

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

**A20180005233
Appeal 2018/10**

UNDER Section 79, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Horowhenua 11 (Lake) Block

BETWEEN VIVIENNE THERESSE TAUEKI
Appellant

AND HOROWHENUA 11 (LAKE) MĀORI
RESERVATION TRUST
First Respondent

AND MANAWATU-WHANGANUI REGIONAL
COUNCIL TRADING AS HORIZONS
Second Respondent

Hearing: 24 June 2019, 2019 Māori Appellate Court MB 292 - 324
(Heard at Wellington)

Coram: Judge S Te A Milroy (Presiding)
Judge C T Coxhead
Judge M P Armstrong

Appearances: L Thornton for the Appellant
K Tahana and L Underhill-Sem for the First Respondent
S Johnston for the Second Respondent

Judgment: 29 October 2019

JUDGMENT OF THE MĀORI APPELLATE COURT ON COSTS

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Introduction

[1] On 24 June 2016, we dismissed the appeal by Vivienne Taueki. On 17 July 2019, we ordered Ms Taueki to pay costs of \$15,000.00 to the second respondent, Horizons.¹

[2] Counsel for Ms Taueki subsequently filed an application to recall the costs decision. We determined that:²

(a) There was a factual error in the costs decision as we failed to take into account that Ms Taueki was in receipt of special aid; and

(b) We would rehear and reconsider the costs decision in light of the grant of aid.

[3] Pursuant to our directions, the parties filed further submissions solely on the issue of whether costs should be awarded given the grant of special aid. This judgment determines that issue.

What is the question in this case?

[4] The general approach to an award of costs is settled. The relevant principles were summarised by Judge Harvey in *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*:³

[11] This provision provides the Court with a broad jurisdiction to grant costs in any proceeding. The principal authorities concerning costs are considered in *Nicholls v Nicholls - Part Papaaroha 6B Block*. Those decisions include *Riddiford v Te Whaiti*, *Manuirangi v Paraninihi Ki Waitotara Incorporation*, and *De Loree v Mokokoko and others – Hiwarau C* and they identify the following principles:

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

¹ *Taueki v Horizons – Horowhenua 11 (Lake) Block* [2019] Maori Appellate Court MB 356 (2019 APPEAL 356).

² *Taueki v Horizons – Horowhenua 11 (Lake) Block* [2019] Maori Appellate Court MB 398 (2019 APPEAL 398).

³ *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238) at [11]-[13].

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.

[12] It is also 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 v Amalgamated Dairies Limited*. That principle is supported by earlier authority cited by Anderson J in *Shirley v Wairarapa District Health Board*. 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. I adopt the reasoning set out in these judgments.

[13] In the determination of costs it is clear that there is a two-stage approach required, as the principal authorities underscore. The first question being should costs be awarded? If the answer is yes, then the Court moves to consider the quantum.

[5] The question in this case is how these principles should be applied where the unsuccessful party is in receipt of a grant from the special aid fund. Ms Thornton, for Ms Taueki, contends that, as with the legal aid regime, costs can only be awarded against a recipient of special aid in exceptional circumstances. Ms Johnston, for Horizons, submits it is not necessary for exceptional circumstances to exist before costs can be awarded.

[6] We first consider the legal aid and special aid regimes, before analysing relevant authorities, and finally turn to determine this matter.

What is the legal aid regime?

[7] Legal aid is regulated by the Legal Services Act 2011 (“LSA”). The purpose of the LSA is to promote access to justice by establishing a system that:⁴

- (a) Provides legal services to people of insufficient means; and
- (b) Delivers those services in the most effective and efficient manner.

[8] Legal aid is administered by the Legal Services Commissioner under the direction of the Minister of Justice, and the Secretary for Justice.⁵

[9] Sections 45 and 46 of the LSA sets out a specific regime for an award of costs in civil proceedings where the unsuccessful party is in receipt of legal aid. Section 45 states:

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 Legal Services Act 2011, s 3.

⁵ Ibid, ss 70 and 71.

- (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.

