

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT**

A20110012598

UNDER Section 58, Te Ture Whenua Maori Act 1993

IN THE MATTER OF Determination of dispute between Te Rūnanga o
Ngāti Hine and Te Rūnanga ā Iwi o Ngāpuhi – a
decision made at 28 Taitokerau MB 217-245 on
6 October 2011 - Appeal

BETWEEN TE RŪNANGA O NGĀTI HINE
Appellant

AND TE RŪNANGA Ā IWI O NGĀPUHI
Respondent

AND THE CROWN
Second Respondent

Hearing: 2012 Māori Appellate Court MB 462, dated 17 July 2012
(Heard at Whangarei)

Court: Deputy Chief Judge Fox (Presiding)
Judge L R Harvey
Judge S F Reeves

Appearances: M J Doogan and S M Downs for the Appellant
J D Every-Palmer and A S Olney for the First Respondent
C Linkhorn for the Second Respondent

Judgment: 20 May 2013

JUDGMENT OF THE MĀORI APPELLATE COURT ON COSTS

Solicitors: McCaw Lewis Chapman, Hamilton & Thorndon Chambers, Wellington for the Appellant
Season-Mary.Downs@mccawlewis.co.nz Karen.Feint@chambers.co.nz
Russell McVeagh, Wellington for the First Respondent james.everypalmer@russellmcveagh.com
adrian.olney@russellmcveagh.com
Crown Law, Wellington for the Second Respondent Andrew.Irwin@crownlaw.govt.nz
Craig.Linkhorn@crownlaw.govt.nz
Maryann Mangu, Moerewa Mere_mangu@xtra.co.nz

Introduction

[1] Te Rūnanga o Ngāti Hine (TRONH) sought to withdraw from Te Rūnanga ā Iwi o Ngāpuhi (TRAION), the recognised joint mandated iwi organisation (joint MIO) of Ngāpuhi per s 19 of the Māori Fisheries Act 2004. TRONH sought withdrawal because it opposed the mandating process for the negotiation and settlement of the historic Treaty of Waitangi claims, commonly known as the Tūhoronuku proposal, adopted by TRAION for all of Ngāpuhi, including Ngāti Hine. The Māori Land Court dismissed TRONH's application on 6 October 2011 and that decision was subject to appeal to this Court.

[2] On 22 March 2013 the appeal was dismissed.¹ The Respondents were directed to file submissions on costs within 14 days from receipt of the judgment and the Appellant was given a further 14 days to reply.

[3] The issues for determination are firstly, whether costs should be awarded and secondly, if so, to what extent?

Submissions for Te Rūnanga ā Iwi o Ngāpuhi

[4] By submissions dated 19 April 2013 TRAION seek \$25,000 plus \$2,112.26 (including GST) disbursements from TRONH. A band 2B award per the High Court Rules would amount to \$19,203.50. However counsel submits that an "uplift" to \$25,000 represents a reasonable contribution to costs for the following reasons:

- (a) There are no whānaunga issues that would make an award of costs inappropriate.
- (b) The proceedings have involved counsel and have been conducted in a manner akin to civil litigation and the same principles as those regarding costs in civil litigation should apply.
- (c) The proceedings were initiated as a result of TRONH's challenge of the mandate process and although important issues were addressed, involved considerable time, effort and money.

¹ (2013) Māori Appellate Court MB 89

- (d) There were serious issues associated with the TRONH challenge and TRAION's arguments ultimately prevailed.
- (e) An analysis of costs attributed to this appeal confirms that the legal costs to TRAION are in the order of \$69,000.
- (f) The contribution sought from TRONH represents the actual and reasonable costs incurred in progressing this appeal proceeding.

[5] TRAION argue that the costs of the appeal and the proceedings in the Māori Land Court should be met by TRONH. In any event, TRAION claim costs for the appeal "without prejudice to any later recovery by TRAION of the balance of its actual costs" as per clause 7.1 of Schedule 3 to the TRAION Trust Deed.

Submissions for the Crown

[6] By memorandum dated 22 April 2013 counsel confirms that the Crown does not seek costs.

Submissions for Waetford Sadlier and Hoho Tarau

[7] Counsel filed a memorandum dated 12 April 2013 confirming that she appeared at the hearing on 17 July 2012 representing Mr Sadlier and Mrs Tarau. Counsel claims costs of \$15,242.15 including an unpaid account for \$6,883.50 presented to the Māori Land Court on 25 October 2011. She also claims \$7,607.25 for preparation of the case before the Māori Land Court and additional disbursements of \$751.40.

