IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A200140010464
APPEAL 2014/09

UNDER	Section 79, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal by DUNCAN MATUTAERA MATTHEWS against an order of the Māori Land Court made on 2 August 2014 at 253 Aotea MB 250-274 and confirmed on 6 August 2014 at 323 Aotea MB 191-192 in respect of the Māori Land interests of GRAHAM NGAHINA MATTHEWS
BETWEEN	DUNCAN MATUTAERA MATTHEWS Appellant
AND	GEORGE MATTHEWS, LESLEY PEDDIE, STEPHEN COMRIE AND BARBARA JACKI CLARK Respondents

Coram: Judge C T Coxhead (Presiding)
Chief Judge W W Isaac
Judge M J Doogan

Judgment: 4 May 2016

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT AS TO COSTS

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Introduction

[1] On 29 September 2015 we issued a reserved decision granting the appeal filed by Duncan Matthews in respect of the Māori land interests of Graham Ngahina Matthews. In addition we made orders revoking the lower court order made on 2 August 2010 at 253 Aotea MB 250-274 and subsequently granted the application filed by the late Graham Ngahina Matthews to vest several of his Māori land interests in his son Duncan Matthews by way of gift pursuant to a Deed of Transfer dated 19 August 2008.

[2] At the conclusion of the judgment we directed counsel for the appellant to submit a costs memorandum to the Court within 15 days of receiving the judgment following which counsel for the respondent could reply within 15 days of receipt.

[3] Submissions as to costs have now been filed. The appellant seeks an award of 75% of the total costs incurred being $30,575 plus the full disbursements of $1,421.50. The respondents oppose the costs sought and submit that costs should lie where they fall. In the alternative, counsel for the respondent proposes that an award of $3,533.63 to the appellant is reasonable.

[4] Following the receipt of those submissions we issued a further minute on 17 March 2016 inviting counsel for the applicant to file further submissions as to whether the Appellant is entitled to costs given that their first memorandum only addressed the quantum of costs[1]. The respondents were also given the opportunity to file further submissions in response. Further submissions have now been filed by counsel for the appellant. The respondent did not file further submissions.

Issue

[5] The issue for determination is whether costs are payable and if so what amount.

[1] 2016 Māori Appellate Court MB 137 (2016 APPEAL 137)

Background

[6] The background to these proceedings is set out in detail in our decision dated 29 September 2015 and need not be repeated here.

Appellants Submissions

Should the Court award costs?

[7] Mr Laurenson for the appellant initially made the submission that in our judgment dated 29 September 2015, this Court determined that the appellant is entitled to costs on his successful appeal and as such the only issue for determination is the quantum of costs.

[8] Given our indication that Mr Laurenson file further submission addressing the issue of whether costs should be awarded he now submits that the principles to be applied in determining this issue are those set out at paragraph [10] (a) to (e) of this Court's decision in *Samuels v Matauri X Incorporation* (as cited in *Henare v Māori Trustee*). Those principles being:

a) The Court has an absolute and unlimited discretion as to costs;

b) Costs normally follow the event;

c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;

d) The Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may sometimes make awards of costs inappropriate. However, where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply; and

e) There is certainly no basis for departure from the ordinary rules where the proceedings were difficult and hard fought, and where the applicants succeeded in the face of serious and concerted opposition.

[9] According to Mr Laurenson the respondents, in their submission, have addressed principles (a) to (c), addressed in part principle (d) and completely omitted to address principle (e). Counsel submits that the significance of the fact that the respondents failed to address (e) has been lost in the factors they do advance in their attempt to rebut the presumption that costs follow the event.

[10] Mr Laurenson argues that the correct approach to the principles set out in *Samuels* should be as follows:

(a) that costs are in the absolute discretion of the Court;

(b) costs normally follow the event and a successful party should be awarded a reasonable contribution;

(c) there is no basis for departure from these principles where litigation has been conducted similarly to litigation in the ordinary courts and where the litigation was difficult and hard fought and the party succeed in the face of serious and concerted opposition; and

(d) where all of the factors in (c) do not apply the Court may ameliorate the application of costs if it sees this to facilitate good relations among common ownership (including family).

[11] Mr Laurenson submits that in applying the principles in *Samuels* the first thing to identify is the proceedings for which costs are sought. Those proceedings are the appeal and the hearing of the appeal. They are not any of the proceedings in the lower court. As such counsel submits that it does not matter in this case how the respondents may have first become involved in the proceedings or how the issue on appeal came before this Court.

