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

**11 WAIARIKI MB 191**
**(11 WAR 191)**
**A20090014063**

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| UNDER | Sections 19, 67, 231, 239 and 240, Te Ture Whenua Maori Act 1993 |
| IN THE MATTER OF | Whakapoungakau 24 Block |
| BETWEEN | JILLIAN NAERA, ERIC HODGE, WARWICK MOREHU, ANAHA MOREHU, BUNNY ORMSBY<br>Applicant |
| AND | PIRIHIRA FENWICK, WIREMU KINGI, WINNIER EMERY AND HIWINUI HEKE<br>First Respondents |
| AND | TAI ERU<br>Second Respondent |

Hearing: 344 Rotorua MB 176-192 dated 7 September 2009
347 Rotorua MB 50-80 dated 30 September 2009
348 Rotorua MB 253-279 dated 23-24 November 2009
350 Rotorua MB 20-81 dated 23 November 2009
4 Waiariki MB 285-319 dated 2 March 2010
5 Waiariki MB 1-183 dated 3-5 March 2010
7 Waiariki MB 231-337 dated 20-21 April 2010

Appearances: H Aikman QC, H Fagan and H Van der Wal for the Applicants
D Hurd and D Dowthwaite for the First Respondents
N Ingram QC and C La Hatte for the Second Respondent

Judgment: 30 June 2010

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## RESERVED JUDGMENT ON APPLICATIONS FOR SPECIAL AID

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[1] All parties to this proceeding have made either oral or written applications for assistance from the Special Aid Fund. At the time the applications were made I was advised by the Chief Registrar that no funds were available and accordingly I confirmed to counsel that assistance would not be forthcoming. Since then the Chief Registrar has on at least one occasion confirmed that a modest amount of funding was available. I then issued an order for payment of $40,000.00 from the fund on 24 December 2009 to the Whakapoungakau 24

Trust even though the costs incurred by them exceeded that amount.[1] At the date of judgment I understand that the trust's unpaid legal costs exceed $165,000.00.

[2] On 29 April 2010 Mr La Hatte on behalf of Mr Eru reapplied for assistance from the fund. I understand his client is liable for approximately $25,000.00 in legal costs of which Mr Eru has apparently paid $10,000.00 himself. Mr La Hatte it seems is seeking payment of the balance being $15,000.00.

[3] For the applicants, the Registrar has advised me that the solicitors for the applicants will not be making a claim for assistance but instead submit the costs of counsel, Ms Aikman QC, which amount to $47,000.00.

[4] There are two principal issues for determination. Firstly, was it necessary for any of the parties to be represented? Second, are any of the parties entitled to assistance from the fund and if they are, for what proportion of costs incurred should assistance be provided? At present the total costs claimed, excluding solicitor's costs for the applicants, exceed $300,000.00.

[5] A related issue is whether or not a charge is appropriate per s 98(6) of Te Ture Whenua Māori Act 1993.

**Submissions**

[6] For the applicants it was submitted that it is right and proper that they should received assistance from the fund. The issues before the Court are complex and accordingly it is necessary for the applicants to be represented. It was also argued that the matters raised by the applicants are serious and require the Court's immediate intervention, hence the initial application for injunction.

[7] As to the application of the first respondents, counsel submitted that it was inappropriate for Special Aid to be provided to the trustees on the basis that their claims were unjustified, their defences unmeritorious and because of the lack of support for their stance from within the ownership over the very matters at issue in this case.

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[1] 350 Rotorua MB 82 (350 Rot 82)

[8] Mr La Hatte also submitted that, given the issues involved, and the unique position of his client standing apart from the first respondents, it was necessary that he be separately represented. In addition, counsel submitted that Mr Eru was a person of limited means and could not meet his legal costs without considerable difficulty.