[10] Section 46 states:

46 Costs of successful opponent of aided person

- (1) This section applies if an order is made under section 45 that specifies that an aided person would have incurred a liability, or a greater liability, for costs if that section had not affected his or her liability.
- (2) If this section applies, the party to the proceedings who is prejudiced by the operation of section 45 (in this section, the **applicant**) may apply to the Commissioner in the prescribed manner for payment by the Commissioner of some or all of the difference between the costs (if any) actually awarded to that party against the aided person and those to which that party would have been entitled if section 45 had not affected the aided person's liability.
- (3) In considering any such application, the Commissioner must have regard to the following matters:
 - (a) the conduct of the parties to the proceedings;
 - (b) the court's findings under section 45(2);
 - (c) the hardship that would be caused to the applicant if the costs were not paid by the Commissioner.
- (4) For the purposes of subsection (3)(c), the Commissioner may require any person to furnish information on the financial circumstances and needs of the applicant.
- (5) If, having regard to the matters specified in subsection (3) and to any information received under subsection (4), and to all relevant circumstances, the Commissioner considers that any payment should be made by the Commissioner to the applicant, the Commissioner may determine accordingly and must make the payment.

- (6) The Commissioner may recover any payment made under this section from the aided person as a debt due to the Commissioner, unless the payment relates to an order made under section 45(5).
- (7) The Commissioner may make a payment under this section to a lawyer who is not a provider under this Act.

What is the special aid regime?

[11] The Māori Land Court Special Aid Fund is regulated by s 98 of Te Ture Whenua Māori Act 1993 (“TTWMA”). This section states:

98 Maori Land Court Special Aid Fund

- (1) There shall be paid out of public money into a fund to be known as the Maori Land Court Special Aid Fund (in this section referred to as the Fund) such amounts as are from time to time appropriated by Parliament for the purpose.
- (2) The Fund shall be held by the Chief Registrar of the Maori Land Court.
- (3) The Court may from time to time make orders for the payment from the Fund of the reasonable legal costs or the reasonable out-of-pocket expenses or both of—
 - (a) any person or class of person heard or represented in any proceedings before the Court:
 - (b) any barrister or solicitor appointed to assist the Court under section 70(3)(a).
 - (c) *[Repealed]*
- (3A) *[Repealed]*
- (4) A duplicate of any order made by the Court under subsection (3) of this section shall be forwarded by post to the Legal Services Commissioner as soon as practicable after the making of the order.
- (5) No person in whose favour an order has been made under subsection (3) may apply for or be granted assistance under the Legal Services Act 2000 in respect of the same matter.
- (6) Where an order is made under subsection (3) the Court may also make an order charging any real or personal property of the person or class of person in whose favour the first order is made, or of any other owners whose interests are or could have been affected by any order made in the proceedings to which the grant of aid relates, with the whole or any part of the amount so ordered to be paid out of the Fund, and fixing the terms and conditions on which the amount charged is to be repaid.
- (7) Every charge created by an order of the Court under subsection (6) shall be in favour of the Maori Trustee on behalf of the Crown.

- (8) Any such charge may be registered against any interest in land to which it relates in accordance with Part 5.
- (9) Except as the Court may otherwise order, there shall also be paid out of the Fund—
- (a) the reasonable fees and reasonable expenses of any accountant to whom a Judge refers a matter under section 40(3); and
 - (aa) the reasonable fees and reasonable expenses of any person the Registrar is directed, by the Judge, to engage to assist with an inquiry and report under section 40; and
 - (ab) the reasonable fees and reasonable expenses of a mediator to whom a Judge refers matters under section 30B(3)(c), section 30C (3)(d), section 30G(3)(a), or section 30I(2); and
 - (b) all reasonable costs and reasonable out-of-pocket expenses of any person called by the court as a witness under section 69(2); and
 - (c) the reasonable fees and reasonable expenses of any barrister or solicitor appointed under section 70(3); and
 - (d) the reasonable fees and reasonable expenses of any person appointed as a receiver under section 83; and
 - (e) the reasonable fees and reasonable expenses of any person appointed as an examining officer under section 280 to investigate the affairs of a Maori incorporation.