[12] Rather, Mr Laurenson submits that in this Court the respondents fully supported the judgment of the lower court; the issues on appeal were "hard fought" by the respondents and the appellant succeeded in the face of "serious and concerted opposition" by the respondents.

[13] In addition Mr Laurenson argues that the hearing on appeal was if not the same, virtually the same as the hearing of an appeal in the ordinary courts.

[14] Counsel submits that these factors are sufficient for this Court to award costs to the appellant subject to determination of quantum and that these factors override the matters advanced by the respondents regarding amicable relationships, their role in the lower court and appellate court proceedings, and the alleged novel and important issue.

[15] In addition, Mr Laurenson submits that if the respondents have a concern about ongoing whānau relations, it is to be remembered that they advanced a position contrary to their father's wishes in his original application for the vesting order in the appellant and it was always open for the respondents not to support the lower court judgment. The respondents could have given way on appeal.

[16] Counsel submits that the appellant accepts that vexatiousness or unreasonableness in the conduct of an appeal or of the opposition to an appeal is a factor that can be considered albeit it is not specifically stated in paragraph [10] of *Samuels*. However counsel submits that some of the arguments advanced by the respondents at the hearing were at best tenuous.

[17] In addition counsel says that if this Court is to stand aside from the principles in *Samuels* or form a too rigid or formulaic application of those principles and look at the respondents ground to rebut as a whole those grounds are not compelling or sufficient to avoid the presumption.

[18] In summary, Mr Laurenson submits that the appellant should be awarded costs because the respondents can show no matters which rebut the presumption of the rule that costs normally follow the event. The respondents could have avoided litigation at the appeal stage or any stage if they were concerned about family relations. He reiterates that the appellant was fully successful on appeal after being put to the expense of fully contested hard fought litigation.

Quantum of costs

[19] As to the quantum, Mr Laurenson submits:

(a) in line with the Māori Appellate Court decisions of *Samuels v Matauri X Incorporation*[2] and *Nicholls v Trustees of W T Nicholls Trust - Part Papaaroha 6B Block;*[3] a starting point for costs should be a reasonable contribution to costs actually incurred which should at least reflect the time

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2 *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216).

3 *Nicholls v Trustees of W T Nicholls Trust - Part Papaaroha 6B Block* [2014] Māori Appellate Court MB 2 (2014 APPEAL 2).

and resources the appellant has given to the appeal and their degree of success;

(b) the appellants' total legal costs are $40,767.50 (incl GST) excluding $1,421.50 for disbursements. That total includes 20 hours for briefing and settling affidavit evidence for an application to adduce further evidence which was ultimately not granted and dismissed by this Court;

(c) while the further evidence was not admitted, the preparation of it was integral to the preparation, briefing and understanding of the appellants' case for the purposes of the appeal and completion of submissions for the appeal and should therefore be included in the consideration of a costs award;

(d) the costs incurred include the costs of second counsel Mr Porter and are for his attendances regarding the appeal;

(e) the Māori Appellate Court has made it clear in its decisions on costs that quantum to be awarded to a successful party on an appeal should be a substantial contribution to the appellants' actual costs;

(f) in this case the appeal was fully contested and some of the respondents' arguments were unmeritorious. The submissions made by the respondents regarding the consent of the deceased and s 71 of the Act are evidence of this. Those arguments were firmly rejected by this Court.

[20] The appellant seeks an award of 75% of the total costs incurred being $30,575 plus the full disbursements of $1,421.50.

Respondents Submissions

[21] Mr Watson for the respondents submits that that an award of costs is not appropriate in this case and costs should lie where they fall. In the alternative, counsel submits, that if costs are awarded a proposed award of 70% to costs would result in an

excessive award given the circumstances of the case. Instead counsel proposes a contribution of 25% is warranted.

[22] In regard to the question of whether costs should be awarded, Mr Watson submits that the appellants' proposition that this Court has already indicated that the appellant is entitled to costs is not correct. Counsel refers the Court to *Henare v Maori Trustee - Parengarenga 3G* where a similar assumption was rejected by the Māori Appellate Court.[4]

[23] Mr Watson says that the factors to consider in determining whether costs should be awarded include:

(a) That the Court has an absolute discretion as to costs, albeit a discretion which must be applied judicially;

(b) Costs normally follow the event;

(c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;

(d) Where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply; and

(e) The Court has an important role in attempting to facilitate amicable relationships between parties who are invariably connected by whakapapa to both the land and each other and on occasion that aim will be frustrated by an award of costs.