[9] For the first respondents it was submitted that the trustees had been put to considerable costs due to the "frivolous" and "vexatious" claims of the applicants which it was argued ought to have been dismissed and substantial costs awarded. It was also contended that the proceedings were simply a smokescreen to enable tribal settlement issues to be pursued to the detriment of the owners' property rights – a contention denied by the applicants. It was further submitted that the trust, with the injunction still in force, could not raise sufficient finance to pay its mounting legal costs. The trust, it was argued, was therefore placed by the applicants in the invidious position of having to defend itself for undertaking what the trustees considered were lawful actions without access to proper legal representation.

[10] In addition, it was claimed that the trust's solicitors have now refused to accept any further instructions due to the non payment of fees. Indeed, I was further advised by the Deputy Registrar that the solicitors intended to take legal action to recover the sums outstanding from the trustees, both from the assets of the trust and in the trustees' personal capacities. It was necessary therefore that the trust obtain advice on how to meet existing challenges before this Court as well as seeking counsel on how to deal with the potential claims for the recovery of costs from the trust's former solicitors.

[11] Criticisms have been made by both the applicants and the first respondents as to firstly, whether or not parties should be entitled to assistance, and secondly, whether the substantive claims before the Court are meritorious. It has also been submitted that, but for the "fishing expedition" claims by the applicants, the respondents would not have incurred such significant costs. In rejoinder the applicants submit that if the trustees had been more forthcoming and less secretive about discovery then the process would not have been so elongated and costly for all parties. Counsel emphasised that but for the excessive secrecy, which ultimately proved to be unnecessary in large part, the trial might have proceeded more efficiently and with less cost to all parties. If the trustees had incurred significant legal costs it was argued that they only had themselves to blame.

[12] I further note the submission from counsel for the applicants that the trust's principal subsidiary company lent some $300,000.00 to its joint venture partner and could call upon

those funds to pay its own legal costs. The trustees replied that those monies are historically used for the hotel operation of the subsidiary during the low season and consequently were unavailable for use to pay legal costs.

**The Law**

[13] The issue of assistance from the Special Aid Fund was recently considered in the decision *Hokio A Trust – Hokio A and Part Hokio A*.[2] In that judgment reference was made to the seminal decision of the Māori Appellate Court, *Mokomoko– Part Hiwirau C*.[3] In its decision the Māori Appellate Court endorsed an earlier judgment *Dennett -Rotoma No 1 Block Inc*[4] that the Special Aid Fund "is not a general legal aid fund". The Māori Appellate Court considered that the use of the word "special" in s 98 is itself a qualifying indicator of how the fund is to be applied. The Appellate Court held:[5]

> "In light of that meaning, it is impossible to describe the Māori Land Court Special Legal Aid Fund as a general legal aid fund. We consider, therefore, that the proper approach to the interpretation of section 98 requires the Māori Land Court to treat the fund as a Special Fund."
>
> While we acknowledge that the difficulties for owners of multiply owned Māori land in instructing counsel and obtaining civil legal aid as identified in *Re the Proprietors of Rangatira Point and Huriharama Point* (1984) 6 Waiariki ACMB 348 still exist, that is a matter for Parliament to resolve through the enactment of appropriate legislation."

[14] The Court went on to emphasise the importance of the preamble, s 2 and the general objectives of the Court set out in s 17 before going on to consider the issue of charging orders where assistance has been granted from the fund:[6]

> "It is only when these matters have been considered, in light of the circumstances of the particular case, that the Māori Land Court should exercise its discretion and grant an order in terms of section 98(3)/93. Once having granted that order, the Māori Land Court should then turn its mind to section 98(6)/93. In the great majority of cases it will be appropriate to issue the charging order however, there will be cases where it is not appropriate. An example of the latter would be where the special circumstances of the case indicate that a charging order would effectively result in the undermining of the principles of retention and utilisation and thereby defeat the primary objective of the Māori Land Court and the purpose and intention of the legislation itself."

