IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

2012 Māori Appellate Court MB 149
(2012 APPEAL 149)
A20110004678

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Parish of Matata 39A2A and 39A2B2B2A
BETWEEN	RIHI VERCOE LAWRENCE TE AOKAHARI NIAO Appellants
AND	SAM BARNS & ORS 1st Respondents
AND	BEVERLY ADLAM 2nd Respondent
AND	GEOTHERMAL DEVELOPMENTS LIMITED 3rd Respondent

Hearing:	2011 Māori Appellate Court MB 591-614 dated 8 November 2011 (Heard at Rotorua)
Court:	Deputy Chief Judge C L Fox Judge D J Ambler Judge S F Reeves
Appearances:	David Dowthwaite, Counsel for the 1st Respondent Daniel Hughes, Counsel for the 2nd Respondent Patrick Mulligan, Counsel for the 3rd Respondent
Judgment:	29 March 2012

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] The appellants, Rihi Vercoe and Lawrence Niao, are trustees of the Alice Niao-Savage Whanau Trust ("the Trust"). The Trust is an owner in land under two ahu whenua trusts: the Matata Parish 39A 2A, which is administered by the Savage Papakainga Land Trust ("Matata 39A2A"), and is the site of a major geothermal development; and Matata Parish 39A2B2B2A Ahu Whenua Trust ("Matata 39A2B2B2A"), that operates largely as a farm. Mr Niao is also a trustee of Matata 39A2B2B2A.

[2] Over a number of years the appellants have been involved in protracted litigation with several trustees of the two ahu whenua trusts and other parties. The litigation has involved accusations of trustee inaction and mismanagement. Several applications are still before the Court, including proceedings relating to a lease agreement for the geothermal development which generates a large income for both trusts.[1]

[3] In December 2010 the lower Court heard two applications for injunction filed by the appellants. In the first application, heard on 3 December 2010, the appellants sought an injunction to prevent Samuel Barns, the chairperson of Matata 39A2A, from holding scheduled trustee meetings. In dismissing that application Judge Savage addressed the merits of the application and the manner in which it had been brought before the Court:[2]

> You have fired off these proceedings against one person … they are ill advised, you have bombarded the Court with documentation. You have used legal process you don't understand. You have put these trustees to expense and time coming here today and nothing you have told me … would support the issue of an injunction … If you had been properly advised and if you had filed proper proceedings, you might have got some traction … But the proceedings you have filed are simply ill advised, and I now dismiss them.

[4] Judge Savage did not award costs but went on to warn the appellants:[3]

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[1] A20080003007.
[2] 24 Waiariki MB 45 (24 WAR 45) at 50.
[3] Ibid, at 51.

> ... if you file further proceedings like this ... if they are not supported by the evidence then I am likely to award costs against you ... It could have severe financial consequences for you ... but these people are taking time from jobs, they are travelling here for this, for proceedings which are entirely misconceived. I think you should consider your position very carefully before you take further steps.

[5] The present appeal relates to a second injunction application heard on 21 December 2010[4]. The appellants sought to prevent the trustees of Matata 39A2A and Matata 39A2B2B2A from paying outstanding rates arrears owing on both blocks out of trust funds held in a solicitor's trust account.

[6] Judge Savage dismissed the application for injunction,[5] and awarded costs totalling $1,950 jointly and severally against the trustees of the Trust.[6]

[7] The appellants initially appealed Judge Savage's decision to dismiss the injunction, but subsequently withdrew that ground of appeal and continued only with an appeal against the costs award.[7]

Judge Savage's costs decision

[8] In dismissing the injunction application Judge Savage commented:[8]

> I put it repeatedly to Ms Vercoe, that she should address me as to why payment from that account in accordance with the resolution of the trustees was in breach of the trust order, or was unlawful in a general sense, or was imprudent. She could not assist me further and I have no alternative other than to dismiss her application as presented, it is entirely misfounded.

