19th day of August 2015

C T Coxhead
JUDGE