IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20150001617
APPEAL 2015/9

	UNDER	Sections 58 and 79 of Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Maungatautari No 4G Sec IV Block
	BETWEEN	TRUSTEES OF THE MAUNGATAUTARI 4G SECTION IV TRUST Appellants
	AND	MAUNGATAUTARI ECOLOGICAL ISLAND TRUST First Respondent
	AND	WAIPA DISTRICT COUNCIL Second Respondent
	AND	TED TAUROA Third Respondent
	AND	LANCE HODGSON Fourth Respondent
Hearing:	2015 Māori Appellate Court MB 447-453 dated 12 August 2015	
Coram:	Judge L R Harvey (Presiding) Chief Judge W W Isaac Judge M P Armstrong	
Appearances:	J Garrett, for the Appellants A Twaddle, for the First Respondent P Lang, for the Second Respondent	
Judgment:	12 October 2015	

JUDGMENT OF THE COURT ON COSTS

Copies to: Mr J Garrett, Grayson Clements Lawyers, PO Box 105, Hamilton 3240, jgarrett@gclegal.co.nz
Ms A Twaddle, Davidson Twaddle Isaac, 127 Alexandra Street, PO Box 9198, Hamilton 3240, andrea@dtilawyers.co.nz
Mr P Lang, Victoria Legal Chambers, PO Box 19-539, Hamilton 3244, p.lang@xtra.co.nz

Introduction

[1] On 12 August 2015 this Court heard submissions on a proposed appeal by the trustees of the Maungatautari 4G Section IV Trust against the decision of Judge Clark delivered on 16 December 2014.[1]

[2] Counsel for the appellants sought to adduce further evidence at the commencement of the hearing. Counsel was informed that the rules for doing so had not been followed. A discussion ensued on whether in fact a rehearing of the decision was being sought. Counsel submitted that if the additional evidence could not be heard by this Court the appeal would be withdrawn and an application for a rehearing might be filed in the Māori Land Court.

[3] The appeal was then withdrawn and the parties were invited to file submissions on costs which have now been received. Maungatautari Ecological Island Trust ("MEIT") seeks an 80 per cent contribution of total costs incurred being $25,177.60 plus GST. Waipa District Council ("WDC") seeks a 70 per cent contribution of their total costs incurred being $13,130.90. The appellants say that the Court should exercise its discretion not to award costs.

Issues

[4] The issue to determine is whether costs are payable, and if so, for what amount?

Background

[5] The details of the block and the trust are succinctly set out in the decision of the Court below *Trustees of Maungatautari 4G Sec IV Block v Maungatautari Ecological Island Trust* at [7] to [24].[2] Those details need not encumber this costs judgment.

MEIT's submissions

[6] Ms Twaddle submits that costs should be awarded on the basis that the Court has an unlimited discretion as to costs, and that discretion should be exercised on the grounds that

---

1 *Trustees of Maungatautari 4G Sec IV Block v Maungatautari Ecological Island Trust* (2014) 90 Waikato Maniapoto MB 291 (90 WMN 291)

2 (2014) 86 Waikato Maniapoto MB 248 (86 WMN 248)

costs should follow the event, the appellant withdrew the entire appeal, and an award should be made to MEIT.

[7] Ms Twaddle further submits that legal costs have been incurred. The costs incurred by MEIT were undertaken on a pro bono or subsidised basis. Counsel charged a reduced rate of $100.00 plus GST (a reduction of $100.00) to enable invoicing and payment on an interim basis, on the understanding that the liability for payment over the $100.00 plus GST hourly rate would arise only if a costs order is made so that an assessment can be made as to a reasonable contribution to costs incurred.

[8] In addition, Ms Twaddle says that the Court should take into account the decision of *Taipari v Hauraki Māori Trust* which set out the principles in relation to pro bono work.[3]

[9] Ms Twaddle submits that the proceedings have been akin to civil litigation, the appellants have filed proceedings in both the Māori Land Court and Environment Court, and related proceedings have also been undertaken in the District Court. There is no common land ownership between the parties and the appellants have not tried to resolve the dispute outside of the Court as suggested by the Māori Land Court.

