

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

A20210014702
APPEAL 2021/7

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| WĀHANGA <i>Under</i> | Section 79, Te Ture Whenua Māori Act 1993 |
| MŌ TE TAKE <i>In the matter of</i> | Kohewhata 27C2A and Others |
| I WAENGA IA <i>Between</i> | RACHEL WITANA Te Kaitono Pīra <i>Appellant</i> |
| ME <i>And</i> | BRUCE CUTFORTH AND COLLEEN BERMINGHAM-BROWN AS TRUSTEES OF THE OMAPERE TARAIRE E AND RANGIHAMAMA X3A AHU WHENUA TRUST Ngā Kaiurupare Pīra <i>Respondents</i> |

Nohoanga: On the papers
Hearing

Kooti: Chief Judge Isaac (Presiding)
Court Judge Coxhead
Judge Mullins

Kanohi kitea: K Dixon for Appellant
Appearances J Burley for Respondents

Whakataunga: 31 October 2022
Judgment date

TE WHAKATAUNGA Ā TE KOOTI HĀNGAI KI TE UTU RŌIA
Judgment of the Court as to Costs

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Hei tīmatanga kōrero

Introduction

[1] Rachel Witana (“the appellant”) filed an appeal on 6 December 2021. The Māori Appellate Court commenced hearing the case on 11 May 2022. The matter was adjourned. When the matter was recalled on 30 May 2022, the appellant withdrew her appeal.

[2] Bruce Cutforth and Colleen Bermingham-Brown, trustees of the Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust (“the respondents”) have incurred expenses responding to the appellant’s appeal application. They seek the actual costs incurred in March 2022 and May 2022. The respondents say that the appellant should be required to contribute \$28,472.90 to the respondents’ costs relating to the appeal.

[3] The appellant, Ms Witana, says that it would be inappropriate to award costs given the unique circumstances of the case.

Te Ture

The Law

[4] Section 79 provides that the Court may make orders for costs:

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.
- (2) The court may make an order under subsection (1) for the payment of costs by or to any person notwithstanding that that person is then deceased.
- (3) Where the court is satisfied that any party to the proceedings has acted, not only on his or her own behalf, but on behalf of other persons having a similar interest in the proceedings, the court shall have the same power to make an order for the payment of the costs of those proceedings by those other persons as it has under subsection (1) in respect of that party.
- (4) At any stage of any proceedings, the court may require any party to deposit any sum of money as security for costs, and, in default of that deposit being made, the court may stay or dismiss the proceedings either wholly or in respect of the party so in default.
- (5) When any sum has been so deposited as security for costs, it shall be disposed of in such manner as the court directs.

- (6) In any proceedings, the court may make an order charging the whole or any part of the costs of the proceedings, and of any charges, fees, or expenses that, in the opinion of the court, were reasonably and properly incurred by any party to the proceedings or by any other person for the purposes of or in relation to the proceedings, upon any land or interest in land or any revenues derived from any land or interest in land to which the proceedings relate, whether or not any other order is made in the proceedings in relation to the land.
- (7) Any order made under this section for the payment of costs or imposing a charge for costs may, when made in open court, either specify the sum or sums so payable or charged, or leave the amount to be determined by taxation in accordance with the rules of court; but, in the latter case, the order as drawn up and sealed shall specify the sum or sums so determined by taxation.

[5] The general approach to an award of costs is settled. In the determination of costs there is a two-stage approach, the first question being should costs be awarded? If the answer is yes, then the Court moves to consider the quantum.

[6] The following general principles apply when deciding whether to award costs:

- (a) The Court has an unlimited discretion to award costs.
- (b) Generally, costs follow the event.
- (c) It may be inappropriate to award costs if it would frustrate the Court's role to facilitate amicable relationships between parties often connected through whakapapa. However, if litigation has been pursued in a manner akin to civil litigation, then the starting point will be that costs are appropriate.

[7] In relation to quantum, the following general principles apply:

- (a) The Court has a broad discretion as to quantum.
- (b) Quantum should reflect a reasonable contribution to costs actually and reasonably incurred.
- (c) A reasonable contribution will seldom be as low as 10 per cent, but an 80 per cent or 90 per cent contribution will seldom be reasonable.

- (d) The Court should consider what is just in the circumstances, having regard to a range of factors including the nature and course of the proceedings, the complexity of the arguments, the importance of the issues, the successful party's degree of success, the time required for effective participation, the parties' legal situation, the parties' conduct and sense of realism and whether the proceedings were informal or akin to civil litigation.
- (e) If a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and helpless claim or defence – this may justify a more liberal award of costs.