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2 (2010) 249 Aotea MB 261 (249 Aot 261)
3 (2001) 10 Waiariki Appellate MB 32 (10 AP 32)
4 (1996) 1 Waiariki Appellate MB 42 (1 AP 42)
5 Supra, fn3 p39
6 Ibid, p40

[15] The Appellate Court also stated that it was preferable for applications to be made before rather than after a hearing had concluded. More recently that court affirmed this point when declining an application for grant of aid that was made after the hearing: *Pomare v Rangihaeata*[7]. In that decision the Appellate Court restated the importance of applications for aid being filed in advance[8]:

> "[6] There are good reasons why parties who claim that they are unable to prosecute their case without special aid are expected to apply for special aid prior to any hearing taking place. This encourages the parties to obtain a determination or an indication of whether special aid will be granted and to consider financial implications of proceedings if there is no prospect of funding. By providing an advance estimate of costs they allow the Court to make an order that special aid up to a specified amount will be paid, or, where the Court has insufficient information to do this, for the Court to provisionally indicate whether aid for reasonable costs is likely to be granted, and any conditions that might attach."

[16] The judgment also reaffirmed the principle that special aid is not general legal aid and that neither the issues of representation of a class of persons nor financial hardship are necessarily sufficient reasons to ensure that a grant of special aid will follow[9]:

> "[11] The fact that proceedings are brought or defended on behalf of a class of persons will not, however, be sufficient in itself to obtain a grant of special aid. In Maori Land Court proceedings this is frequently the case, and something more is required. In addition, even if it were possible to demonstrate a degree of hardship if special aid is not granted, nor would that of itself be sufficient, as otherwise the fund would be a general aid fund and not a special one."

I adopt those principles. It is evident that the overarching point from these authorities is that the fund is a "special" fund and not a general legal aid fund. It is arguable therefore that one factor to consider in the grant of aid to individuals is whether or not they have sought assistance from the Legal Services Agency ("LSA") and whether that body has approved or declined such application. Conversely, it might be contended that if rejection by the LSA were to be determinative in whether aid should be granted, then many litigants before this Court would not have received assistance. It seems difficult to accept that the interests of justice and the owners might be best served by complex proceedings being attempted by lay litigants.

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7 (2009) 16 Whanganui Appellate MB 108 (16 WGAP 108)

8 Ibid, pp109-110

9 Ibid. See also *Barcello-Gemmell – Gore Blocks XVII* (2004) 6 Te Waiponamu Appellate MB 29 (6 APTW 29)

## Discussion

[18] Like any owner of Māori land, the applicants are entitled to bring proceedings in this Court for injunction and removal of trustees. The respondents are similarly entitled to defend such claims to protect both the trust and the trustees in the exercise of that office within the parameters of the trust order and general trust law principles. Whether their respective claims and counter claims succeed or fail is a separate question. What the parties seem to be suggesting in the present case however, the first respondents in particular, is that the Special Aid Fund should, in effect, underwrite and cover the majority of the legal costs incurred in this litigation.

[19] What must also be borne in mind is that the issue of costs will be considered once a final decision has been issued. Two obvious outcomes are possible. The first is that one party will prevail and consequently the unsuccessful party must pay costs. Alternatively, it may be appropriate for the Court to order that costs lie where they fall. The short point is that while assistance may be granted that does not dispose of the issue of costs should one party prevail over another. It should also be emphasised that assistance from the fund does not eliminate the exposure of an unsuccessful party to liability for a costs award, unlike the situation where an unsuccessful party is in receipt of legal aid. See *Eriwata v Eriwata – Waitara SD Section 6 & 91 Land Trust.*[10]

## Representation

[20] Dealing with representation, the issues raised in the original application are not without merit. Process issues have been argued and subject to close scrutiny during the hearings. I am satisfied that some of the criticisms levelled at the trustees are justified. Whether they are sufficient to warrant removal is a question to still be considered in my final judgment. Other criticisms are less valid and indeed some are unsustainable.

[21] In any event, the applicants have brought an application in good faith, notwithstanding allegations of inappropriate motives and conduct. The issues have become complicated, the claims are significant and the proceedings have involved lengthy interlocutory processes. Lay litigants would have encountered considerable difficulty in

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[10] (2006) 165 Aotea MB 37 (165 AOT 37)

attempting to navigate through these proceedings even at that early stage. Accordingly, I am satisfied that the applicants' desire for representation was not unreasonable.

