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IN THE MAORI APPELLATE COURT
WAIARIKI DISTRICT

IN THE MATTER of the Maori Freehold land known as **PAENGAROA NORTH B No. 10A BLOCK**

AND

IN THE MATTER of the determination of costs in respect of an application for an Interlocutory Injunction under Section 30(1)(f) of the Maori Affairs Act 1953 to prevent trustees **of PAENGAROA North B No. 10A Block** from taking any steps or intermeddling in the administration of the trust lands vested in those trustees.

DECISION OF APPELLATE COURT ON AWARD OF COSTS

At the conclusion of the hearing of the application for an interlocutory injunction, the Appellate Court gave an oral and unanimous decision that the application for an injunction be dismissed and reserved the question of costs pending receipt of written submission from counsel. The Appellate Court indicated it would give its full reasons for the dismissal in writing and these reasons were subsequently given in a written memorandum from the Court dated 22 September 1992. The question of costs having been reserved and counsel now having made submissions thereon it remains for the Appellate Court to consider these submissions and determine this question. The applicant before the Appellate Court was Putu Mihaka, a beneficial owner, represented by counsel, Mr John Grant. The application was opposed by the five trustees in whom Paengaroa North B No. 10 A Block was vested under Section 438 and they were

represented by counsel, Mr Graham Dennett. The Appellate Court has carefully considered the very full memoranda on this matter submitted by Mr Grant and also by Mr Dennett. Counsel have helpfully presented to the Court several authorities in which the question of the award of costs has been considered As counsel for the applicant submitted, the jurisdiction of the Appellate Court under Sections 45 and 57 of the Maori Affairs Act 1953 is to "make such order as it thinks just as to the payment of costs thereof or of any proceedings incidental or preliminary thereto, by or to any person who is a party to these proceedings or to whom leave has been granted to the Court to be heard".

The interlocutory proceedings were heard prior to the Appellate Court moving to hear the substantive appeal. No security for costs had been ordered by the Appellate Court in respect of the injunction application although security had been fixed by the Appellate Court in respect of the appeal. No sum at that point had been paid into Court as the time for payment had not been reached. It is well settled law that in the exercise of its discretion a Court has full power to determine by whom and to what extent costs are to be paid. There are a number of limitations upon the exercise of this discretion and a party has no right to costs unless and until the Court awards them. There have been a number of decisions in the Maori Land Court and Maori Appellate Court dealing with questions relating to the award of costs. In re Rangirumaki Pereniki deceased, (1961) 77 Hauraki Minute Book 77, reported at page 86 of Taiwhati decisions 1958-1983 the Court held that it had an absolute and uncontrolled discretion in the award of costs and referred to and cited Voyce vs Lawrie 1952 (NZLR) 984. The limitation on the discretion is that such discretion must be exercised judicially and it must not be exercised arbitrarily but in accordance with reason and justice. See Halsburys Laws of England Vol 37 para 714 page 550. It is also well established principle that costs follow the event unless it would be more fair that some exception be made to the general rule. This principle was followed by the Maori Land Court in re Rangirumaki Pereniki deceased, wherein the Court referred to Cates v Glass 1920 NZLR 37 In another yet unreported decision of the Maori Land Court, in re Horowhenua 11 (Lake Horowhenua) 90 Otaki Minute Book 142-162, the Court canvassed in detail the duties upon it in the exercise of its discretion and looked at the alternative bases upon which costs could be ordered with reference to the position in the District and High Courts. The Court came to the view that because it had no scale of costs which could be used as the basis for taxation and also bearing in

mind that it was usual for the Court to require taxation of costs if a trust fund was involved it determined that it should make a lump sum award. In that case the Court decided to make a lump sum award and in so doing referred to another Maori Appellate Court decision in re Whareroa and Ors, Maori Trustee v Ministry of Works recorded at 1963 5 Rotorua ACMB 136 (see Taiwhati page 111). In this decision the Appellate Court gave consideration to the matters to which the Court should direct its discretionary power on an award of costs and set out 6 circumstances which needed to be canvassed.