[9] He also referred to the previous injunction application and noted:[9]

> ...it is part of a sting [sic] of litigation that has been bought before this Court, for injunctive relief, which is misfounded and misconceived. In recent weeks I have

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[4] 25 Waiariki MB 96 (25 WAR 96).
[5] Ibid at 111.
[6] Ibid at 113.
[7] 2011 Māori Appellate Court MB 573 (2011 APPEAL 573), 2011 Māori Appellate Court MB 591 (2011 APPEAL 591) at 593.
[8] Supra, fn 4 at 111.
[9] Ibid.

> warned Ms Vercoe that if she proceeds in this way then there will come a point where costs will become an issue.

[10] Judge Savage's then gave his cost decision:[10]

> **Court:** I have had before me an application for injunction with a plethora of material filed by the applicant, much of which had absolutely nothing to do with the issues before the Court. As I said before, it is a part of a string of applications where Ms Vercoe bombards the Court and the parties with documentation.
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> I do not take into account her late appearance today at all, but I do take into account the fact that an adjournment was necessary in relation to an affidavit that was filed at the beginning of the hearing this morning. We had to adjourn for 45 minutes, with costs to everybody for the three lawyers involved.
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> The figures that I now fix are subject or have been subject to a 50% deduction. In other words, I would have awarded twice as much, but because there is a whanau element to this, and because I feel somewhat sorry for the trustees of the Alice Niao Savage Whanau Trust, that they have been stricken with those proceedings, when I suspect it wasn't really about them. I would have awarded Sam Barns $2,000. I award him $1,000.
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> I would have awarded John Savage $400, I award him $200. The lawyers would have got twice as much, I award $250 costs in each case and those costs are payable jointly and severally by the trustee of the Alice Niao Savage Whanau Trust.

Further evidence

[11] The appellants sought to adduce further evidence at the appeal hearing. We heard the request despite the fact that no application had been filed and the evidence was in the form of an unsigned affidavit filed on 3 November 2011, five days prior to the hearing, and comprised – pages of material.

[12] The appellants submitted that the material was relevant as it set out other costs they had incurred in trying to resolve issues in relation to the two ahu whenua

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[10] Ibid, at 113.

trusts. The respondents opposed the application on the basis that the material appeared to be wholly irrelevant to the costs issue on appeal.[11]

[13] We declined the application. The appellants had not satisfied the grounds for adducing further evidence and there was ample material on the record to enable us to arrive at a just decision.[12] What was more disturbing was that the attempt to adduce the further evidence had all the hallmarks of the approach Ms Vercoe had taken in the lower Court which Judge Savage criticized.

Submissions on appeal

[14] The appellants made two main submissions in support of the appeal. First, that they had suffered significant disadvantage as a result of Mr Niao's sudden ill-health prior to the hearing on 21 December 2010 which meant he was unable to attend Court. Ms Vercoe said that her mind was not focussed at the hearing because of her husband's ill health and what she referred to globally as the "prevailing circumstances". Second, that, had they been aware of an alternative option to pay outstanding rates, this would have avoided the need for the injunction application.

[15] Mr Dowthwaite represented some of the trustees of Matata 39A2A and Matata 39A2B2B2A. Submissions were also received from Mr Mulligan for Geothermal Developments Limited, – which has a commercial relationship with one or both of the ahu whenua trusts and which is caught up in related proceedings – and Mr Hughes for Beverley Rae Adlam – a trustee of Matata 39A2A who has been suspended by the lower Court. They all opposed the appeal. The respondents' submissions took a common approach. They relied on the leading authorities of *Samuels v Matauri X*[13] and *Nicholls v Nicholls – Part Papaaroha 6B*.[14] They said that the substantive application had no merit and that the lower Court was entitled to exercise its broad discretion to award a modest level of costs which recognised the lack of particularisation of the application and the resulting uncertainty for the respondents when responding to the application. Finally, they said that the Court's

[11] Supra, fn 7 at 596.
[12] Ibid at 598.
[13] (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216).
[14] (2011) 2011 Maori Appellate Court MB 64 (2011 APPEAL 64).

broad discretion to award costs should not, as a matter of policy, be lightly overturned.