[8] In *Taueki v Horowhenua II (Lake) Māori Reservation Trust* this Court confirmed 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.¹

Me utua ai te kaitono pīra ngā utu rōia?
Should costs be awarded against the appellant?

Ngā tapaetanga o ngā kaiurupare - Respondents' submissions

[9] The respondents submit that they have acted reasonably and in the best interests of the beneficiaries of the Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust (“the ORT Trust”). They have not taken any steps in this appeal other than in response to the documents filed by the appellant, as part of their opposition to the appeal or as directed by the Court. In summary they submit:

- (a) Between December 2021 and 30 May 2022, the appellant had multiple opportunities to reconsider whether she wished to pursue her appeal and at each opportunity prior to 13 May 2022, she opted to continue with her appeal.

¹ *Taueki v Horowhenua II (Lake) Māori Reservation Trust* [2019] Māori Appellate Court MB 652 (2019 APPEAL 652).

- (b) The respondents have incurred costs by responding to the appellant's appeal which she ultimately abandoned. The appellant should therefore be required to pay the costs she forced the respondents to incur in responding to her appeal.
- (c) There is no reason that this Court should depart from the usual position that costs follow the event, and r 8.23 of the Māori Land Court Rules 2011 is consistent with the usual position that the respondents are entitled to costs on an appellant's withdrawal of the appeal.
- (d) The appellant and respondents are not closely related whānau. They are all trustees of the ORT Trust. The parties to this appeal are the only current trustees of the ORT Trust; the appellant considers herself to be the minority trustee, with the respondents being the majority trustees.
- (e) There are further extant applications between the appellant and the respondents relating to the ORT Trust that are yet to be heard by the Māori Land Court. Therefore, because of the acrimonious relationship between the parties as trustees, it is important for the Court to discourage the parties from commencing, continuing, or defending proceedings in this Court or the Māori Land Court that are vexatious, frivolous, improper, or unnecessary.
- (f) The beneficiaries of the ORT Trust should not have to bear the cost of defending unmeritorious proceedings brought by one or more of its trustees.

[10] Counsel submits that there is no reason for this Court to depart from the principle that the appellant should pay a reasonable contribution to the respondents' actual and reasonable costs relating to this appeal.

Ngā tapaetanga o te kaipīra - Appellant's submissions

[11] The appellant submits that an award of costs in this case would be inappropriate given the unique circumstances of the case and the parties involved. The appellant implores the Court to exercise discretion in favour of letting costs lie where they fall. In summary counsel for the appellant says:

- (a) The conduct of the appellant in the initiation of these proceedings was reasonable. Proceedings were filed on the honest belief that they were necessary to stop a project of the ORT Trust (“the project”) and ensure trustee decisions made in relation to the project were valid and in the best interests of the beneficiaries (which the appellant says they were not).
- (b) The appellant, upon legal advice and extensive correspondence, eventually withdrew the appeal to prevent incurring further costs based on advice and knowledge of the progress of the project.
- (c) The respondents seek costs for the amount sought in order to financially devastate the appellant so that she is unable to pursue further proceedings in the Māori Land Court that will be trying serious questions of law relating to the conduct of the respondents in relation to the ORT Trust and the project.
- (d) The appellant is also a beneficiary of the ORT Trust, therefore it is in her best interests as both a trustee and a beneficiary to prevent misconduct by trustees if and when it arises.
- (e) The respondents did not act reasonably nor in the best interests of the beneficiaries in that there was little to no communication between counsel regarding the appeal itself from the initiation of the appeal by the appellant on 6 December 2021 up until May 2022. The respondents could have prevented some of the costs incurred by being more forthcoming with the information the appellant required to better inform her as to the appropriateness of these proceedings.
- (f) The appellant and respondents are all trustees of the ORT Trust which is a large and commercially successful trust in Taitokerau. While the parties are not closely related whānau, the effective management of the ORT Trust for the benefit of the beneficiaries relies on their relationship being a harmonious one.

[12] The appellant submits that the respondents are in part responsible for the costs they have incurred as they withheld vital information and miscommunicated that information.

Accordingly, while the respondents submit that they did not take any steps other than those required of them for this appeal, they also failed to take steps that would have reduced the length of these proceedings and accordingly the time and resources spent on them.

Kōrerorero mō ngā utu roia

Discussion on costs

[13] The Court has an unlimited discretion as to costs. It has been noted that costs normally follow the event.