[24] As regards the issue of quantum Mr Watson submits:

(a) the Court should have regard to the fact that the proceedings involve siblings and can be distinguished from commercial entities operating at arm's length, the siblings will need to continue to deal with each other and a

[4] *Henare v Maori Trustee - Parengarenga 3G* [2012] Māori Appellate Court MB 540 (2012 APPEAL 540)

costs award may strain familial relationships which would be inconsistent with the principles and objectives of the Act;

(b) the Court should also have regard to the nature of the proceedings and the role of the respondents in the proceedings. The respondents were not a party to the s 164 order but were notified as interested parties at the direction of the Court. The concerns raised by the respondents in respect of the lower court proceedings were considered by that court to be legitimate. The lower court determined a middle ground which did not find wholly in favour of both party and it was that determination which was found to be in error by the Māori Appellate Court;

(c) it is unfair for the respondents to bear the majority of the appellants costs, they have not been drivers of the proceedings and have simply reacted at each juncture to preserve their entitlements to the whenua;

(d) the issues on appeal had not previously arisen and as such the appeal concerned issues of significance in the interpretation of s 164 and involved matters which were of critical importance to the parties and warranted their involvement;

(e) there is no basis for the suggestion that the respondents acted vexatiously or unreasonably in the conduct of the proceedings;

(f) the claim of 70% is unjustified and excessive. The hearing comprised one half day and even on a High Court comparison an award of costs in excess of $30,000 would not be justified. Counsel further points out that his own costs for the appeal was $5,376.25;

[25] In relation to the costs associated with the application to adduce further evidence Mr Watson submits:

(a) there is no basis for a costs award to be made for this matter given that the application was not granted.

(b) this Court concluded that the witnesses could have presented evidence in the lower court; the evidence was opposed and not appropriate and was not seen as having an important influence on the substantive issues.

(c) the respondents raised the issue of costs in responding to the application at the judicial teleconference on 20 January 2015.

[26] Mr Watson argues that on that basis no costs should be awarded in relation to the application to adduce further evidence. Mr Laurenson's invoice for 20 hours on this aspect, he says, should be deducted as well as disbursement of $862.50 relating to the preparation of affidavit evidence.

[27] In addition Counsel asks for a contribution to the respondents' costs in successfully opposing the application to adduce further evidence. Mr Watson advises that the respondents seek $960 plus GST and propose that this be deducted from any costs award against them.

[28] As to the costs regarding the appellants' two senior counsels, Mr Watson submits

(a) it is not appropriate for a costs award to be sought in relation to two senior counsel working the same case. He relies on *Henare v Māori Trustee* in support of his submission and argues that applying civil procedure principles, any justification for two senior counsel would normally be established at the outset of the proceedings, which did not occur here;

(b) Mr Porter's costs are not supported by an invoice.

[29] In terms of disbursements, Mr Watson accepts the filing fee and accommodation claims for one counsel however he opposes the sum incurred for preparation of affidavit evidence for previously stated reasons. Mr Watson also accepts that $454.50 is appropriate to be reimbursed in full by the respondents.

[30] In all, Mr Watson claims that an award of $3,533.63 representing 25% of Mr Laurenson's costs[5]; and disbursements of $454.50 is appropriate.

Law

[31] The established principles as to costs are set out in the Māori Appellate Court decision of *Samuels v Matauri X Incorporation.*[6] The relevant paragraphs read as follows:

> **Law**
>
> [8] Section 79(1) of the Act provides as follows:
>
> > **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.
>
> [9] Section 79(1) provides a broad jurisdiction to the Court to grant costs in any proceeding. In the determination of costs it is clear that there is a two-stage approach required. The first question being should costs be awarded. If the answer is yes, then the Court moves to consider the quantum.
>
> [10] The principal authorities concerning cost are *De Loree v Mokomoko and others – Hiwarau C* (2008) 11 Waiariki Appellate Minute Book 249 (11 AP 249), *Niao v Niao* (2004) 10 Waiariki Appellate MB 263 (10 AP 263), *Manuirirangi v Paraninihi Ki Waitotara Incorporation* (2002) 15 Whanganui Appellate MB 64 (15) WGAP 64) and *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184). These are authorities for the following principles:
>
> a) The Court has an absolute and unlimited discretion as to costs;
>
> b) Costs normally follow the event;
>
> c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
>
> d) The Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may sometimes make awards of costs inappropriate. However, where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply;

