

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

A20220001868

WĀHANGA <i>Under</i>	Sections 58 and 79(1) of Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	An appeal against the order of the Māori Land Court (Judge Wara), Waiariki District, dated 21 December 2021 at 267 Waiariki MB 184-196
I WAENGA I A <i>Between</i>	BERYL TAWA Kaitono pira <i>Appellant</i>
ME <i>And</i>	TUAROPAKI E TRUST Kaiurupare pira <i>Respondent</i>

Nohoanga:
Hearing 18 October 2022, 2022 Māori Appellate Court MB 377-389
19 August 2022, 2022 Māori Appellate Court MB 255-300
(Heard at Rotorua)

Kooti:
Court Deputy Chief Judge C L Fox (Presiding)
Judge M J Doogan
Judge Te K Te A R Williams

Kanohi kitea:
Appearances J Kahukiwa for Appellant
M Mahuika for Respondent

Whakataunga:
Judgment date 19 January 2023

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court as to Costs

Hei timatanga korero

Introduction

[1] On 18 October 2022 this Māori Appellate Court issued a judgment dismissing the appeal filed by Ms Beryl Tawa, challenging the Māori Land Court decision of Her Honour Judge Wara dated 21 December 2021. In her decision, Judge Wara dismissed Ms Tawa’s application seeking a review of the Tuaropaki E Trust (“the Trust”) due to the 2 year statutory time bar contained in s 231(2) of Te Ture Whenua Māori Act 1993 (“the Act”).

[2] In our decision we dismissed Ms Tawa’s appeal as we found that there was no jurisdictional error or procedural unfairness by Judge Wara. We considered that the approach taken was entirely consistent with the authorities and there was no error in her conclusion that s 351 ought to be read consistently with s 231. Therefore, we dismissed the appeal pursuant to s 51(1)(g) of the Act.

[3] The Respondent now seeks an order for costs against the Applicant. Of relevance to the determination of costs is the fact that the Applicant was in receipt of Special Aid.

Ko te hatepe ture o te tono nei

Procedural History

[4] The Respondent filed submissions regarding costs on 8 November 2022. The Respondent did not file any invoices supporting the costs applications.

[5] The Applicant filed submissions in relation to costs dated 22 November 2022.

Ngā korero a te kaitono

Respondents’ submission

[6] Counsel for the Respondents submitted that an award of costs should be made against the Applicant given that the Respondent has incurred \$33,699.50 excluding GST and disbursements in the Māori Appellate Court process and the sum of \$43,552.50 excluding GST and disbursements in the Māori Land Court process.

[7] The Respondent acknowledges that the Applicant is in receipt of Special Aid but submits that there are exceptional circumstances to warrant the granting of an award of costs

which takes the issue outside of the general rule found in *Wairoa District Council v Wairau - Kaiwaitau*.¹ The grounds that the Respondents submit that costs should be awarded are:²

- (a) The receipt of special aid is not a barrier to costs;
- (b) The application was unsuccessful;
- (c) The application lacked merit;
- (d) Mediation was not sought;
- (e) The proceedings were akin to normal civil litigation; and
- (f) The trustees were put through significant time and effort to defend the applications.

[8] The Respondent submits that the essence of the application was to try and require the Respondent to conduct an immediate vote on a variation to the trust order which was sought by the Applicant, in order to implement regular trustee elections and trustee rotation.³

[9] Further, the respondent submits that the review application and appeal were progressed, despite the fact that the Respondent trust was already progressing a review of the trust order and was undertaking a process to provide beneficial owners with an indication or the opportunity to have a say on the issue of trustee rotation and regular trustee elections in accordance with s244(3). This, the Respondents say, was the process that had been endorsed at the Trust's 2021 annual general meeting.⁴

[10] This review application and appeal has meant that the Respondent has had to put to significant time and effort to engage in both in the Māori Land Court and Appellate Court proceedings, which were both conducted akin to normal civil litigation.⁵

¹ *Wairoa District Council v Wairau - Kaiwaitau* 7C2B (2009) 128 Wairoa MB 168 (128 WR 169) at [6]-[7].

² Memorandum of Counsel for the Respondent seeking costs (8 November 2022), [15] [19]

³ Above n 2 at [13].

⁴ Above n 2 at [14]

⁵ Above n 2 at [18].

