IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

A20150001488
APPEAL 2015/6

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Wairau Block XII Section 6C2C
BETWEEN	PHILLIP MACDONALD Appellant
AND	BRIGHAM MACDONALD Respondent

Hearing:	19 May 2015 (Heard at Blenheim)
Court:	Chief Judge Isaac (Presiding) Judge Savage Judge Doogan
Appearances:	L Radich for the appellant M Hardy-Jones for the respondent
Judgment:	27 September 2016

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT ON COSTS

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Introduction

[1] On 7 June 2016 we issued our judgment in this case, upholding the decision of Judge Reeves in the Māori Land Court declining to grant the application made by Phillip MacDonald (Phillip) to partition the land block, Wairau Block XII Section 6C2C, that he jointly owns with his brother Brigham MacDonald (Brigham).[1] Our decision rested on the conclusion that the even split in support and opposition for the partition between the two owners did not meet the statutory requirement for a sufficient degree of support for the partition amongst the owners; and that the partition did not meet the statutory requirement of being necessary to facilitate the effective operation, development and utilisation of the land.

[2] At the conclusion of our judgment we noted that no submissions had been made as to costs, and that we were inclined to think that costs should lie where they fell. However, we reserved leave for Brigham's counsel, Mr Hardy-Jones, to file a memorandum within 14 days of receipt of the judgment if his client did seek a costs order.

[3] Mr Hardy-Jones filed a memorandum advising that his client sought a costs order, and the basis for this position, on 21 June 2016. A response to this submission was subsequently filed by Phillip's counsel, Mr Radich, on 2 July 2016.

[4] On 12 July 2016 the Court issued a direction requiring Mr Hardy-Jones to file a breakdown of the costs incurred by Brigham in these Appellate Court proceedings.[2] This breakdown was filed by Mr Hardy-Jones on 22 July 2016.

Submissions for Brigham

[5] Mr Hardy-Jones submits that this Court should make an award of costs to Brigham in relation to both the proceedings in the Māori Appellate Court and Māori Land Court, noting that submissions as to costs have been filed in the lower court but that no decision on this matter has been issued.

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1 *MacDonald v MacDonald – Wairau Block XII Section 6C2C* [2016] Māori Appellate Court MB 259 (2016 APPEAL 259).

2 2016 Māori Appellate Court MB 308 (2016 APPEAL 308).

[6] He submits that an award of costs is appropriate for the following reasons:

(a) Phillip's case was unlikely to succeed from the outset, as there had already been an arbitration process that the parties had undertaken for the division of their joint assets, including in relation to the land block;

(b) the land in question was already being utilised as efficiently as it could be;

(c) there was insufficient support amongst the land's owners for the application;

(d) the application was seeking an outcome preferable to Phillip, rather than one that met the strict criteria of Te Ture Whenua Māori Act 1993; and

(e) Phillip had failed to consider alternative means to resolution of the dispute in the form of accepting rent from Brigham.

[7] In relation to the Māori Land Court proceedings heard by Judge Reeves, Mr Hardy-Jones submits that Brigham's total costs were $29,983.96, and seeks a costs award of between $19,500-$22,500 (being 65-70% of total costs).

[8] In relation to these Māori Appellate Court proceedings he submits that Brigham's total costs were $26,151.15, and seeks a costs award of between $17,000-$19,600 (being 65-70% of total costs).

[9] Overall, Mr Hardy-Jones submits that a global costs award of $30,000 (approximately 60% of total costs) covering both the appellate and lower court proceedings would be appropriate.

[10] Mr Hardy-Jones also submits that, applying the High Court 2B costs scale, Brigham would be entitled to a costs award of $9,447.50 in comparable proceedings in the High Court.

Submissions for Phillip

[11] Mr Radich submits that costs in this matter should lie where they fall, in accordance with the Court's initial view. He submits that while Phillip was unsuccessful in his application for partition of Wairau Block XII Section 6C2C, he did not act unreasonably in making this application, particularly in light of his ongoing exclusion as a joint owner from use of the land or from any of the profits made from it.

[12] In response to the application for an order covering Brigham's costs in the Māori Land Court, Mr Radich submits that the authorities show that this is a matter that should appropriately be dealt with by Judge Reeves in the lower court, not by the Māori Appellate Court. He cites the decisions in *Davies v Trustees of Te Tii (Waitangi) Ahu Whenua Trust*[3] and *Fenwick v Naera*[4] in support of this position.

[13] In relation to the Māori Appellate Court proceedings, and in response to the submissions of Mr Hardy-Jones as to why an order of costs is appropriate, Mr Radich submits that:

(a) it is demonstrably incorrect that the land block was dealt with in the arbitration proceedings between the parties;

(b) that the question of whether the land block was being utilised effectively, having regard to ss 2 and 17 of Te Ture Whenua Māori Act 1993, was an important part of Phillip's case, and while his argument on this point was not accepted by the Court it was not a hopeless position to take;

(c) that the question of sufficient support was also crucial to Phillip's case, and while he was also unsuccessful on this point his position was not an unreasonable one to take;

(d) that it is correct to say that Phillip sought an outcome that was more preferable to him, and considers it unfortunate that this did not meet the strict requirements of the Act; and

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3 *Davies v Trustees of Te Tii (Waitangi) B3 Ahu Whenua Trust – Te Tii (Waitangi) B3 Trust* [2016] Māori Appellate Court MB 179 (2016 APPEAL 179).