[14] Rule 8.23 of the Māori Land Court Rules 2011 specifically provides that where an appellant withdraws an appeal, this Court may make an order as it thinks just for the payment of any costs relating to the appeal. Rule 8.23 states:

8.23 Withdrawal of appeal

- (1) The appellant may withdraw the appeal—
 - (a) by notice in writing to the Chief Registrar, at any time before the hearing of the appeal:
 - (b) at the hearing.
- (2) Where the appellant withdraws the appeal, the Māori Appellate Court may make an order as it thinks just for—
 - (a) the payment of any costs relating to the appeal; and
 - (b) the disbursement of any sum that has been lodged as security for costs.

[15] In this situation, the starting point must be that costs should be awarded.

[16] Counsel for the appellant submits that there are unique circumstances in this situation which should be taken into consideration, which mean the Court should deviate from the normal approach. These circumstances are that an award of costs will financially devastate the appellant and render her unable to, or significantly jeopardise her ability to, pursue the other proceedings she currently has before the Māori Land Court. Further, as a beneficiary of the ORT Trust, it is in her best interests as both a trustee and a beneficiary to prevent misconduct by trustees.

[17] From another perspective, an award of costs will mean that the appellant might seriously reconsider pursuing further proceedings in court. She will not look to proceed with applications that are misguided and misconceived knowing that costs are a potential consequence of such applications. She will take more care before filing an application knowing that an award of costs could be a consequence of her application being dismissed.

[18] Here, the appellant withdrew her appeal when the matter was recalled on 30 May 2022. The appellant is no stranger to the Court. She has filed proceedings previously and has a number of extant matters currently before the Māori Land Court. She has also engaged counsel. Her appeal, while she submits it was filed on her honest belief that it was necessary, was totally misguided.

[19] Counsel's submissions also appear to put much blame on the respondents for the costs incurred in responding to the appeal. Put simply, the submission is that the respondents did not respond adequately to the appellant's appeal and there was insufficient communication between counsel regarding the appeal. Counsel submits that the respondents withheld vital information, which if the respondents had been more open and helpful to the appellant (who was taking the case against them) it would have prevented some costs being incurred. This seems somewhat disingenuous to blame the respondents for incurring costs that could have been avoided if they had assisted the appellant with her case against them.

[20] While we recognise that the appellant is not legally qualified, she has had legal advice, and is no stranger to court proceedings. Therefore, she should be aware of the consequences of taking matters to court, filing an appeal which had little chance of success, and then withdrawing the appeal at a very late stage.

[21] A further matter we must consider is that the appellant received funding from the Māori Land Court Special Aid Fund.

[22] In *Trustees of Horina Nepia and Te Hiwi Piahana Whanau Trust v Tahamata Incorporation*, Judge Harvey (as he then was), noted in relation to awarding costs against applicants assisted by the Special Aid Fund:²

² *Trustees of Horina Nepia and Te Hiwi Piahana Whanau Trust v Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238), at [14]-[16], citing *Wairoa District Council v Wairau – Kaiwaitau 7C 2B* (2009) 128 Wairoa MB 168 (128 WR 168).

[14] ...On 31 May 2012 the Māori Land Court issued a Practice Note containing guidelines for use of the Māori Land Court Special Aid Fund which states:

9. That the mere fact that a party to proceedings before the Māori Land Court is in receipt of special aid is not a barrier to costs being awarded against them.
10. A Judge will generally only award costs against persons who are in receipt of special aid if he or she is satisfied that there are exceptional circumstances.

[15] In *Wairoa District Council v Wairau-Kaiwaitau 7C2B* costs were sought against a party who had received payments from the Māori Land Court Special Aid Fund. Chief Judge Isaac was cognisant of the provisions of s 40 of the Legal Service Act 2000 and considered that it would be unwise to distinguish Māori Land Court Special Aid from aid provided under the Legal Services Act 2000. The test being whether there are exceptional circumstances to award costs against a legally aided person and, if awarded, these costs must be reasonable with regard to all circumstances.

[16] Section 45 of the Legal Services Act 2011 sets out several factors to consider in determining whether there are exceptional circumstances as follows:

- (3) In determining whether there are exceptional circumstances under subsection (2) the court may take account of, but is not limited to, the following conduct by the aided person:
 - (a) any conduct that causes the other party to incur unnecessary cost:
 - (b) any failure to comply with the procedural rules and orders of the court:
 - (c) any misleading or deceitful conduct:
 - (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
 - (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
 - (f) any other conduct that abuses the processes of the court.