[8] The minutes of the hearing before this Court record counsel as stating: "I appear for Mr Waetford on a watching brief only today and to record that he is unwell and cannot attend..."² The minute also records that Ms Mangu was told that she had not filed a Notice to Appear before the Court and could not assume a right to make submissions. Counsel acknowledged this stating that she wanted her presence noted in preparation for the next hearing before Judge Ambler.³

² (2012) Māori Appellate Court MB 464

³ Ibid, at 465

Submissions for Te Rūnanga o Ngāti Hine

[9] By submissions dated 3 May 2013 counsel contends that costs should lie where they fall on the following grounds:

- (a) TRAION has not succeeded in the appeal. The judgment of 22 March 2013 advised that the Court did not have jurisdiction to determine the legal effect of withdrawal and that the issue of whether TRAION trustees have the authority to represent Ngāti Hine for non-fisheries purposes is an issue for the High Court to resolve.
- (b) The issues addressed in the proceedings were of importance to both TRAION and TRONH and both parties have expended considerable time, effort and money in the proceedings.
- (c) The TRAION trustees have a duty to act with neutrality in legal proceedings and must act even-handedly towards their beneficiaries, which include Ngāti Hine. These principles are set out in *Re Schroder's Wills Trusts*.⁴ Therefore the proceedings should not be regarded as adversarial; rather TRONH must respect Ngāti Hine's statutory right to withdraw.
- (d) The appeal proceedings considered the nexus between the Māori Fisheries Act 2004 and the TRAION Trust Deed. The principles in *In Re Buckton*⁵ questioned whether the trustees in that case were entitled to seek costs from beneficiaries, even when a beneficiary initiates proceedings, because the proceedings are regarded as being incurred for the benefit of the whole.
- (e) TRAION have the benefit of holding the Ngāpuhi fisheries assets, including those Ngāti Hine would receive on withdrawal.
- (f) TRAION and Ngāti Hine have a whānaunga relationship that would make an award of costs inappropriate and result in strained relationships.

⁴ [2004] 1 NZLR 695 (HC), at [39] citing *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220,1225

⁵ [1907] 2 Ch 406, at 414-415, cited in *Dark v Weenink*, HC Auckland CIV-2003-404-5846, 5 February 2007

[10] Counsel dispute that clause 7.1 of Schedule 3 of the TRAION Trust Deed represents an indemnity for TRAION's costs and note that this Court is not placed to resolve this issue. Counsel submits that if this Court decides to award costs a final determination on quantum should be postponed until the matter is fully resolved.

[11] In addition, counsel argues that the costs sought are excessive and should not be awarded at the High Court scale for two reasons. First, the proceedings were not of sufficient complexity to warrant the necessity of a second counsel. Second, r 14.6(3) of the High Court Rules sets out that the determination of costs should be predictable and expeditious. TRAION have not provided clear grounds that justify an order for increased costs.

[12] TRONH also oppose the claim for costs of Mr Sadlier and Mrs Tarau on the basis that Ms Mangu's clients are not parties to the proceedings and unsurprisingly counsel did not take an active role in the appeal. Her limited participation was in any event unnecessary and did not assist this Court. Moreover, counsel argued that Ms Mangu has submitted an application to the Māori Land Court which is still extant.

The Law

[13] Section 79 (1) of Te Ture Whenua Māori Act 1993 states:

79 Order as to costs

(1) In any proceedings, the Court may make such order as it thinks just as to the payment of 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.

[14] The principal authorities concerning costs are considered by this Court in *Nicholls v Nicholls - Part Papaaroha 6B Block*.⁶ Those decisions include *Riddiford v Te Whaiti*,⁷ *Manuirirangi v Paraninihi Ki Waitotara Incorporation*,⁸ and *De Loree v Mokomoko and others - Hiwarau C*⁹ and they identify the following principles:

(a) the Court has an unlimited discretion as to costs:

⁶ (2011) Maori Appellate Court MB 64 (2011 APPEAL 64)

⁷ (2001) 13 Tākitimu Appellate MB 184 (13 ACTK 184)

⁸ (2002) 15 Whanganui Appellate MB 64 (15 WGAP)

⁹ (2008) 11 Waiariki Appellate Minute Book 249 (11 AP 249)