[10] Further, the appellants abandoned all four matters raised on appeal and attempted to raise new evidence on appeal.

[11] Ms Twaddle argues that MEIT have met the appeal with a genuine desire to resolve the appellants concerns. They have invited feedback from the appellants, have met with them, engaged in correspondence and communication, and provided an undertaking to them. MEIT have also encouraged the appellants to adjourn the proceedings to attempt to resolve the matters.

[12] The appellants, Ms Twaddle says, did not, despite prior requests, clarify the basis for the appeal. Submissions filed on the date of the hearing were focussed on matters not before the Court and no leave was sought to amend the notice of appeal or to raise fresh grounds on appeal.

[13] Regarding quantum, Ms Twaddle submits that the proceedings are akin to civil litigation. They are unusual by nature and course. She argues that the issues are important

---

[3] (2010) 1 Waikato Maniapoto MB 59 (1 WMN 59)

for all parties, as the appeal related to arrangements to provide public benefits through access to the Maungatautari Ecological Island and the conduct of educational tours. The conflict puts funding at risk. The appellants persisted with the Court hearing of the appeal despite ongoing attempts by MEIT and WDC to resolve matters. The appellants have sought to use the proceedings to secure payment from MEIT for activities on its land.

[14] Ms Twaddle argues that the appellants' conduct has been unreasonable, three of the four appeal points were withdrawn due to a lack of merit. The fourth point, involving the attempt to introduce new evidence at the hearing, was taken to hearing but was unmeritorious. The appellants put the respondents to additional and unnecessary costs in having to raise preliminary matters before the Court to try and determine the matters that would be addressed at the hearing, including the issue of the new evidence. MEIT was still required to make detailed submissions although the appeal was withdrawn.

[15] In addition, Ms Twaddle argues that the remedy sought by the appellants was offered by way of an undertaking by MEIT and in the knowledge that this would be raised as an issue as to costs. MEIT and the appellants entered into correspondence concerning the license to undertake the guided tours on a without prejudice save as to a costs basis.

[16] Further, while the nature of the arguments was not difficult, the lack of defined and coherent issues being pursued by the appellants, along with the mixture of grounds of claim, submissions and evidence filed, made the proceedings difficult. The appeal lacked substance and was pursued with a lack of realism. It was ultimately withdrawn at the hearing following the Court's indication of the significant challenges arising from the appellants' claim. It is appropriate that an award of 80 per cent of the actual legal costs incurred by MEIT be made by the Court.

[17] Ms Twaddle submits that the appellants' agent made numerous representations to the Court of his expertise in Māori land matters, he was the appellants' representative up until the week prior to the hearing, and the appellants also engaged Grayson Clements Ltd to negotiate on its behalf subsequent to the mediation, and the firm represented them at the hearing. The proceedings were therefore comprehensively pursued and contested within a formal framework in a similar manner to civil litigation.

[18] Ms Twaddle also points out that the award of costs sought by MEIT is less than the amount that would be payable under the High Court scale for Category 2B proceedings.

Waipa District Council's submissions

[19] Mr Lang submits that costs should follow the event in this case and presented similar arguments to those advanced by counsel for MEIT. He submits that the appellants ultimately withdrew the whole of the appeal and costs would normally be awarded in those circumstances. He says WDC have incurred legal costs. No claim for costs is sought in respect of any input by WDC officers. Counsel has charged $370.00 per hour plus actual expenses. The total costs sought are $18,758.44 excluding GST.

[20] Mr Lang further submits that the appeal is the latest in a series of proceedings in the District Court, Environment Court and Māori Land Court. All proceedings have related to the access and activity arrangements over the appellants' land. The appeal has been conducted akin to civil litigation intended to produce an improved commercial result for the appellants and to run alongside land use and payment negotiations. There is no commonality of land ownership or any family relationship involved. It is appropriate that a contribution of costs of the respondents be made.

