IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20160004583

UNDER	Section 79 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Costs in respect of determination against an order made at 123 Taitokerau MB 240-274 on 29 January 2016 and related proceedings.
BETWEEN	MARY BRATTON Appellant
AND	RONDA LE LIEVRE Respondent

Hearing: On the papers

Court: Deputy Chief Judge Fox (Presiding)
Judge L R Harvey
Judge M J Doogan

Appearances: J Kahukiwa for the Appellant
P Hoskins for the Respondent

Judgment: 18 October 2017

JUDGMENT OF THE COURT ON COSTS

Copies to:

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Introduction

[1] This appeal was dismissed on 8 June 2017. Counsel were invited to exchange submissions on costs and these were filed on 8 August and 6 September 2017 respectively.[1]

[2] The appellant is legally aided.[2] Pursuant to s 45(2) of the Legal Services Act 2011, costs cannot be awarded against the appellant unless there are 'exceptional circumstances'.

[3] The issue for determination is whether a costs award is appropriate.

Respondent's submissions

[4] The respondent seeks:

(a) indemnity costs based on her actual and reasonable costs and uplifted by 90%; or

(b) if increased costs are to be applied, an uplift from actual and reasonable costs of 50%; or

(c) 80 per cent of the costs the respondent actually and reasonably incurred.

[5] Moreover, the respondent submitted that there are exceptional circumstances justifying an award of costs against a legally aided person. First, counsel contended that the appellant engaged in a litigious process, giving little regard to whanaunga considerations. Second, the proceedings were lodged before costs could be determined for the original Māori Land Court proceedings, causing that case to be adjourned. That meant the respondent incurred further costs without those in the Māori Land Court being determined.

Appellant's submissions

[6] The appellant submits that there are no exceptional circumstances justifying an award of costs. In response to the respondent the appellant argued:

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1 *Bratton v Le Lievre – Muriwhenua Incorporation* [2017] Māori Appellate Court 131 (2017 APPEAL 131)

2 By Memorandum counsel confirmed that legal aid was approved on 31 August 2017.

(a) Her conduct cannot properly be characterised as 'litigious'. She was merely exercising her right to take her case on appeal;

(b) The fact she took her case on appeal before the matter of costs in the Court below could be determined is irrelevant. The appellant merely exercised her right of appeal under s 58 of Te Ture Whenua Māori Act 1993, as she was entitled to;

(c) None of the non-exhaustive circumstances outlined in s 45(3) of the Legal Services Act 2011, which the Court may take into account when determining whether there are exceptional circumstances, apply to the appellant's conduct here.

The Law

[7] Section 79 of Te Ture Whenua Māori Act 1993 provides:

> **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.
> …

[8] The principles that apply to an award of costs were summarised in *Samuels v Matauri X Incorporation — Matauri X Incorporation*:[3]

(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; and

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[3] [2009] 7 Taitokerau Appellate Court MB 216 (7 APWH 216) at [10]. That summary was endorsed by this Court recently in *Monschau v Bambler – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* [2016] Māori Appellate Court MB 383 (2016 APPEAL 383).

(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.

[9] When determining costs a two step approach is required. The Court must first determine if costs should be awarded. If so, the Court must then consider an appropriate quantum.

[10] However, s 45(2) of the Legal Services Act 2011 is relevant. It provides that the Court can only award costs against an unsuccessful party if there are 'exceptional circumstances':

> **45 Liability of aided person for costs**
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
> (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.
> (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
> (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.
> (6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—
> (a) that next friend or guardian *ad litem* has the benefit of this section; and
> (b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

[11] The rationale underlying s 45 is to "reduce, but not eliminate entirely, the risk that a legally aided person, if unsuccessful in the litigation, may be required to pay substantial costs despite having limited means."[4] The bar on costs awards in s 45(2) promotes access to justice by ensuring that impecunious parties are not deterred from standing on their rights by the prospect of a cost award beyond their means.[5] Given that rationale, only circumstances

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4 *McCollom v Thompson* [2017] NZCA 269, [2017] NZAR 1106 at [77]
5 Ibid

which are "quite out of the ordinary" will be considered 'exceptional' for the purposes of s 45(2).[6]

Discussion

[12] Although the appellant applied for legal aid in March 2016, which was approved for the case in the Court below, it was only granted in respect of this appeal on 31 August 2017. There has been some judicial disagreement about the extent to which grants of legal aid operate 'retroactively'.[7] However, we endorse the view of Mander J in *AA v LA*: "[t]he question is not when legal aid was approved, but to which costs the grant of legal aid attaches."[8]

[13] We understand that the appellant was granted legal aid in respect of the entire appeal process. Accordingly, the s 45(2) bar applies to all costs incurred during the appeal proceedings, in the absence of exceptional circumstances.

[14] The respondent points to the litigious manner in which the appellant has approached this dispute, and the fact that these proceedings were lodged before costs could be determined for the original proceedings in the Court below, as supporting an argument that there are 'exceptional circumstances' in this case. The appellant's unreliability as a witness is another circumstance which may support the respondent's argument.[9]

[15] We have examined those aspects of the appellant's conduct of the case, together with the non-exhaustive list in s 45(3). In our assessment, none of those matters justify a conclusion that the circumstances in this case were 'exceptional'.

[16] Moreover, only when an appeal is particularly unmeritorious, and "inevitably bound to fail", have courts considered the decision to exercise appeal rights as going toward establishing 'exceptional' circumstances.[10] In any case, there was an element of novelty in

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6 *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [31]. For consideration of the phrase 'exceptional circumstances' in the Māori Land Court see *Rolleston v Moore – Lot 1 Deposited Plan South Auckland 52401 and Ongaonga No 1C No 1 Block* (2016) 133 Waikato Maniapoto MB 39 (133 WMN 39) at [52]-[74].

7 The differing views are canvassed in *AA v LA* [2017] NZHC 646 at [12]-[21].

8 Ibid at [17]

9 See *Bratton v Le Lievre*, above n 1, at [17]

10 *Russell v Lawrence* HC Auckland CP427/02, 3 June 2003 at [30], cited in AA v LA [2017] NZHC 646 at [27]

these proceedings, in that there were no decisions of this Court that addressed a renewal clause like that contained in Ms Le Lievre's license to occupy. That suggests the appeal was not wholly unmeritorious, and weighs against a finding of exceptional circumstances.[11]

[17] That said, pursuant to s 45(5) we observe that were the appellant not legally aided, factoring in the adverse credibility findings made against her, the appellant would have been liable for 70 per cent of the costs actually and reasonably incurred by the respondent.

Decision

[18] The application for costs is dismissed.

[19] If the appellant had not been legally aided she would have been liable for 70% of the costs actually and reasonably incurred by the respondent.

Pronounced at 3.00pm Wellington on Wednesday this 18th day of October 2017

C L Fox	L R Harvey	M J Doogan
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**

[11] *Bratton v Le Lievre – Muriwhenua Incorporation*, above n 7, at [28]. For the proposition that where a novel argument is raised, that is a factor which weighs against a finding of 'exceptional circumstances, see *McGarvey v Temo* [2009] NZCA 29 at [7].