[11] The Respondents say that it had elected not to seek costs in the Māori Land Court after successfully defending that application, as they had hoped that the matter would end there. However, given an appeal was filed and the appeal proceedings required a substantive response from the Trust, the trustees have now changed their position. They now seek costs relating to the Māori Land Court proceedings as well as the Appellate Court proceedings.⁶

[12] The Respondent trustees seek an order of costs, being a reasonable contribution to the actual amount of legal fees incurred by the Trust in relation to both proceedings.⁷

Ngā korero a ngā kaiurupare
Applicant's submissions

[13] The Applicant opposes any award of costs and asks instead that the application be dismissed.

[14] The Applicant submits that whilst it is accepted that this Court has the power to award costs under s 79 of the Act, the following propositions are relevant against the Court deciding to do so:⁸

- (a) The Applicant is in receipt of Special Aid;
- (b) Whilst Special Aid is not necessarily equivalent to legal aid it is not inappropriate to have regard to the provisions of s 40 Legal Services Act 2003 and the *Wairoa District Council v Wairau Kaiwatau 72CB case*;⁹
- (c) None of the circumstances identified by the Respondent come close to being “exceptional” in the sense of the guidance provided by s 45(3) of the Legal Services Act 2011;¹⁰ and

⁶ Above n 2 at [21]

⁷ Above n 2 at [24].

⁸ Submissions of counsel for the appellant in relation to costs (22 November 2022) at[2].

⁹ Above n 8 at [6.1].

¹⁰ Above n 8 at [11].

- (d) There was no indication that this application lacked merit or that the appeal amounted to an abuse of process of the Court, nor did the Applicant act unreasonably or in a contemptuous manner.¹¹

[15] The Applicant goes on to say that the fact that the Respondents were successful, that mediation was not sought or that the proceedings were conducted akin to normal civil litigation, does not amount to exceptional circumstances.¹²

[16] The Applicant then submits that there is no line drawn between the Māori Land Court proceedings and the Māori Appellate Court proceedings. In respect of the Māori Land Court proceedings the Court commented that some of the issues raised needed to be addressed and as such the matters raised in the Māori Land Court were validly raised despite the application being dismissed.¹³

[17] Furthermore, the Applicant points out that the matter of costs in the Māori Land Court was not a part of this appeal. The Respondents did not apply to the Māori Land Court within two months of the Māori Land Court judgment seeking costs and are now asking the Māori Appellate Court to award costs for the Māori Land Court proceeding.

[18] The Applicant says that is neither appropriate nor does it fall within the ambit of s 56(1) of the Act. As such, applications in respect of the Māori Land Court application are inappropriately being put to this Court.

What is the approach in this case?

[19] The general approach to an award of costs is settled. The relevant principles were summarised by Judge Harvey (as he was then) in *Trustees of the Horiana Nepia & Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee & Tahamata Incorporation*:¹⁴

[11] The principal authorities concerning costs are considered in *Nicholls v Nicholls – Part Papaaroha 6B Block*. Those decisions include *Riddiford v Te Whaiti*,³ *Manuīrirangi v Paraninihi ki Waitotara Incorporation* and *De Loree v Mokomoko and Ors – Hiwarau C* and they identify the following principles:

¹¹ Above n 8 at [11.1(a)] - [11.1(e)].

¹² Above n 8 at [11.2] - [11.4].

¹³ Above n 8 at [12.2].

¹⁴ *Trustees of the Horiana Nepia & Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee & Tahamata Incorporation – Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238) at [11].

- (a) the Court has an unlimited discretion as to costs;
- (b) Costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably occurred;
- (c) 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. Even so, where litigation has been pursued in accordance with conventional principles then the starting point will be that costs are appropriate;
- (d) 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;
- (e) an award of costs at a level of 80% was warranted in the *Riddiford* case due to the difficult nature of the arguments, their lack substance, the unsuccessful party’s lack of realism, the parties’ legal situation, the degree of success achieved by the Respondent and the time required for effective preparation;
- (f) there is no basis for departing the ordinary rules where the proceedings were difficult and hard fought, and where the Applicants succeeded in the face of serious and concerted opposition; and
- (g) 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.

[20] The question in this case is how these principles should be applied where the unsuccessful parties are in receipt of a grant from the Special Aid Fund.

[21] The Māori Appellate Court in *Taueki v Horowhenua II (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.¹⁵

[22] Also of note is the comment of Judge Harvey when referring to the decision in *Wairoa District Council v Wairau Kaiwatau 72CB* and also to s 45 of the Legal Services Act where he found:¹⁶

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

¹⁶ Above n 14 at [17].