[21] In addition, Mr Lang submits that the appellants abandoned all four points on appeal and attempted to introduce new evidence and submissions up to and including the day of the hearing. WDC has attempted at all stages to negotiate a solution to the issues raised by the appellants but has been met with a constantly changing approach by the appellants.

[22] Mr Lang submits that the nature and course of the proceedings are unusual in that the appeal was based entirely on new evidence. The issues are important to all parties, as they relate to arrangements made amongst the parties to provide substantial public benefits through access to the Maungatautari Ecological Island and educational guided tours. The conduct of the appellants has been persistent, in the face of difficulties with the foundation for the appeal, and with a view to securing commercial benefit.

[23] Further, the appellants were represented by an agent claiming to have expertise in Māori land matters, then in the later stages by a solicitor and legal counsel. The proceedings were comprehensively pursued and contested within a formal framework in a similar manner to civil litigation.

[24] Mr Lang submits that the factors set out in the Māori Appellate Court decision of *Riddiford v Te Whaiti* apply equally to the present case.[4] The costs claimed by WDC are similar to those payable on the High Court scale for Category 2B proceedings.

Appellants' submissions

[25] Mr Garrett submits that the Court should exercise its discretion not to award costs against the appellants. If the Court is minded to make an award then 15 per cent may be appropriate rather than the 70 per cent to 80 per cent submitted by the respondent parties.

[26] Mr Garret says that MEIT has purported to charge for pro bono work, however, they have provided no evidence of any such arrangements and the invoices filed with the submissions do not state the hourly rate charged. He says counsel for MEIT should have invoiced for the full rate then discounted their invoice. Counsel for MEIT has been paid for their services and this case should be distinguished from the decisions in *Taipari v Hauraki Māori Trust Board* and *Henare v Maori Trustee - Parengarenga 3G*.[5]

[27] Mr Garrett argues that if the Court were to apply a percentage cost award it ought to consider the actual cost to MEIT at $100.00 plus GST per hour. The actual costs to MEIT is therefore $11,200.00 not $31,472.00. He further argues that the appropriate category for any costs assessment ought to be category 2A rather than category 2B as proposed by the respondent parties, and the proceedings should be calculated at 4.5 days rather than 8.1 days.

[28] In addition Mr Garrett says the proceedings were straightforward given that the matters involved interpretation of three primary documents.

[29] Regarding WDC's costs, Mr Garrett submits that they should not be considered, as the Court directed submissions on costs to be filed by the respondent parties within ten days of the 12 August 2015 hearing, which he says is 22 August 2015. The second respondent's submissions were filed on 24 August 2015 and Mr Garrett argues that they are therefore out of time and no consideration should be given to their submissions.

[30] Mr Garrett also points out that Mr Cullen, the agent for the trustees, is a lay person who worked in a role assisting the trustees in attempting to resolve the dispute. He contends

---

4 (2001) 13 Takitimu Appellate Court MB 184 (13 ACTK 184)

5 (2010) 1 Waikato Maniapoto MB 59 (1 WMN 59); [2012] Māori Appellate Court MB 540 (2012 APPEAL 540)

that, as a lay person, Mr Cullen did not understand the nuances of procedure, including filing additional evidence on appeal and out of time.

[31] Mr Garrett confirmed that he was instructed to appear just days before the appeal was to be heard. At the hearing the appeal was withdrawn on the basis that a fresh application would be filed in the Court below, with additional relevant evidence. He says the appellants have not acted unreasonably and the Court must take into account the historical context of the matter. The pest proof fence was put up without the express consent of the landowners, the first respondents desecrated a wāhi tapu site, and access to the block has been obstructed by MEIT and WDC in the past. Further, counsel argued that MEIT and WDC continue to flout the resource consent conditions and operate guided tours.

[32] In addition, Mr Garrett says that the appellants have made genuine attempts to resolve this dispute. The parties have attended two mediations, one in December 2014 and the other in March 2015. Following that, the parties have met on four separate occasions. Every offer by the appellants has either been declined or not responded to by the parties.