[5] Mr Watsons sum is based on the exclusion of costs for application to adduce evidence and takes into account a contribution to the respondents for that application

[6] *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) cited with authority in *Rameka v Hall – Opepe Farm Trust* [2012] Māori Appellate Court MB 167 (2012 APPEAL 167); *Smith v Courtney – Ohuirua No 2 Block* [2011] Māori Appellate Court MB 492 (2011 APPEAL 492); and *Vercoe v Barns – Parish of Matata 39A2A and 39A2B2B2A* [2012] Māori Appellate Court MB 149 (2012 APPEAL 149).

e) There is certainly no basis for departure from the ordinary rules where the proceedings were difficult and hard fought, and where the applicants succeeded in the face of serious and concerted opposition.

[11] We also endorse the comments made in the *Ahitapu v Trustees of Rawhiti 3B2 – Rawhiti 3B2* (2000) 5 Taitokerau Appellate MB 209 (5 APWH 209) case that in the lower Court the objectives set out in section 17 of the Act:

> "anticipate ready access to and involvement by the Court in cases where circumstances might give rise to the application of those objectives. To award on the basis of a strict regime of "costs should normally follow the event" would tend to mitigate against access to the Court and be contrary to the objectives set out in section 17."

[12] Those comments must be tempered however by the discussion by the Court in that case in which it was acknowledged that many proceedings in the lower Court constitute the first opportunity for owners to hear of and examine, question and/or object to a proposal.

[13] In terms of the level of the award of costs the principles set by *De Loree, Niao, Manuirirangi* and *Riddiford* are:

a) The Court has a broad discretion;

b) The Court should look to what is just in the circumstances and in doing so should have regard to the nature and course of the proceedings; the importance of the issues; the conduct of the parties; and whether the proceedings were informal or akin to civil litigation;

c) If a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice;

d) Where the unsuccessful party has not acted unreasonably. It should not be penalised by having to bear the full party and party costs of his/her adversary as well as their own solicitor and client costs;

e) The Court's discretion as to the level of contribution is a broad one but a reasonable contribution will seldom be as little as 10% and a contribution as large as 80% or 90% will seldom be reasonable on an objective analysis;

f) Where proceedings involve counsel and are comprehensively pursued and contested within a relatively formal framework in a similar manner to civil litigation then an award of costs should be made.

[14] It is noted in the Māori Appellate Court case *Riddiford* that an award of costs at a level of eighty percent was warranted due to the difficult nature of the arguments, the lack of substance in the arguments, the unsuccessful party's lack of realism, the degree of success achieved by the respondents, and the time required for effective preparations.

[32] We adopt the principles set out above.

Should costs be awarded?

[33] The first issue for consideration is whether costs should be awarded.

[34] The costs that this Court is dealing with relate to those costs incurred before the Māori Appellate Court. Therefore matters of the lower Court, while providing context, are not necessarily relevant to the determination of costs on appeal.

[35] In the proceedings before us both parties engaged counsel and matters were conducted in a manner similar to litigation in the other Courts. While the parties are siblings, the litigation proceeded on a very formal and contested basis.

[36] Either party could have avoided litigation at any stage if they were concerned about family relations. They did not.

[37] The appellants have been successful on appeal and should be awarded costs.

What level of costs should be awarded?

[38] There are several matters for consideration in terms of the level of costs to be awarded.

Should the costs incurred for the application to adduce further evidence be included in the costs award?

[39] While the appellants were successful with regards to this appeal, they were unsuccessful in their application to have further evidence put before this Court.

[40] Mr Laurenson makes the submission that the further evidence, even though not admitted, was integral to the preparation, briefing and presentation of the appellants' case for the purposes of the appeal.

[41] While that may be the case, the fact is that none of the new evidence was considered by this Court as the application to have it presented was unsuccessful. Therefore, the costs incurred in seeking the application to adduce further evidence should not be included in the costs award.