(Footnotes omitted)

[23] A grant of Special Aid funding does not act as a shield against an award of costs.³ This was acknowledged by counsel for the appellant.

³ *Te Wani v Peters - Te Puru No 5* (2016) 124 Waikato Maniapoto MB 272 (124 WMN 272), at [15]-[18], citing *Trustees of Horina Nepia and Te Hiwi Piahana Whanau Trust*, above n 2, at [17].

[24] The fact that the appellant was in receipt of funding from the Māori Land Court Special Aid Fund does not prevent the making of a grant of costs. In particular, given as noted on the appellant's Special Aid application, that the appellant was receiving legal advice from 22 November 2021 – the date Counsel received instructions.

[25] The issue at appeal was whether a project was going to proceed despite the appellant not having signed a deed of novation. Most importantly, as accepted by counsel, this was not an issue before Judge Armstrong.

[26] In our view, there are no unique circumstances that would persuade us not to follow the normal costs follow the event approach. There will be an award of costs.

Te rahinga

Quantum

Ngā tapaetanga o ngā kaiurupare - Respondents' submissions

[27] In terms of the quantum to be awarded, the respondents submit the appeal from the Māori Land Court was civil in nature and the matter at issue was akin to an appeal to the High Court or to the Court of Appeal. Costs for all steps taken in relation to this appeal using the appropriate steps in the High Court (Band B) and in the Court of Appeal (Band A) provide a cost calculation of \$13,264.50.

[28] The appellant's conduct in relation to this appeal merits the costs award being made against her at the higher end of the range. The respondents refer the Court to s 45(3) of the Legal Services Act 2011 in relation to exceptional circumstances and also r 14.6 of the High Court Rules 2016, which lists circumstances that merit the High Court making orders for increased or indemnity costs. The point being that the respondents submit that the appellant's conduct has been a significant contributor to the respondents' costs incurred in relation to this appeal.

[29] Further, the appellant knew, or ought to have known, that her grounds for appeal (that the Māori Land Court failed to intervene to amend her deficient pleading or allow her to rely on grounds not pleaded in her application for injunction) were doomed to fail.

[30] Other conduct matters raised include:

- (a) The submissions advanced by the appellant in support of her appeal did not address the questions on appeal; rather, the submissions were focussed on the appellant's substantive claim, which had not yet been heard in the Māori Land Court.
- (b) The appellant did not file an application to adduce further evidence on appeal.
- (c) The appellant's submission in relation to Dr Robust were tantamount to an admission that the appellant's third ground of appeal was frivolous and unnecessary.
- (d) The appellant has been represented by counsel in the Māori Land Court and in this Court. It is therefore fair to presume that the appellant was properly advised in both the lower Court and this Court. It can also be presumed that the appellant was advised that costs could be awarded against her, despite her being in receipt of Special Aid.

[31] The respondents seek an award against the appellant for the actual costs incurred by the respondents in March 2022 and May 2022 for invoiced legal fees of \$28,472.90. Some of counsel's time has been written off resulting in a reduction of 31%. Further, while the respondents incurred legal fees relating to this appeal from December 2021, the respondents are not seeking costs against the appellant for legal fees incurred between December 2021 and February 2022.

Ngā tapaetanga o te kaipira - Appellant's submissions

[32] Counsel acknowledges that both the matters appealed and the grounds of the appeal were civil in nature and that a party being in receipt of a grant of Special Aid does not preclude an award of costs being made against that party.

[33] The appellant, as noted above, opposes an award of costs but did submit that if the Court is minded to award costs to the respondents then the Court should consider a number of matters including:

- (a) She was self-represented at the time she filed her notice of appeal. She was advised by previous counsel that 6 December 2021 was the last day that she could file her notice and it is noteworthy that counsel for the respondents refused to accept service of her notice of appeal in the first instance.
- (b) One of the main grounds of her application for Special Aid was that of her impecuniosity. Particularly, she was unable to privately fund her appeal and she is a Work and Income beneficiary with no other funding avenues available to her to cover legal fees. Proof of her impecuniosity was filed in support of an application for Special Aid which was notably granted.
- (c) This is not a situation that justifies the Court making an order for increase to indemnity cost against her, given the nature and stage of these proceedings was not such that the time required by the respondents substantially exceeded the time allocated under Band C. The respondents' conduct has contributed to the time and expense of the proceedings by failing to provide the information sought in a way that is understandable to her.
- (d) Her substantive application was wanting in terms of specific relief sought. An explanation was given in the relevant submissions, namely that taking a specific stance on relief put her in danger of breaching one or more of her trustee duties.