In his submission to the Appellate Court, counsel for the applicant put forward the following general grounds why costs be disallowed in the present case.

1 That the interlocutory application was not frivolous or vexatious and was found not to be so by the Appellate Court.

2 The appellant had no personal stake in the proceedings and his interests arose out of the interest of the other beneficial owners.

3 There has been a history of difficulty in this block and the question of calling a meeting of owners was a high priority.

4 The applicant was of limited means and resources personally. He is apparently unemployed and would be unable to meet any substantial award of cost which would cause hardship to him.

5 Counsel emphasised the costs should not be used as a punishment against an unsuccessful party.

6 The respondents had not given attention to the calling of a meeting of owners to resolve the matter.

Counsel then went on to make a submission that if the Court proposed to award costs then it should consider the matters laid down by the New Zealand Court of Appeal in Kuwait Asia Bank EC vs National Mutual Life Nominees Ltd (1991) 3PR NZ 571 at 574. In this case the Court of Appeal reaffirmed the well established view that generally orders in relation to costs should be limited to a

reasonable contribution towards the successful party's costs on a party-and-party basis. The Appellate Court might here comment that this generally has been the procedure followed by the Maori Land Court in most cases where an award is made. Counsel for the applicant also referred to Effem Foods vs Best Friend Pet Foods Ltd (1989) 3PRNZ 254 wherein Barker, J considered that there should be only a reasonable contribution to the other parties costs bearing in mind that it was an interlocutory application.

Counsel for the respondents in seeking a contribution towards costs submitted that the amount of $2,000 would be a reasonable contribution in the circumstances. The respondents, he argued, had been put to substantial costs by the application, had called additional evidence which could have been dealt with by affidavit, and that if the applicant was representing other beneficial owners then they would no doubt want to assist him to meet any award of costs

The Appellate Court has noted the various reasons put forward by the applicant against an award of costs. Although this point was not raised by counsel for the trustees, the Appellate Court must have regard to the finding in its decision that the applicant along with the other members of an action group had conspired to defy the trustees, to defy Court orders and to commit trespass on the land. The Appellate Court found it was certainly not prepared to countenance and encourage further breaches of the law by granting the injunction sought and in its findings said that it would be a mockery of the rule of law and of justice to make available the processes of the law to grant an order to an applicant who by his own actions and admission was supporting persons who were defying the law. The respondents had made no reference to this point as no doubt they do not desire to exacerbate what has been a very difficult and trying situation. However, the Appellate Court cannot disregard this fact. It cannot also disregard the fact that the respondents were put to substantial costs which ultimately will be a charge against the trust funds. Having said this the Appellate Court is mindful of the view that it has generally followed a most conservative position in the award of costs.

In the earlier case referred to affecting Lake Horowhenua, the judge made the observation that after a careful appraisal of High Court decisions he had found that even lump sum awards made by the High Court were conservative and would not reimburse a successful litigant for his actual costs.

Bearing all matters in mind, including the factors set out in re Whareroa 2E and others (supra), the Appellate Court now makes an order under Section 57 of the Maori Affairs Act 1953 that the applicant Putu Mihaka pay costs to the trustees of Paengaroa North B No. 10A Block in the sum of $750.00 and that sum be paid to Messrs Dennett, Olphert Sandford & Dowthwaite, Barristers and Solicitors, Rotorua whose receipt shall be a sufficient discharge.

In the circumstances and bearing in mind the need for the trustees and owners to work together in harmony this Appellate Court considers that the sum awarded is a just award. Section 57 - Order to issue forthwith.

Dated at Wellington **this** 23rd **day of** February **1993**

A G McHugh
Presiding Judge

H B Marumaru
Judge

G D Carter
Judge