4 *Fenwick v Naera* [2015] NZSC 68.

(e) that the proposed alternative means to resolution of accepting rent from Brigham is "somewhat disingenuous" as Brigham has made one offer of rental payment, without consultation with Phillip; Brigham has made no payments since the hearing of the case in the lower court; and that in any event Phillip sought through his application not merely to profit from the land but to share in its utilisation.

[14] If the Court does decide an award of costs is appropriate, Mr Radich submits that the contribution to costs sought by Brigham is unreasonable, as the total costs figure incurred by Brigham is unusually large. By comparison to the total cost of $26,151.15 claimed by Brigham, Mr Radich notes that Phillip's total costs for the appeal were $8,000.

[15] In relation to the calculation of the High Court 2B scale comparison prepared by Mr Hardy-Jones, Mr Radich submits that this calculation should be reduced as it includes costs for the preparation of the Case on Appeal (which Brigham, as the respondent in the appeal, was not required to prepare) and for the assistance of a second counsel (which Mr Radich submits the case was insufficiently complex to require). Mr Radich submits that, subtracting these costs from the calculation, the High Court 2B scale costs applicable would be $6,690. Mr Radich submits that, if costs do not lie where they fall, a costs award of no more half this amount ($3,345) would be appropriate.

The Law

[16] Section 79 of Te Ture Whenua Māori Act 1993 sets out the Court's power to order costs:

> **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.

[17] *Samuels v Matauri X Incorporation* states that the Court should approach the question of costs in two steps. First, it should consider whether there should be any award

of costs. If the answer is yes, then the Court should go on to consider the appropriate quantum of costs.[5]

[18] As discussed in the recent decision of *Karepa v Te Riini*,[6] the Court has developed the following general principles regarding the question of whether it is appropriate 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 where this would frustrate the Court's important 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.

[19] In relation to quantum, the Court should consider the following principles:

(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%, but an 80% or 90% contribution will seldom be reasonable.

(d) The Court should consider what is just in the circumstances, with regard to 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 preparation, the parties' legal situation, the

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5 *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) at [9].

6 *Karepa v Te Riini – Kikorangi Kareti Karepa Whanau Trust* (2016) 144 Waiariki MB 3 (144 WAR 3).

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, pursuing a wholly unmeritorious and hopeless claim or defence – this may justify a more liberal award of costs.

[20] The principles on costs espoused in the authorities provide guidance but the Court must decide an outcome based on the circumstances of each particular case.[7]

Discussion

[21] In relation to the costs incurred by Brigham in the Māori Land Court, Mr Radich is correct in his submission that any costs order in relation to those proceedings should be determined by the lower court. We accordingly in this decision consider only whether an order of costs should be made in relation to the appeal proceedings heard by this Court.

[22] We first consider the question of whether any award of costs should be made.

[23] As recorded in our judgment of 7 June 2016, our initial view was that costs should lie where they fell.

[24] Having now had the opportunity to consider the submissions of the parties, we agree with Mr Hardy-Jones that it is appropriate that an award of costs be made. While this case related to a dispute between brothers, the nature of the dispute was in many ways a commercial one, especially taking into account the broader context to the application of the separation by the two brothers of their commercial interests in a number of land blocks, including the vineyard adjoining and partially covering Wairau Block XII Section 6C2C. Brigham was the successful party in this appeal, and in line with the general assumption set out above is entitled to a reasonable contribution to his legal costs.

[25] We next turn to consider what the quantum of this reasonable contribution to Brigham's costs should be.

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7 *Samuels v Matauri X Incorporation*, above n 5, at [32].

[26] We agree with Mr Radich that the total costs incurred by the respondent in this appeal, $26,151.15, are unusually large for a proceeding of this nature (although we record, having received the detailed breakdown of costs provided by Mr Hardy-Jones, that these are costs that were actually incurred by the respondent). In consideration of this, we take the High Court 2B costs scale figure provided by the respondent, $9,447.50, as the starting point in assessing a reasonable contribution of costs to be made by the appellant to the respondent. We note the concerns raised by Mr Radich that this scale calculation includes two allowances that the appellant says are inappropriate, but find that (a) the allowance specified for the preparation of the Case on Appeal does not appear to have actually been included in the final calculation of total scale costs made by the respondent; and (b) the allowance for work completed by a second counsel is minimal and, in our view, appropriate.

[27] Taking this amount of $9,447.50 as a starting point, we take into account the fact that the appeal brought by Phillip occurred in the unusual situation of there being an exact 50/50 split in the support for and opposition to the proposed partition. In this circumstance we consider that it was not wholly unreasonable for Phillip to make the application that he did, and to pursue his case on appeal, notwithstanding that he was ultimately unsuccessful.

[28] Considering this, we find that the appropriate costs award, as a reasonable contribution to the costs incurred by Brigham, is $6,300, approximately two-thirds of our starting point.

Decision

[29] Pursuant to s 79 of Te Ture Whenua Māori Act 1993, and for the reasons given above, we order the appellant, Phillip MacDonald, to pay the respondent, Brigham MacDonald, $6,300 as a contribution to his legal costs incurred in this appeal.

W W Isaac (Presiding)	P J Savage	M J Doogan
CHIEF JUDGE	**JUDGE**	**JUDGE**