[33] Mr Garrett submits that the dispute remains ongoing and the withdrawal of the appeal was on the basis that the appellants would re file their application. The dispute has not been settled between the parties or finally adjudicated upon. Mr Garrett argues that the applications for costs should be declined or, at the very least, reserved to a further date when the matters can be fully dealt with.

[34] Counsel submits that the Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership and usage. In the decision of the Māori Land Court dated 16 December 2014, WDC and MEIT were discouraged from seeking costs for the sake of the ongoing relationship between the parties going forward. So an award of costs should be declined, he argued.

Reply submissions of WDC

[35] In response, counsel for WDC points out that their costs submissions were filed in time and can be considered. Counsel says that the submissions could not have been filed on 22 August 2015, being a Saturday, as the Māori Land Court office was closed and as such the submissions were filed on the next working day being 24 August 2015.

The Law

[36] In *Nicholls v Trustees of W T Nicholls Trust - Part Papaaroha 6B Block* this Court set out the principles for awarding costs:[6]

> [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**
> >
> > (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 quantum.
> >
> > [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

---

6 [2014] Maori Appellate Court MB 2 (2014 APPEAL 2)

> 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?

[37] The appeal was filed on 16 February 2015. The grounds of appeal initially related to issues regarding the reliance of the Court below on MEIT's assurance that there were no guided tours on the block, which led to the dismissal of the application in the Māori Land Court. There were also allegations that guided tours were continuing to occur by way of access that was not part of the resource consent granted to MEIT, and for which the trustees and landowners of the block did not give permission.

[38] The appeal was initially set down to be heard on 20 May 2015.[7] However, a series of teleconferences were held before that date since there appeared to be some prospect of the appeal being resolved.[8] At a teleconference held on 1 May 2015 the appellants confirmed that the parties had had sufficient opportunity to resolve all matters but that had not been achieved. The parties were directed to file submissions with a view to the hearing being held on 20 May 2015.[9] Before then the appellants requested an adjournment to allow the parties to once again attempt to resolve matters by agreement. The adjournment was granted and the appeal was subsequently set down in August 2015.[10]

[39] At the hearing held on 12 August 2015, counsel for the appellants sought to adduce further evidence but accepted that they were out of time. The evidence related to the issue of whether guided tours were continuing to occur over the block. Counsel also accepted that the evidence did not relate directly to the determination of the Court below. A discussion ensued with counsel on whether a rehearing in the Court below would have been more appropriate than an appeal. The hearing was then adjourned to enable counsel to take instructions on whether the appeal should be withdrawn.

[40] Counsel subsequently confirmed that the appellants would prefer that the appeal be adjourned and the issues be reheard by the Court below. Counsel for MEIT was concerned with any ongoing adjournment and proposed that the appeal be dismissed. Counsel for WDC agreed. Following a further adjournment, counsel advised that the appellants wished to withdraw the appeal. The issue of costs was then reserved.

[41] These events illustrate the manner in which these proceedings have been prosecuted. There have been a series of interlocutory events and the parties have been represented, albeit not always be counsel. There have also been numerous attempts at resolution which were ultimately unsuccessful. As foreshadowed, at the hearing counsel for the appellants attempted to adduce new evidence, which did not relate to whether the decision of the Court below was correct or not. Eventually the appellants agreed that the appeal be withdrawn and rehearing proceedings be filed in the Court below. Counsel for the respondents were not required to respond to the appeal grounds despite having filed submissions.

---

7 2015 Chief Judge's MB 95 (2015 CJ 95)
8 2015 Chief Judge's MB 338 (2015 CJ 338); 2015 Māori Appellate Court MB 109 (2015 APPEAL 109)
9 2015 Māori Appellate Court MB 109 (2015 APPEAL 109)
10 2015 Māori Appellate Court MB 136 (2015 APPEAL 136)

[42] In short, these proceedings have been undertaken largely on a basis comparable to orthodox civil litigation. It is important to underscore for the benefit of the appellants that litigation of any kind is invariably serious – more so with proceedings in an appellate forum. The appellants have been unsuccessful because they withdrew their appeal. The respondents have been put to the expense of replying to allegations that were never proven. An award of costs is therefore appropriate.