[22] Similarly, the trustees were entitled to defend the application, the assets of the trust and their reputations as trustees of this land, provided they have acted at all times within the confines of their roles as trustees. Serious allegations have been made against them and so it is unsurprising that they sought the assistance of experienced counsel. They are also entitled to be indemnified out of the assets of the trust, except where they have committed breaches of trust so serious that such indemnity could not be justified: *Turner v Hancock.*[11]

[23] In summary, the complexity of the proceedings, the nature of the issues, the possible risks to the trust and the potential liability of the trustees required representation for all parties. The next issue to consider is what if any entitlement do the parties have to assistance from the fund.

**Entitlement to assistance**

[24] It is trite law that there is no automatic entitlement to assistance and that the grant of refusal of any application is a matter of discretion. As the Māori Appellate Court has stressed, the Special Aid Fund is not a general legal aid fund. That means that only in specific circumstances will it be appropriate for the Court to issue orders effectively underwriting the entire cost of litigation for particular parties. While I am aware that there has been in the past a practice of supporting litigation from the fund in its entirety, in light of the Māori Appellate Court decisions referred to, that approach is, with respect, one that must be followed with caution and only where circumstances justify payment of all reasonable legal costs.

[25] Any determination of whether assistance should be granted involves careful consideration of a range of factors that may include:

(a) the nature and complexity of the proceedings;
(b) the potential prejudice to a party who is unrepresented;
(c) the legal issues before the Court – whether untested claims are being pursued; and
(d) the ability of litigants to fund or contribute toward their legal costs.

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[11] (1882) 20 Ch D 303

[26] There may be other considerations that require review before an application for a grant can be made or declined. For present purposes, for the reasons stated in paras [20]-[23], and given the financial positions of particular parties, I am satisfied that all the parties have made out their cases for assistance from the fund for payment, in part, of their legal costs. The next issue is a question of how much assistance should they be entitled to, taking into account the particular features of this case? Further questions arise that may be taken into consideration, including for example:

(a) Should their individual and collective financial circumstances be taken into account as with legal aid generally or should the Court simply approve payment of the legal costs of all parties in whole or in part?

(b) Should the trust exhaust all avenues it may have available to it before any entitlement to assistance arises?

(c) If the Chief Registrar advises that the funds available at any given time are available in whole or in part, are tagged to other existing or potential claims or may be available across separate financial years, to what extent if any are those matters relevant considerations? Are they relevant questions, simply matters to note or issues that are irrelevant in the exercise of the discretion, given that no such considerations or constraints are mentioned in the legislation?

[27] It could be argued that the ability of the fund to pay is not a relevant consideration and that orders should simply be made where an application for assistance has been filed. Moreover, it has been suggested from time to time that any consideration of the availability of funding may act as an inappropriate fetter on judicial discretion since ss 70 and 98 of the Act do not provide for such a restriction or indeed any requirement that the Court need consider the ability of the Chief Registrar to meet the payment of orders issued under those provisions. With respect, there is arguably an element of artificiality to such a proposition in that there seems little point in issuing orders for payment that cannot be met because the fund is exhausted. More importantly, the notion that the fund is liable for payments of any order issued by the Court is currently a matter at issue in a landmark case which at present remains unresolved.

[28] Moreover, the reality is that the Special Aid Fund is limited in terms of what it can be used for, the amounts paid and its general availability to litigants. Unlike legal aid provided to claimant counsel before the Waitangi Tribunal, the Special Aid fund is more

limited in its availability. Historically, the Chief Registrar advises, the fund has not exceeded approximately $450,000.00 on an annual basis for both the Māori Land Court and the Māori Appellate Court.