... there is nothing in the submissions before me to support an argument that a grant of aid acts as a shield against an award of costs. Accordingly, I see no reason why costs should not be awarded in this case.

[23] 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.¹⁷ This was also confirmed by the Māori Appellate Court in *Taueki*.¹⁸ We adopt these principles and apply this approach.

Kōrerorero

Discussion

[24] We consider that this application involved a serious question to be tried but the Appeal was ultimately unsuccessful.

[25] In accordance with general principles, respondents are normally entitled to costs.

[26] We consider that the Respondent in this case has been able to demonstrate exceptional circumstances.

[27] We note that s45(3) of the Legal Services Act 2001 refers to what the Court can take into account in assessing if unreasonable circumstances exist. Notably that includes “any conduct that causes the other party to incur unnecessary cost” and “any unreasonable pursuit of one or more issues on which the aided person fails”.¹⁹

[28] In our view the Applicant has not acted in contempt or misconducted herself in the proceedings. However, the Applicant has sought a review of the Trust, in a situation where not only was it barred by statute from doing so, but she could have simply waited a few months to validly seek another review. Instead, she applied not only to the Māori Land Court but also to the Māori Appellate Court, cognisant of the fact that the Trust had already commenced a process to assess the level of support for an amendment or variation to the

¹⁷ *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Appellate Court MB 216 (7 APWH 216) at [32].

¹⁸ Above n 15 at [27].

¹⁹ Legal Services Act 2011 s45(3)(a), (d).

trust order in accordance with s 244 of the Act. This in our view was unreasonable, and as is evident, the pursuit of that issue failed.

[29] Despite the lack of supporting documents being filed by Respondent Counsel to confirm the legal costs that have been incurred by the Respondent, there is no doubt that the Respondent would have incurred legal fees to defend the actions in both Courts. Indeed, it was evident at the Māori Appellate Court hearing level at least, that the Respondent was formally represented. Therefore, the Respondent would have incurred costs as a result of at least the Māori Appellate applications.

Māori Land Court costs

[30] This Court agrees with the Applicant that the matter of costs in the Māori Land Court should have been raised in the Māori Land Court and the Respondents failed to do so.

[31] There was no application in this Court to seek costs in relation to the Māori Land Court application. There is a potential argument that this Court could make an order for an award of costs for the Māori Land Court proceedings pursuant to s 56(1)(f) of the Act.

[32] However, as it appears that the Respondent failed to make application for costs in the Māori Land Court, and it is unclear that the issue of costs was discussed in the substantive hearing, there is no proposed order for us to consider.

[33] As such this Court does not consider it appropriate to make any award of costs in relation to the Māori Land Court application.

Māori Appellate Court Costs

Should costs be awarded against the Applicant given that she was in receipt of Special aid?

[34] There is some force to the suggestion that given the legal complexity in the application, particularly surrounding s 351 and s 231 of the Act, and an investigation of Hansard, that the need for legal counsel was justified. However, it is questionable that this appeal should have been made for the reasons we give above.

[35] Whilst the evidence filed by the Applicant indicated that there was some support from beneficial owners for her proposition that there should be a review of the Trust order to consider a variation providing for trustee election and rotation, it is unclear whether those numbers supported or justified the appeal.

[36] Therefore, in our view we consider that costs should be awarded against Ms Tawa for the Māori Appellate Court proceedings. We reiterate that it is not necessary for exceptional circumstances to be present to award costs against the recipient of Special Aid, and that these are simply factors that we have taken into account in exercising our discretion in this case.

[37] We do however consider that Ms Tawa's grant of Special Aid is relevant to quantum and therefore we make an award in light of this.

Whakataunga

Decision

[38] We order per s 79(1) of the Act Ms Tawa to pay costs of \$5,000.00 to the Respondent as a contribution to the costs incurred by the Respondent in the Māori Appellate Court proceedings.

I whakapuaki i te 2:00pm i Turanganui-a-kiwa, i te ra tekau ma iwa o Kohitātea i te tau 2023.
Pronounced at 2:00pm at Turanganui-a-kiwa on the 19th this day of Kohitātea 2023.

C L Fox
DEPUTY CHIEF JUDGE

M J Doogan
JUDGE

Te K Te A R Williams
JUDGE