What is an appropriate quantum?

[43] In considering quantum the three issues raised by the appellant will be reviewed:

(a) the costs incurred by MEIT given the work undertaken was pro bono;

(b) whether WDC's costs were filed out of time, and if so, whether they should be considered; and

(c) the appropriate comparison of costs on a High Court scale.

Costs incurred by MEIT

[44] Counsel submits that the total legal costs incurred by MEIT were $31,472.00. Counsel seeks an 80 per cent contribution to those costs, being $25,177.60 plus GST. The work undertaken by counsel was done on a pro bono agreement basis in which counsel charged a reduced rate of $100.00 plus GST (a reduction of $100.00) to enable invoicing and payment on an interim basis on the understanding that the liability for payment over the $100.00 plus GST hourly rate would arise only if a costs order is made so that an assessment can be made as to a reasonable contribution to costs incurred.

[45] Counsel for the appellants submits that counsel for MEIT has purported to charge for pro bono work and says that counsel has in fact been paid on this basis. He says this case can be distinguished from the situations in *Taipari v Hauraki Māori Trust*, where counsel in that case sought costs on the basis that they would not be paid unless there was an award of costs made.[11]

---

[11] (2010) 1 Waikato Maniapoto MB 59 (1 WMN 59)

[46] Counsel says that MEIT have provided no evidence of the purported arrangements, and the invoices filed with their submissions do not state the hourly rate charged. Counsel submits that the proper procedure would have been for counsel for MEIT to have invoiced for the full rate then discounted their invoice. He says the actual costs to MEIT is $11,200.00 not $31,472.00.

[47] It is accepted that costs can be awarded in favour of a successful party, despite the work having been completed on a pro bono basis.[12] In *Tandem Maritime Enhancement Ltd v Waikato Regional Council* the Environment Court undertook an analysis of the case law concerning "incurred" and "pro bono":[13]

> [5] The words in s.285(l)(a) of critical import for present purposes are "incurred by that other party". As counsel for Ngati Maru notes, the term "incurred" is not defined in the RMA itself. However, the Shorter Oxford English Dictionary (Third Edition) defines the word "incur" as meaning "to render oneself liable to…to bring upon oneself'. Again, the definition of "incur" found in Webster's Third International Dictionary includes the following: "Become liable or subject to; bring upon oneself '.
>
> [6] These definitions were cited with approval … in the Ontario Court of Appeal, in *R v Allan* (1979) 45 CCC (2d) 524 at 529-530. In considering s.35 of the Interpretation Act, RSC 1970, cl 1-3, where reference was made to the repeal of an enactment not affecting "any penalty, forfeiture or punishment incurred under the enactment so repealed", the word "incur" was treated as synonymous with "liable to" or "subject to".
>
> [7] A more recent case, this time of New Zealand origin, is again of assistance. In *R v Rada Corporation Ltd* (1991) 7 CRNZ 76, Barker J had occasion to consider questions of costs under s.5 of the Criminal Cases Act 1967. It was found that English authority had rejected the submission that the words "incurred by him" meant "paid by him".
>
> …
>
> [8] Case law deriving from Australia is additionally helpful in the light of *pro bono schemes* that operate in that country. For instance, in *Chancliff Holdings Pty Ltd v Bell* [1999] 1 FCA 1783 the Federal Court held that if a respondent in litigation obtains assistance from a legal practitioner under a *pro bono* scheme (as distinct from a legal aid scheme), the party instituting the litigation may thereafter incur liability to pay costs that the practitioner may be entitled to recover pursuant to the provisions of the scheme. It was observed (p 1785): "That the respondent may have no liability, or a limited liability, to pay the costs of that practitioner, unless the respondent succeeds in obtaining an order for costs against the applicant, will not determine whether an order for costs should be made in favour of the assisted respondent if the applicant fails in the litigation it has brought against that party. The fact that such an order may be made is a risk an applicant must take into account in continuing its litigation".
>
> …