The law

[16] The principles concerning appeals against awards of costs are well known and are set out in the leading authorities of *Riddiford v Te Whaiti*,[15] *Samuels v Matauri X*, and *Nicholls v Nicholls - Part Papaaroha 6B.* The awarding of costs is an exercise of discretion. Importantly, as set out by the Supreme Court in *Kacem v Bashir*, where Tipping J made reference to *May v May*[16] and *Blackstone v Blackstone*,[17] an exercise of discretion can only be overturned on appeal where: there is an error of law or principle; or the lower Court has taken into account irrelevant considerations; or the lower Court failed to take account a relevant consideration; or the decision is plainly wrong. [18]

Discussion

[17] The appellants have failed to point to any flaw in Judge Savage's decision that would lead us to overturn that decision. In fact, Judge Savage's award of 50% of actual costs can properly be described as modest given that the application for an injunction failed, the appellants' conduct in the lower Court and Judge Savage's warning in relation to the earlier proceedings that further unwarranted applications would result in a costs award.

[18] Ms Vercoe's complaint that she was affected by the "prevailing circumstances" is not a reason to deny the respondents some modest compensation for the costs they incurred in the lower Court. In any event, Mrs Vercoe did not seek an adjournment when she appeared before Judge Savage.

[19] As to the second matter raised by the appellants, that there was an alternative option for payment of rates, that is a red herring. Judge Savage's substantive ruling was that the appellants had not established that the trustees were in breach of their

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[15] (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184).
[16] (1982) 1 NZFLR 165 (CA) at 170.
[17] [2008] NZCA 312, (2009) 19 PRNZ 40 at [8].
[18] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

obligations by intending to pay rates from the funds held by the solicitor. The fact that there was an alternative fund was irrelevant. Furthermore, the appellants have not challenged Judge Savage's substantive decision dismissing the injunction.

[20] That disposes of the matters raised by the appellants. But there is an additional matter that requires mention. At the appeal hearing Judge Ambler pointed out that the minutes of the lower Court hearing appeared to show that Ms Vercoe was not offered an opportunity to respond to the other parties' costs submissions.[19] He queried whether there had been a breach of natural justice.

[21] When asked about this Ms Vercoe simply said that she had not followed the award of costs "[b]ecause my mind was not focused due to all the prevailing circumstances before I even got to Court".[20] Counsel for the respondents considered the situation should not cause concern for this Court. They submitted that costs generally follow the event, that if the costs sought had been extraordinary (which they were not) then a complaint of breach of natural justice might be available, and that, in any event, the lower Court took into account all the relevant matters.

[22] On reflection, we do not have any substantive concerns about the conduct of the lower Court hearing. Ms Vercoe had been warned of the costs issue on the previous occasion. She could have opposed costs but did not do so. She has now addressed her grounds of opposition to costs by way of this appeal and we are satisfied that Judge Savage's costs award was appropriate.

Costs on appeal

[23] The respondents each seek costs on the appeal. Mr Mulligan referred to the fact that, on a High Court 2B scale, the respondents would each be entitled to $2,632 costs plus disbursements. Accordingly, he seeks costs of $2,500. Mr Hughes and Mr Donthwaite support that approach. The appellants opposed the application for costs by emphasising their bona fides in pursuing the application for injunction in the lower Court.

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[19] Supra, fn 7 at 609-610.
[20] Ibid at 612.

[24] The respondents are entitled to costs on the appeal. The appeal was wholly unsuccessful. The appellants unwisely pursued the appeal without the assistance of counsel when they are represented by counsel in the related proceedings and when Deputy Chief Judge Fox encouraged them to take legal advice.[21] The appellants failed to grapple with the grounds that must be made out for an order of costs to be overturned and have caused the respondents further unnecessary costs.

Outcome

[25] The appeal is dismissed.

[26] Pursuant to s 79 of the Act we award each of the respondents costs of $2,500 against the appellants.

[27] A copy of this decision is to go to all parties.

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

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C L Fox	D J Ambler	S F Reeves
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**
(Presiding)		

[21] Memorandum of the Court of 31 August 2011 (2011 Māori Appellate Court MB 472-473).