- (b) Costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
- (c) the Court has an important role in attempting to facilitate amicable relationships between parties who are invariably connected by whakapapa to both the land and each other and on occasion that aim will be frustrated by an award of costs. Even so where litigation has been pursued in accordance with conventional principles then the starting point will be that costs are appropriate;
- (d) if a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the judge, but there is no invariable practice;
- (e) an award of costs at the level of 80% was warranted in the *Riddiford* case due to the difficult nature of the arguments, their lack substance, the unsuccessful party's lack of realism, the parties' legal situation, the degree of success achieved by the respondent and the time required for effective preparation.
- (f) there is no basis for departing 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; and
- (g) where the unsuccessful party has not acted unreasonably it should not be penalised by having to bear the full party and party costs of his/her adversary as well as their own solicitor and client costs.

[15] It is trite law that the exercise of a judicial discretion, including that applied in the grant or refusal of an application to award costs must be exercised judicially: *Glaister and Amalgamated Dairies Limited*.¹⁰ That principle is supported by earlier authority cited by Anderson J in *Shirley v Wairarapa District Health Board*.¹¹ The Supreme Court in that case considered that, although the cost jurisdiction is discretionary, it is not unprincipled or else it would be unacceptably arbitrary.

¹⁰ [2004] 2 NZLR 606 at para [9], Hammond J

¹¹ [2006] 3 NZLR 523

[16] In *Samuels v Matauri X* this Court considered that in the determination of costs a two-stage approached is required.¹² Should costs be awarded? If so, what is an appropriate quantum?

Discussion

Should costs be awarded?

[17] These were complex proceedings, and they were sufficiently difficult and onerous to require all parties to be legally represented. Although the issue before us boiled down to a preliminary matter of jurisdiction, distilling the arguments to that point required some knowledge of the circumstances of the case, a comprehensive understanding of reasonably complex legislation and a review of equally complex legal correspondence and documents including the TRAION Trust Deed. We consider that the TRONH must pay a contribution toward the costs of TRAION.

[18] As to the claim for costs by Mr Sadlier and Mrs Tarau, we accept the submissions of counsel for TRONH that costs are inappropriate for the reasons submitted. As the costs for Ms Mangu relate to the Māori Land Court proceedings and she has already filed for such costs in that Court, and given her negligible involvement in the appeal, the application to this Court is misconceived.

What is an appropriate quantum?

[19] As foreshadowed, we consider it just in all the circumstances that an award of costs be made. It should reflect, at least in part, what TRAION has dedicated in terms of resources to the appeal process and the degree of its success. We further note that these proceedings involved counsel and were comprehensively pursued and contested, in a manner akin to civil litigation. In assessing the level of an award in favour of TRAION we do not consider that TRONH has acted unreasonably and accordingly we decline to award costs significantly indemnifies TRAION. There is no authority for the proposition that any successful party in these circumstances is entitled to the full indemnity of their costs.

[20] The factors that signal what level of award may be granted, must be balanced against the further relevant circumstances that exist in this case that include the following:

¹² (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216)

- (a) Ngāti Hine are members of TRAION and are represented on it. They could not be a member if in tikanga terms, they were not Ngā Puhi whānaunga;
- (b) clarity around the issue of withdrawal and the jurisdiction of the Māori Land Court has benefited all the parties as it provides a sound basis for future decision making and the exploration of legal pathways for both TRAION and TRONH; and
- (c) there are relative inequities between the parties as TRAION holds Ngāti Hine's fisheries assets.

[21] In short, we agree with counsel for TRONH that no sufficient grounds for the increase in costs above the bands set by the High Court Rules have been made out.

[22] Finally, while the proceedings were complex, both in terms of the nature of the arguments and the material covered, we consider that, effectively, these proceedings were pursued for a Māori community development benefit rather than for personal profit. Therefore, and after weighing all matters, we consider a costs award of 40% (based on the High Court Rules 2B scale) is appropriate and just in all the circumstances.

Decision

[23] The Appellant is ordered, per s79 of Te Ture Whenua Māori Act 1993, to pay the First Respondent \$7,681.40.

[24] The application for costs by Waetford Sadlier and Hohi Tarau is dismissed.

Pronounced in open Court at am/pm on the day of May
2013

C L Fox
DEPUTY CHIEF JUDGE
(Presiding)

L R Harvey
JUDGE

S F Reeves
JUDGE