[12] The special aid fund is not a general legal aid fund. The fund is held by the Chief Registrar. Grants from the special aid fund are made by the court. The special aid fund is not restricted to funding legal services. The court can also make a grant out of the fund to cover the costs of any person who assists the Registrar with an inquiry and report per s 40 of TTWMA, the costs of any person called by the court as a witness per s 69(2) of TTWMA, and costs arising in certain proceedings for the appointment of a mediator, receiver or examining officer.

[13] When applying for assistance from the special aid fund, the financial circumstances of the applicant is relevant. However, this is not the sole determining factor. The court also takes into account:⁶

- (a) Whether the applicant is acting in a representative capacity;

⁶ Māori Land Court of New Zealand: Practice Note - Special Aid Fund - Appointment of a Barrister or Solicitor, 31 May 2012.

- (b) The nature of the proceeding including the legal or factual complexity;
- (c) The degree of need for legal representation;
- (d) The amount of aid sought relative to the possible impacts of a Court order on that person;
- (e) Whether financial assistance is available from other sources such as legal aid;
- (f) The degree of hardship that would be suffered if special aid is not granted;
- (g) The circumstances of the case including whether it is distinctive or special;
- (h) Whether there is any real or personal property owned by the applicant over which the court may make a charging order; and
- (i) Any other considerations set out in relevant case law.

[14] TTWMA and the Māori Land Court Rules 2011 (“MLCR”) are silent on whether costs can be awarded against a recipient of special aid and, if so, what principles apply.

What do the authorities say?

[15] In *Wairoa District Council v Wairau – Kaiwaitau 7C2B*,⁷ Acting Chief Judge Isaac, as he then was, considered whether to award costs against a recipient of special aid. He held:⁸

[7] However, I note that Ms Wairau’s legal representation was funded by the Māori Land Court Special Aid Fund. While this is not necessarily equivalent to legal aid, I am cognisant of the provisions of Section 40 of the Legal Services Act 2000, which require that there must be exceptional circumstances to award costs against a legally aided person and, if awarded, these costs must be reasonable with regard to all the circumstances.

...

[8] As noted above, Ms Wairau was aided by the Māori Land Court Special Aid Fund in these proceedings. It would be unwise, in my view, to distinguish this aid

⁷ *Wairoa District Council v Wairau – Kaiwaitau 7C2B* (2008) 128 Wairoa MB 168 (128 WR 168).

⁸ *Ibid*, at [7]-[8].

from aid provided under the Legal Services Act 2000, and it follows that there must be exceptional circumstances to justify an award of costs against Ms Wairau.

[16] On 31 May 2012, the lower Court issued a practice note concerning the special aid fund. In relation to an award of costs, the practice note states:

Costs Against a Person of Class of Persons in Receipt of Special Aid

9. The mere fact that a party to proceedings before the Māori Land Court is in receipt of special aid is not a barrier to costs being awarded against them.
10. However a Judge will generally only award costs against persons who are in receipt of special aid if he or she is satisfied that there are exceptional circumstances.

[17] This comment in the practice note refers to the decision in *Wairoa District Council v Wairau*. Per r 16.8 of the MLCR, this practice note is a guide and does not bind the court in the exercise of its discretion concerning the special aid fund.

[18] In *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*,⁹ Judge Harvey also considered whether costs can be awarded against a special aid recipient. Judge Harvey referred to the decision in *Wairoa District Council v Wairau Kaiwaitau 7C2B* and also to s 45 of the LSA. Judge Harvey found:¹⁰

...There is nothing in the submissions before me to support an argument that a grant of aid acts as a shield against an award of costs. Accordingly, I see no reason why costs should not be awarded in this case.

[19] While Judge Harvey referred to the *Wairau* decision, he did not expressly find that exceptional circumstances were required or that they existed in that case.

[20] In *Gemmell v Gemmell*,¹¹ the Māori Appellate Court also considered this issue. The Court held:¹²

[7] We reject in particular Mr Davies' arguments that an award of costs against Sam is not appropriate because he was at some point in time in receipt of Special Aid. While the Special Aid Fund has some similarities to the legal aid regime under

⁹ *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust – Ngāti Tukorehe Tribal Committee and Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238).

