IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20130001428
A20130005882
2014 Maori Appellate Court MB 2
(2014 APPEAL 2)

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal against an orders of the Māori Land Court made on 21 December 2012 at 50 Waikato Maniapoto MB 10-16 and on 30 April 2013 at 55 Waikato Maniapoto MB 288-306 in respect of Part Papaaroha 6B Block
BETWEEN	GEORGE TAMA NICHOLLS Appellant
AND	MARK STEVENS, AIRINI PIRIHIRIA TUKERANGI, DELACE WILLIAM JAMES, KAHUTOROA MATAIA TUKERANGI, VIV TAMA NICHOLLS, ANITA MARI NORMAN AND SARAH JANE NICHOLLS as Trustees of the W T Nicholls Trust Respondent

Hearing:	29 - 30 July 2013 (Heard at Hamilton) 10 September 2013 (Heard at Hamilton)
Court:	Deputy Chief Judge C L Fox Judge S F Reeves Judge M J Doogan
Appearances:	Mr Kahukiwa and Ms Takitimu for the Appellant Mr Wackrow and Ms Gray for the Respondents
Judgment:	04 February 2014

RESERVED JUDGMENT ON COSTS OF THE MĀORI APPELLATE COURT

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Introduction

[1] We dismissed the appeals of Mr George Tama Nicholls for the reasons set out in our judgment of 22 November 2013[1].

[2] The respondents who are the trustees of the WT Nicholls Trust ('the Trust') now seek costs representing 75% of actual costs incurred in both appeals plus disbursements. This would amount to a total award of $60,418.64 being costs of $55,926.12 and disbursements of $4,492.52.

[3] The appellant opposes an award of costs, saying this Court should be consistent with previous lower Court decisions in these proceedings not to award costs, which the appellant says should lie where they fall.

[4] The issue is whether costs should be awarded, and if so, what is the appropriate amount to award?

Respondent's submissions

[5] Counsel for the respondents, Mr Wackrow, provided extensive submissions on 16 October 2013 and reply submissions on 18 December 2013. The key points were:

(a) the respondents have been successful in both appeals and costs should follow the event;

(b) the respondents are entitled to a reasonable contribution to actual and reasonable costs incurred;

(c) the lower Court chose not to award costs as the parties are closely related but the appellant continued to pursue the litigation in a manner similar to civil litigation and costs should now be awarded in the usual way;

(d) the appellant has acted unreasonably in undertaking the appeals which have resulted in substantial cost and risk to the Trust's income and development;

[1] 2013 Māori Appellate Court MB 598-632

(e) the appellant chose not to give evidence of relevant matters in the substantive appeal despite being given the opportunity to do so, and a significant portion of the appellant's affidavit was not admitted as evidence by the Court;

(f) the appellant sought to amend the Notice of Appeal three times, though the first amendment was not opposed;

(g) the appellant made unfounded allegations of bias against the lower Court Judge in inappropriate terms;

(h) the appellant's conduct warrants an award in excess of the High Court scale, or the usual two thirds of reasonable costs incurred.

Submissions for the Appellant

[6] Mr Kahukiwa and Ms Takitimu for the appellant provided brief written submissions on 24 October 2013 and more extensive submissions on 12 December 2013. The award of costs is opposed for these reasons:

(a) the Court should apply the same reasoning as the lower Court in determining whether to award costs;

(b) the appellant has not acted unreasonably and is within his rights to pursue the appeals and have his views taken into account, given that the respondents sought to remove him from the land,

(c) the appeal was partially on the basis of denial of the opportunity to present evidence in the lower Court, and the appellant was subsequently granted leave to adduce further evidence by this Court;

(d) there is a presumption against costs in litigation involving whānau members and the Court is charged with facilitating on-going amicable relationships;

(e) the lower Court queried in the course of proceedings before it whether the orders sought by the respondents (then the applicants) were necessary;

(f) the quantum sought by the respondents is challenged on the basis that the appellants case was not without merit, and that near full indemnity costs as sought by the respondents is not a 'reasonable contribution' to costs;

Law

[7] Both parties have referred to *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH) 216) which sets out the principles at paragraphs [8] to [14]:

> [8] Section 79(1) of the Act provides as follows:
>
> 79 Orders as to costs
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> (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.
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> [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 approact required. The first question being should costs be awarded. If the answer is yes, then the Court moves to consider quantum.
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> [10] The principal authorities concerning cost are *De Loree v Mokomoko and others – Hiwarau C* (2008) 11 Waiariki Appellate MB 263 (10 AP 263), *Manuirirangi v Paranihinihi 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;

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 (200) 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 militate 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 the 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 of *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 to arguments, the unsuccessful party's lack of realism, the degree of success achieved by the respondents, and the time required for effective preparations.

Should costs be awarded?

[8] We reject the appellant's key submission which is that this Court should follow the approach to costs taken in the lower Court. Judge Coxhead declined to award costs on the basis that this would not assist attempts to resolve whānau issues, but clearly warned the appellant that if litigation was continued then an award of costs may be appropriate in the future[2].

[9] Subsequent events demonstrate that the appellant has chosen to pursue the litigation at every point in a manner akin to civil litigation. This has put the respondent to considerable cost and significantly delayed or reduced the prospect that the parties might reconcile or resolve the issues between themselves.

[10] There is no reason in the present case to depart from the principle that costs follow the event. In our view it is now appropriate for this Court to exercise its discretion to award costs.

Quantum

[11] The starting point for costs is a reasonable contribution to costs actually incurred; that should at least reflect the time and resources the respondents have given to responding to the appeals and their degree of success.

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[2] 60 Waikato Maniapoto MB 134-138 at 137, 138

[12] We agree that there are aspects of the appellant's conduct of these appeals which justifies an award of costs at the higher end of the range. We note the appellant has been represented by counsel at all times during the appeals.

[13] We find the position is comparable to that discussed in the *De Loree* decision where the Māori Appellate Court awarded a 75% contribution to costs. It is settled law that the High Court 2B scale is persuasive but not determinative of the level of costs that can be awarded in this Court, and that in appropriate circumstances the Court can award costs far in excess of what may be awarded in the High Court.

[14] We have considered all the circumstances of these appeals. In our view the appropriate award of costs is 75% of actual costs. In awarding this level of costs we have taken the following matters into account:

(i) despite the parties being closely related the appellant has chosen to pursue the litigation at every point in a manner akin to civil litigation;

(ii) the respondents degree of success and the appellant's corresponding lack of success shows the appeals were largely without merit;

(iii) the appeals have resulted in substantial cost and risk to the Trust;

(iv) the appellant's conduct of the appeal including failure to give evidence of key matters, and then seeking to give inadmissible evidence at the appeal hearing resulted in increased preparation time for the Respondents;

(v) baseless allegations of bias were made against the lower Court judge in inappropriate terms which were unsupported by evidence and unable to be substantiated.

Decision

[15] Costs and disbursements of $60,418.64 including GST are awarded.

[16] The appellant paid $1500 by way of security for costs.

[17] Pursuant to s79 of the Act there is an order that the appellant pay the sum of $58,918.64 by way of costs to the respondents less security for costs.

C L Fox (Presiding)	S F Reeves	M J Doogan
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**