[42] We agree with Mr Watson that the costs associated with the application to adduce further evidence should be deducted (as well as disbursements of $862.50), from the overall costs awarded.

[43] In addition Mr Watson argues that given the respondents were successful in opposing the application to adduce further evidence their costs of $960 plus GST should also be deducted from any costs awarded against them.

[44] We agree. The sum of $960 plus GST should be deducted from the total amount awarded to the appellants.

Should the second counsel's costs be included in the costs award?

> While this matter was an appeal the issue itself for appeal was, in the end, straight forward. On appeal we found that the lower Court Judge had made an error of law by failing to have regard to the provisions of s 152(2) and in doing so, misdirected himself as to the scope of the discretion available under s 164 of the Act.

[45] We do not see the matter as being overly complex to the point of requiring two counsel. In *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* the High Court Justice Chambers expressed the view that:[7]

> [I7] It will be a rare category 1 case where the Court will certify for second counsel. It will be a rare category 3 case where the Court will not certify for second counsel. It is difficult, however, to lay down a general rule for category 2 cases. They are the norm. The category spans a wide range of proceedings. I am of the view that past practice as to when second counsel should be certified is no longer a guide as to when certification should be given under the new costs regime. That is because the new costs regime must not be seen in isolation but rather must be interpreted in the overall context of how civil proceedings are now tried in this Court.

[46] Rule 14.3 of the High Court Rules prescribes the categorisation of proceedings as follows:

Category 1 proceedings	Proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court

[7] *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 at [17]

Category 2 proceedings	Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court
Category 3 proceedings	Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court

[47] In these circumstances, given the average complexity of the matter costs of the second counsel are not warranted.

Amount to be awarded

[48] The appellant's total legal costs are $40,767.50 (including GST), excluding $1,421.50 for disbursements. There are deductions to be made from this amount which include:

(a) Appellants costs associated with the unsuccessful application to adduce further evidence $862.50;

(b) Respondents costs of $950 plus GST on the application to adduce further evidence; and

(c) Costs of second counsel, Mr Porter at $14,720.00.

[49] Therefore the starting point in terms of costs to be awarded is $24,092.50.

[50] While the proceedings were not overly difficult they were hard fought and there was concerted opposition.

[51] However, underlying that formal contested litigation remains the fact that the parties involved are siblings. No doubt family relationships have been strained. A high award of costs will certainly not help facilitate cordial ongoing family relationships.

[52] The respondents become involved in these matters after receiving notice of the application issued to interested parties at the direction of the Court. The issue on appeal was not one that was before the parties in the lower Court and as we have noted in our appeal decision, was not a matter contemplated by the parties.

[53] We also note that the respondents counsel's costs on appeal were $5,376.25, while the appellant's total legal costs were $40,767.50 (including GST), excluding $1,421.50 for disbursements.

Comparison with High Court Costs

[54] A number of Māori Appellate Court decisions on costs have looked to compare the award of costs that a successful party might receive according to the High Court scale of costs, in cases which are clearly analogous with High Court litigation.[8]

[55] The High Court's costs scale, although useful is not always relevant to many appeals heard by the Māori Appellate Court.[9] The Māori Appellate Court is obviously not bound by the High Court costs scale, however, the comparison can offer a guide and that guide is simply a relevant factor and not determinative.

[56] In this situation we do note that counsel for the appellant did not provide any comparison with the High Court scale. Counsel for the respondents submitted that a claim of 70 percent is unjustified and excessive, in that, even on a High Court comparison an award of costs in excess of $30,000 would not be justified.

[57] By way of comparison similar proceedings in the High Court calculated on a 2B basis (average complexity excluding the appearances of second counsel), would result in a reasonable costs calculation of $12,300.

Conclusion

[58] In our assessment the appellants should be awarded 50 percent of $24,092.50 plus disbursements of $1,421.50. That is a total costs award of $13,467.75.

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[8] *Muru v Te Aho – Maungatautari 4G Section IV Block* [2013] Māori Appellate Court MB 5 (2013 APPEAL 5)

[9] *Bell v Hall – Opepe Farm Trust* [2012] Māori Appellate Court MB 167 (2012 APPEAL 167)

[59] This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

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C T Coxhead (Presiding)	W W Isaac	M J Doogan
JUDGE	**CHIEF JUDGE**	**JUDGE**