---

12 *Henare v Maori Trustee - Parengarenga 3G* [2012] Maori Appellate Court MB 540 (2012 APPEAL 540); and *Taipari v Hauraki Maori Trust Board* (2010) 1 Waikato Maniapoto MB 59 (1 WMN 59)

13 (2000) 6 ELRNZ 329

> [10] Returning to Australian authority, in *Wentworth v Rogers* [1999] NSWCA 403 the New South Wales Court of Appeal noted that a significant matter for consideration was whether the evidence established that counsel and solicitors for Mr Rogers as respondent had been retained *pro bono*, and, if so, whether the consequence was that the respondent was not entitled to recover costs because he had not incurred any. Reference was made to a previous decision of the same Court in *Graham v Aluma-Life Pty* Ltd (NSWCA, 25 March 1997, Butterworths unreported judgments, BC 9700842), where, in determining whether *pro bono* meant "absolutely free of any charge", it was stated that the issue "... would depend upon an examination of a number of considerations, including the actual terms unon which counsel agreed to do the work…" (emphasis added). In *Wentworth* itself, the following statement appears (p 417): "The various meanings which the expression *pro bono* may have in practice illustrate the need for there to be evidence of the precise terms of the retainer of counsel and solicitors who are acting in this way". The Court in *Wentworth* went on to reject the appellant's submissions that no order for costs should be made in favour of the respondent because the respondent's counsel and solicitor had acted *pro bono*…

[48] In that case Judge Bollard determined that:[14]

> [11] Against the background of *Wentworth*, the significance of a clear understanding of the nature of an arrangement between solicitor and client where a *pro bono* element is involved is obvious enough.

[49] Contrary to counsel for the appellant's allegations, there is no evidence before the Court that MEIT has paid their legal costs already and if they have done so this is not a bar to MEIT now seeking full legal costs pursuant to their arrangement with their counsel. Pro Bono does not have the limited definition given to it by counsel nor does the phrase "incurred". Having regard to all the circumstances it is clear that the full legal costs sought by MEIT should be taken into account.

[50] Curiously, the Court has received additional correspondence from counsel concerning the submissions on this point and the perceived inference that Ms Twaddle may have acted inappropriately. That is incorrect and the issue as one which the Court does not need concern itself with. The parties should endeavour to work amicably toward finding a workable solution.

[51] In any case it is evident that the costs sought by MEIT were properly incurred and should be the subject of an award.

Costs incurred by WDC

[52] Counsel submits that the costs incurred amount to $18,758.44 excluding GST.

---

[14] Ibid at [11]

[53] Counsel for the appellants submits that the WDC submissions were filed out of time and should not be considered. He argued that the Court gave the respondent parties 10 days to file submissions as to costs which expired on 22 August 2015. WDC did not file their submission until 24 August 2015.

[54] WDC says that the submissions could not have been filed on 22 August 2015 as the office was closed and they were accordingly filed on the next working day, being 24 August 2015. They therefore say their submissions should be considered and are not out of time.

[55] The Act does not provide for the filing of documents. Even so, the High Court rules do provide for such an event.

[56] Rule 1.17 of the High Court Rules provides:

> **1.17 Calculating periods of time**
>
> (1) A period of time fixed by the rules or by a judgment, order, or direction or by a document in a proceeding must be calculated in accordance with this rule and rule 1.18.
>
> (2) When a time of 1 day or a longer time is to be reckoned by reference to a given day or event, the given day or the day of the given event must not be counted.
>
> (3) Nothing in this rule or in rules 1.18 and 1.19 affects the reckoning of a period of time fixed by the Limitation Act 2010 or any other statute or the application of the Interpretation Act 1999 in relation to the Limitation Act 2010 or any other statute.

