IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20160001526
APPEAL 2016/1

UNDER	Section 58, 79 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal by Bruce Anderson Bamber and Kathleen Mata Bamber against a decision of the Māori Land Court made on 10 December 2015 at 133 Waiariki MB 245-270 in respect of Tahorakuri A No 1 Section 33A2
BETWEEN	BRUCE ANDERSON BAMBER AND KATHLEEN MATA BAMBER Appellants
AND	SHANE MONSHAU AND HARRY TE NGARU Respondents

Court: Judge L R Harvey (Presiding)
Judge S Te A Milroy
Judge C T Coxhead

Judgment: 23 September 2016

JUDGMENT OF THE COURT ON COSTS

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Introduction

[1] In 2003 Kathleen Bamber, a beneficiary of the Bamber whānau trust, together with her husband Bruce Bamber purported to lease Tahorakuri A No 1 Section 33A2 to Gifford McFadden. The appellants retained the proceeds of that arrangement rather than accounting for the money to all the owners of the block.

[2] An ahu whenua trust was subsequently constituted over the land on 2 November 2011.[1] In 2013 the trustees began proceedings in the Māori Land Court to recover the sum of $168,986.00 (being rental received less expenses) from the appellants.

[3] Judge Savage found that any monies generated subsequent to creation of the trust are the property of the trust and an order should be made per s 242 for payment to the trustees.[2] The Judge also determined that the trustees did not have the right to seek the proceeds retained by the appellants *prior* to the creation of the ahu whenua trust. He decided that any right of recovery lay with the beneficiaries.

[4] Following the release of that decision the trustees filed an appeal ("the First Appeal"), on 16 October 2015, claiming that the Court has the jurisdiction to deal with the monies sought by the trustees prior to the creation of the trust.

[5] On 10 December 2015 the Judge issued a further minute determining the date on which trustees were appointed to the trust, 2 November 2011, and accordingly entering judgment against the appellants for $10,687.50.[3]

[6] Bruce and Kathleen Bamber filed an appeal against that determination ("the Second Appeal"), on 10 February 2016, which was then set down to be heard on 10 May 2016.[4] However, at the request of the trustees the Second Appeal was adjourned to 10 August 2016.

[7] The First Appeal was heard on 17 February 2016.[5] By decision dated 29 June 2016 this Court upheld the appeal and the proceedings were remitted back to the Māori Land Court for determination on the merits of any claim that the trustees may have against the appellants.[6]

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1 43 Waiariki MB 290-300 (43 WAR 290-300)
2 *Monshau v Bamber – Tahorakuri A No 1 Section 33A2* (2015) 125 Waiariki MB 260-266 (125 WAR 260-266)
3 133 Waiariki MB 245-270 (133 WAR 245-270)
4 2016 Chief Judge's MB 120 (2016 CJ 120)
5 2016 Māori Appellate Court MB 78 (2016 APPEAL 78)

[8] The Second Appeal was eventually withdrawn by the appellants prior to hearing.[7] The parties were then invited to file submissions on costs which have now been received. The respondents seek a 50 per cent contribution being $2,035.25. The appellants oppose any award.

Issue

[9] The issue for determination is whether costs should be awarded and if so, for what amount?

Trustees' submissions

[10] Counsel submitted that time and resources have been spent on considering the jurisdictional issue raised, the potential cumulative effect of both appeal proceedings and the ongoing disputes between the parties, and the costs of briefing and advising the trustees on the appeal and filing various memoranda with the Court.

[11] In addition, counsel contended that the appellants refused to co-operate with the trustees to agree that the Court adjourn the proceedings until the outcome of the First Appeal was known. As a result counsel was required to file urgent memoranda seeking an adjournment.

[12] Further, counsel submitted that the trustees were successful in the First Appeal and as a result the appellants are now seeking leave to discontinue the Second Appeal. According to counsel, the appellants' request for discontinuance confirms that their claims were without merit.

[13] Counsel relied on the principles set out in *Samuels v Matauri X Incorporation – Matauri X Incorporation* and submitted that costs should be awarded in favour of the trustees.

Appellant's submissions

[14] The appellants submitted that when the Māori Land Court proceedings began Judge Savage allowed financial assistance for accounting purposes however the appellants paid their own costs.

[15] In addition, the appellants pointed out that although they were partially successful they did not seek costs in relation to those proceedings as they did not want to use the beneficial owners' money.

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[6] *Monshau v Bamber – Tahorakuri A No 1 Section 33A2* [2016] Māori Appellate Court MB 286 (2016 APPEAL 286)

[7] 2016 Māori Appellate Court MB 310 (2016 APPEAL 310)

[16] The appellants argued that these proceedings forced them to incur costs. The appellants also claimed that matters have not been finalised and are concerned with what has happened to the rental money as they consider that, given the state of the farm, it has not been spent there.

[17] The appellants also contended that penalty tax will be incurred and question who will be accountable for those penalties.

[18] Further, the appellants questioned the costs incurred in the proceedings.

The Law

[19] Section 79(1) of the Act provides:

> **79 Orders as to costs**
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> (1) In any proceedings, the court may make such order as it thinks just as to the payment of the costs of those proceedings, or of any proceedings or matters incidental or preliminary to them, by or to any person who is or was a party to those proceedings or to whom leave has been granted by the court to be heard.