[34] Importantly for the appellant, it is submitted that the respondents have not acted reasonably in this Court on the basis that various information had been withheld from both herself and her counsel. This information, if brought to light prior to the 11 May 2022 Court hearing, would have led to earlier withdrawal of these proceedings.

[35] Further, counsel says that the appellant was self-represented at the time of filing the notice of appeal and it is unreasonable to expect the appellant to be aware that costs could be awarded against her, even if she withdrew her appeal.

[36] Counsel for the appellant questions whether the amount sought by the respondents was actually and reasonably incurred. This is on the basis that the appellant was granted

Special Aid for one lawyer rather than two, as the appeal grounds were not extensive. This indicates that if the Court is minded to award of costs, it would be appropriate to consider costs for the work of one lawyer only and calculate costs according to a lower band (Band C).

[37] In addition, it is submitted that the amount sought by the respondents is unreasonably high for the short length of time the proceedings had been active, coupled with limited correspondence with the appellant and her counsel, on matters exclusively relating to these proceedings. It would be inappropriate to award costs for work done that is not directly relevant to the appeal.

Kōrerorero mō te rahinga

Discussion for quantum

[38] The costs being claimed, according to the respondents' submissions, exceed a cost calculation if we were to use the appropriate steps in the High Court (Band B) and the Court of Appeal (Band A) steps. We accept counsel for the appellant's submission that these proceedings were limited and two lawyers acting on this matter, if it was done on a Special Aid basis, was certainly not required. This is despite the fact that counsel for the appellant, in her application for Special Aid, sought costs for two lawyers to act in this matter, which was declined. Therefore, the costs being sought are substantial and exceed what would be paid under the High Court and Court of Appeal costs bands and would certainly be in excess of costs payable if the respondents had been in receipt of Special Aid.

[39] The appellant was granted Special Aid, partly on the basis of her not being eligible for legal aid, her being a beneficiary and having no other funds available to her to assist with legal costs. Her impecuniosity is something we also take into consideration.

[40] In essence, the appellant's conduct has been that she brought and pursued an appeal that was entirely misconceived and doomed to fail, withdrawing her appeal on the morning of the hearing. She advanced arguments that were not available to her on the evidence in the Māori Land Court or this Court and the pleadings. She failed to advance her appeal in accordance with this Court's original timetable which put the respondents to additional unnecessary costs. This is despite her being an experienced litigant who has taken, defended, and participated in numerous proceedings before the Māori Land Court and the Māori

Appellate Court. Further, the appellant was aware of the costs parties are put to as a result of such proceedings and was represented by experienced counsel so presumably was properly advised in relation to her appeal.

[41] We question the appellant and her counsels' submission that she would have withdrawn her appeal earlier had the respondents provided her with information brought to light at the 11 May 2022 Court hearing. In our view, the necessary inquiries and hui could have taken place before counsel incurred significant legal costs. Despite confirmation that the project would be continuing without the appellant's signature, it remained unclear to the appellant whether the Ministry of Primary Industry was prepared to accept a deed of novation signed by two of the three trustees on a majority basis. In the appellant's view, not only did the respondents fail to communicate vital information to her, but their legal counsel went a step further and made misleading submissions on the Ministry of Primary Industry's intention to proceed with the project in the absence of the appellant's signature. As we have already noted, it seems somewhat disingenuous to blame the respondents for incurring costs that could have been avoided if the respondents had assisted the appellant and her counsel with her appeal against them.

[42] In our view the appellant has acted unreasonably. This is balanced against the obvious tension between the appellant and the respondents, who are all trustees of a major trust.

[43] It appears to us that the respondents have acted reasonably in this Court. Further, it was reasonably necessary for them to participate in these proceedings to protect the best interests of the beneficiaries of the ORT Trust.

[44] The Court has a broad discretion regarding the level of contribution in terms of costs. In assessing the nature and course of the proceedings, the importance of the issues, the conduct of the parties, and the fact that the appellant was funded from the Māori Land Court Special Aid fund, we award costs of \$5,000.00 (GST inclusive) to the respondents.

I whakapuaki i te 5:00pm i Tairāwhiti, toru tekau mā tahi o ngā rā o Ōketopa i te tau 2022.

W W Isaac
CHIEF JUDGE

C T Coxhead
JUDGE

R P Mullins
JUDGE