[57] Importantly Rule 1.18 provides:

> **1.18 When time expires when court registry is closed**
>
> When the time for doing any act at a registry of the court expires on a day on which that registry is closed, so that that act cannot be done on that day, the act is in time if done on the next day on which that registry is open.

[58] Rule 4.8 of the Māori Land Court Rules 2011 also states:

> **4.8 Time when document filed**
>
> (1) An application or other document in hard-copy form is filed in an office of the Court when, during the Court's normal opening hours, it is actually received at the office of the Court.
>
> (2) An application or other document in electronic form is filed in an office of the Court—
>
> (a) when it is received during the Court's normal opening hours by the Court's electronic information system; or
>
> (b) if it is received by the Court's electronic information system outside the Court's normal opening hours, at 10 am on the next working day.

> (3) However, a document must be treated as not having been filed if the Registrar refuses to accept it under rule 4.10.

[59] In summary, it is determined that the 10 day period did not begin to run until 13 August 2015 making the ten day period end on 22 August 2015 being a Saturday. The Court does not open on Saturday therefore the act is in time if done on the next day which the registry is open, being Monday 24 August 2015. The submissions were in time and the costs sought by WDC can be considered.

High Court scale

[60] Both respondent counsel have provided a comparison of costs on a High Court Scale, category 2B basis. Counsel for MEIT seeks a daily recovery rate for 11.8 days and Counsel for WDC seeks a daily recovery rate for 8.1 days.

[61] The appellants argue that the proceedings should be more appropriately categorised as category 1 proceedings, given the straight forward nature of the application. Counsel says that the Court should have regard to the history of the matters and the conduct of the parties. Alternatively counsel also says costs should be calculated on a Category 2A basis at 4.5 days.

[62] In *Henare v Māori Trustee – Parengarenga 3G* this Court noted that:[15]

> [48] This Court is not bound by the High Court Rules. However, a comparison can offer a guide. This Court in its discretion and for justified reasons may award an amount of costs far in excess or far less than what a party might be entitled to in the High Court.
>
> [49] As noted in this Court's decision of *Bell v Hall – Opepe Farm Trust* the High Court scale is simply a relevant factor and is not determinative.

[63] On balance, it is evident that the proceedings are properly assessed by the respondent counsel as category 2 and that the appropriate daily recovery rate to be category B, proceedings of average complexity. On a 2B scale it is also determined that the WDC calculation of 8.1 days and MEIT's 11.8 days are reasonable.

Discussion

[64] In assessing an award the Court must consider what is just in the circumstances, having regard to the nature and course of the proceedings. As determined above, the

---

15 [2012] Maori Appellate Court MB 540 (2012 APPEAL 540)

application has largely been run comparable to orthodox civil litigation. The appellants have been unsuccessful and an award of costs should be made.

[65] Generally speaking, this Court considers that the costs sought by the respondents appear on the whole to be reasonable. They have been put to the expense of preparing for an appeal on all four points. In the end that has proved unnecessary, given the pathway that the appellants are likely to now follow. They have also been put to the expense of attempting to resolve matters without recourse to further litigation, which unfortunately has not yet provided a resolution satisfactory to all parties. Even at this late stage, it is suggested that the parties carefully consider whether or not the issues that remain unresolved should be the subject of further litigation where there may yet be alternative pathways to finding a solution.

[66] In conclusion, this Court determines that a costs award of $25,000 in total for both respondents is appropriate taking into account the reality of an ongoing relationship in some form between the parties that is likely to exist into the future.

Decision

[67] The Maungatautari 4G Section IV Trust is ordered to pay the Maungatautari Ecological Island Trust $15,000 as a contribution toward costs.

[68] The Maungatautari 4G Section IV Trust is also ordered to pay the Waipa District Council $10,000 as a contribution towards costs.

This decision is issued per rr 7.5, 8.17(2) and 8.23(2), Māori Land Court Rules 2011

Pronounced at 11.05 am on Monday on the 12th day of October 2015

L R Harvey (Presiding)
JUDGE