[29] Another issue to consider is the fact that cases before both Courts are becoming increasingly complex. Multiple counsel representing numerous affected parties are often involved. However, the increasing complexity of cases and their frequency has not been met by a corresponding increase in the fund on an annual and continuing basis. While it is correct to note that in the last 24 months the Ministry of Justice has made available significant additional funding, that has been due in large part to a very limited number of exceptional cases. It is unclear as to whether or not this level of increased funding will be sustained in the short and medium term.

[30] The judges of this Court have made submissions from time to time to the Chief Registrar and senior officials within the Ministry stressing that the fund has come under increasing pressure due to the number of complex cases being argued before this and the Māori Appellate Court. It has been emphasised to those who carry the responsibility that further funding on an annual basis will be necessary if realistic attempts to achieve the objectives of Te Ture Whenua Māori Act 1993 are to be made. It must also be said that the apparent fluctuations in available funding creates practical difficulties for both litigants and judges.

**Amount of assistance**

[31] In recent years it has been the practice of this Court to require estimates from counsel *prior* to the commencement of litigation or soon thereafter and for such estimates to be provided at civil legal aid rates for Waitangi Tribunal proceedings. From time to time however, those rates will be exceeded where the particular case requires the involvement of more senior counsel. It should also be noted that orders are often made conditional in that no liability will be accepted for work undertaken in excess of approved estimates. In the present case, as foreshadowed, since there was no funding available the issue of estimates did not arise. The result is that costs have been incurred by some of the parties in excess of legal aid rates, which is unsurprising in the circumstances.

[32] The total costs incurred by all the parties exceed $300,000.00. The Special Aid Fund does not have that amount of money available to apply to a single case at the present time. Even if there was, the Chief Registrar as custodian of the fund must also be cognisant

of competing claims from other litigants who have also sought assistance. They too are entitled to be represented, to receive assistance and to have their claims supported, given the issues involved and the risks to the litigants and the owners in those cases. Inevitably then, given the pressures on the fund, any order for assistance in the present proceeding will only be a contribution toward the actual costs incurred.

[33] In assessing an appropriate level of contribution the Court can consider:

(a) the actual costs incurred;
(b) the reasonableness of those costs; and
(c) the ability of the party seeking assistance to contribute toward costs.

[34] The conduct of the parties in pursuing or defending claims – whether unmeritorious or excessively procedural processes have been pursued that were ultimately found to have been unnecessary – may also be a relevant consideration, both in terms of assistance and in any final award of costs.

[35] Then there are the claims that excessive costs have been incurred due to the unnecessary actions of the first respondents in improperly claiming commercial sensitivity during the discovery process. As foreshadowed, they have responded by arguing that the applicants' claims are frivolous and vexatious and should be dismissed with an award of costs against the applicants.

[36] In addition, there is the claim that the trust has funds available to pay at least in part the costs of this litigation. With respect, I disagree with counsel for the applicants that the trust is not entitled to assistance at all and with the suggestion that the trust should use all of its own funds first before any support could be contemplated. If all trusts or incorporations had to exhaust their own funds before being eligible for assistance then it is difficult to see how they might continue with their day to day operations and existing obligations. This could then result in a possible domino-like effect where creditors are left unsatisfied because of legal costs incurred in separate litigation, which then results in the trust being involved in even further proceedings – hardly a desirable outcome for the owners. There are serious implications for the owners if such an argument prevailed which could lead to even greater risks to trust assets and everyday operational requirements if litigation costs in every case had to be completely self funded.

[37] That is not to say that trusts and incorporations should not pay their own legal costs, in part or in whole, where they can. It is true some trusts will be in a position to do so with relative ease but individual applications must be considered on a case by case basis and determined according to their particular circumstances.

[38] As foreshadowed, the claims against the trustees are serious and include allegations that they have exceeded their mandate by entering into an agreement for 52 years to construct a geothermal power station, in concert with other partners, at a cost of over $120 million. The interlocutory processes also have been complicated and lengthy. It is obvious that considerable preparation was involved for all parties, in particular, the applicants and the first respondents. The hearings took seven complete days spread across six months (including the end of year holiday period). There were numerous witnesses including experts and unsurprisingly cross examination was also lengthy. It is rare in this Court for proceedings to last in excess of five days and so that fact alone confirms the complexity of this case and the likelihood that legal costs would be significant.