[20] The legal principles that apply to an award of costs are well established. We adopt the reasoning set out in *Samuels v Matauri X Incorporation – Matauri X Incorporation*.[8] In addition, we also note the subsequent decision of this Court *Nicholls v Nicholls - Part Papaaroha 6B Block* which confirms that discretions are not unfettered and must be exercised judicially, lest they be found to be arbitrary.[9]

[21] In any event, a two step approach is required in determining costs. The Court must first determine whether costs should be awarded and if so, then the next issue is the level of costs to be awarded.

Discussion

Should costs be awarded?

[22] The trustees sought an adjournment on the basis that the First Appeal had been heard by the this Court on 17 February 2016 and it was in the interests of justice that the hearing of the Second

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8 (2009) 7 Taitokerau Appellate Court MB 216 (7 APWH 216)

9 [2011] Māori Appellate Court MB 64 (2011 APPEAL 64) at [9]

Appeal should be delayed until after a decision had issued in respect of those proceedings.[10] As foreshadowed, the judgment regarding the First Appeal was issued on 29 June 2016.[11]

[23] On 8 July 2016 the appellants filed a memorandum seeking to vacate the Second Appeal because the related case was being referred back to the court below. This meant that there was no final judgment against which to bring an appeal. We then issued a minute on 19 July 2016 dismissing the appeal and directing the parties to file submissions on costs.

[24] The established principle is that costs follow the event.[12] In *Big Hill Station Ltd v Trustees of Awarua o Hinemanu Trust* the jurisdiction to award costs following the withdrawal and dismissal was considered: [13]

> [38] This Court has awarded costs following the withdrawal and dismissal of applications on a number of occasions. The jurisdiction to do so is provided for in s 79(1) of the Act. In addition, the High Court rules provide for costs where a plaintiff discontinues proceedings. Rule 15.23 provides that unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay the costs of and incidental to the proceeding up to and including the discontinuance.
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> [39] In *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* the Court of Appeal summarised the general approach to be applied in considering applications for costs where a notice of discontinuance has been filed. Importantly, it was held that the court does not speculate on the merits of a case it has not heard. That aspect would only influence the court's decision on costs in exceptional cases where the merits are clear. Moreover, the reasonableness of the stance of the parties has to be considered.

[25] In *Powell v Hally Labels Ltd* the Court of Appeal stated that there is a presumption that discontinuance is ordinarily tantamount to judgment for the defendant.[14]

[26] These proceedings have been undertaken in a manner akin to civil litigation. Both parties have been represented by counsel. The trustees have been put to the expense of replying to matters that were ultimately never argued in this Court. The application has been withdrawn at the request of the appellant.

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[10] [2016] Māori Appellate Court MB 209 (2016 APPEAL 209); and 2016 Chief Judge's MB 456 (2016 CJ 456)

[11] *Monshau v Bamber – Tahorakuri A No 1 Section 33A2* [2016] Māori Appellate Court MB 286 (2016 APPEAL 286)

[12] *Samuels v Matauri X Incorporation – Matauri X Incorporation* [2009] 7 Taitokerau Appellate Court MB 216 (7 APWH 216)

[13] (2015) 43 Takitimu MB 218 (43 TKT 218)

[14] *Powell v Hally Labels Ltd* [2015] NZCA 11

What is an appropriate quantum?

[27] The trustees seek $2,035.25 being 50 percent of the legal fees invoiced to the trust in relation to these proceedings.

[28] The appellants say that it is not clear that sum has been paid by the trust and query whether any costs at all have been incurred by the trust. Counsel for the trust provided two invoices to the Court. The sum sought appears to have been reasonably and properly incurred. The appellants have provided no evidence to show that the costs are unreasonable or were improperly incurred.

[29] As foreshadowed, the trustees have been put to the ultimately unnecessary expense of preparing for an appeal. They sought and were granted an adjournment of these proceedings in order to await the outcome of the related appeal. The appellants were unwilling to agree to the adjournment.

[30] The discontinuance was sought shortly after judgment in the First Appeal was delivered. The appellants say there is now no order from which to appeal as this Court has referred the related proceedings back to the Māori Land Court to determine.

[31] It is trite that litigation of any kind is a serious undertaking – more so to an appellate court. There should, as a matter of policy, be disincentives to the filing and prosecution of claims that are ultimately withdrawn by a plaintiff or appellant. Costs are one means of dis-incentivising meritless claims. We therefore consider that an award of costs is appropriate in the circumstances of this appeal.

[32] It is well established that a reasonable contribution will seldom be as little as 10 per cent or as large as 80 per cent or 90 per cent on an objective analysis.[15] Given the overall circumstances of these proceedings we agree that an award of 50 per cent of the total costs incurred by the respondents being $2,035.25 is appropriate.

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[15] *Samuels v Matauri X Incorporation – Matauri X Incorporation* [2009] 7 Taitokerau Appellate Court MB 216 (7 APWH 216)

Decision

[33] The appellants must pay the respondents $2,035.25 as a contribution towards costs.

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

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L R Harvey	S Te A Milroy	C T Coxhead
JUDGE	**JUDGE**	**JUDGE**
(Presiding)		