[39] It should be remembered that costs are a matter for the parties. Each litigant will have ultimate say over what costs they are prepared to accept as incurred by their solicitors and counsel. Prudent litigants will seek estimates and regular updates as to unbilled costs to ensure they can be met. Experienced counsel will no doubt take steps to ensure their clients are able to pay before committing them to significant costs. It would be unwise for any litigant to rely on the fund to underwrite their legal costs without prior approval from the Court. As Chief Judge Isaac recently held in *Pomare v Rangihaeata* on an application for assistance from the fund for an appellate hearing after the event, the particular circumstances must justify any departure from the key principle that the fund is a special and not a general legal aid fund. Having reviewed the bills rendered and taking into account the considerations identified previously, I consider that a contribution from the fund of approximately 50% of the costs incurred by the parties is reasonable in the circumstances.

[40] I am satisfied that the applicants' cost of counsel should be met almost in full. It is important to note that only the costs of Ms Aikman are claimed and they have been rendered at rates comparable to those charged for legal aid. Payment in the amount of $45,000.00 should now be issued to Ms Aikman from the fund. The result is that almost 100% of Ms Aikman's costs have been paid from the fund notwithstanding that solicitors' costs have not been claimed and are likely to equal that amount. In the absence of detailed costs from the solicitors it is probable that some 50% of the costs of the applicants will have been paid from the fund.

[41] The first respondents' costs are approximately $210,000.00 as at the end of the hearings. The sum of $40,000.00 has already been paid leaving a balance of approximately $165,000.00. Taking into account the various issues raised, I consider that a payment of $80,000.00 from the fund is appropriate. This will mean over 50% of the trust's costs have been met from the fund - costs that have been rendered in excess of legal aid rates. It should also be remembered that overall control of legal costs is a matter for the trustees.

[42] I note the second respondent has paid $10,000.00 toward his own costs of $24,000.00 and that his counsel has stressed his unique position compared to his fellow trustees. On reflection I consider payment of $12,000.00 towards Mr Eru's costs should now be made. The result is that some 50% of Mr Eru's costs will have been met from the fund. They too have been billed in excess of legal aid rates.

[43] For completeness I note that special aid grants have been made in recent years in excess of $100,000.00 and in one instance without the matter proceeding to a completed trial. Accordingly while I acknowledge that the grants made in this decision to individual litigants are at the upper end of the scale, they are not unprecedented.

**The imposition of a charge**

[44] As the Maori Appellate Court has stated, in most cases where a grant is made from the fund, it will be appropriate to order per s 98(6) of the Act that a charge be imposed against the land.[12] Counsel did not directly address this issue in their submissions. Leave is therefore granted to all counsel to file any further submissions they consider necessary on the issue of whether or not a charge should be ordered against the land. Counsel have 21 days from the date of this decision to file further submissions.

**Decision**

[45] The Registrar will draw orders for payment of legal costs from the Special Aid Fund per ss 70 and 98 of the Act in the following amounts:

(a) $45,000.00 for the legal costs of counsel for the applicants;
(b) $80,000.00 for the legal costs of the first respondents; and
(c) $12,000.00 for the legal costs of the second respondent.

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[12] Supra, fn2 at 40

[46] I direct the Registrar to draw such orders urgently for my attention and they will be issued immediately per r 66 of the Māori Land Court Rules 1994. The total amount of assistance from the Special Aid Fund paid for this proceeding is $177,000.00.

[47] Counsel have 21 days from the date of this judgment to file submissions on s 98(6) of Te Ture Whenua Māori Act 1993.

Pronounced in open Court at 5.15 pm in Rotorua on Wednesday this 30th day of June 2010.

LR Harvey
JUDGE

L R Harvey
**JUDGE**