¹⁰ *Ibid*, at [17].

¹¹ *Gemmell v Gemmell – Mohaka A4 Trust* (2015) 2015 Māori Appellate Court 657 (2015 APPEAL 657).

¹² *Ibid*, at [7].

the Legal Services Act 2011, it is not the same thing, and certainly does not include statutory provisions whereby costs can only be awarded in “exceptional circumstances”. Receipt of Special Aid is not a shield against an award of costs, as Judge Harvey noted in the lower Court decision in *Trustees of the Horina Nepia Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*. While in this decision we are not called upon to decide whether costs can only be awarded against someone in receipt of Special Aid in “exceptional circumstances”, and have not received detailed submissions in this regard, we have doubts about the correctness of such an approach.

[21] In *Rolleston v Moore*,¹³ Judge Clark reviewed the above authorities. He found:¹⁴

[42] No one disagrees with the proposition that the mere fact that if a losing party in proceedings before the Māori Land Court, in receipt of special aid funding, that is not a barrier to costs being awarded against them. The real room for debate appears to be whether or not the Māori Land Court should tie itself into the “exceptional circumstances” approach that the District and High Courts are bound to take into consideration when considering costs against legally aided parties. I accept that there may be room for debate on this issue. Legal Aid and the Special Aid Fund are not one and the same thing. Whilst the financial circumstances of an applicant are a relevant consideration to the Court in granting special aid funding, that is simply one factor which a Court will normally take into account. There are a range of other factors which are outlined paragraphs 3 and 4 of the Practice Note.

[43] The Special Aid Fund is often utilised in cases of some complexity in which one or more of the parties are unrepresented and when there is an obvious need for legal representation. The financial circumstances of an applicant for special aid funding, and the hardship they may suffer if aid was not granted are also matters which are taken into account.

[44] Having said that, applications for special aid funding are not subject to as stringent a process as applications are pursuant to the Legal Services Act 2011. There is no separate agency which independently determines those applications. Therefore it cannot be said that the purpose, processing and criteria applicable to the two funds, are ad idem.

[45] Therefore the express reference to “exceptional circumstances” in the Practice Note may be too stringent a test to apply. However in the circumstances of this case I think it is a relevant approach.

Does the exceptional circumstances test apply?

[22] The early authorities applied the exceptional circumstances test as provided for under the legal aid regime. Despite that, recent case law has called that approach into question. We consider there is good reason to do so.

¹³ *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).

¹⁴ *Ibid*, at [42]-[45].

[23] While there are similarities between legal aid and special aid, the two regimes are not the same. The financial circumstances of the applicant is a relevant factor in deciding whether to grant special aid but it is not determinative. As Judge Clark noted in *Rolleston*, special aid is often utilised in cases with some complexity in which one or more of the parties is unrepresented and there is an obvious need for legal representation. In such cases, a grant of special aid, and the engagement of legal representation, will often assist not only the parties, but also the court, to identify and analyse the issues, evidence and relevant legal principles. A grant of special aid may be made for practical reasons and it would be wrong to assume that the recipient of special aid should be shielded against an award of costs unless exceptional circumstances exist.

[24] It is also significant that the exceptional circumstances test under the legal aid regime is expressly provided for in the LSA. There is no equivalent provision in TTWMA or the MLCR. Section 45 of the LSA does not apply to a grant of special aid. While that approach has been referred to by analogy when considering costs against a specially aided recipient, we consider that if Parliament intended that the exceptional circumstances test was to apply to special aid, this would have been incorporated into TTWMA.

[25] Of even greater significance is that per s 46 of the LSA, where an award of costs is declined, or reduced, due to a grant of legal aid, the affected party can apply to the Legal Services Commissioner for payment of the costs that would have been awarded if s 45 of the LSA did not apply. This is a significant form of relief available under the legal aid regime to ensure that the innocent, and successful, party in the proceeding is not unduly prejudiced by a grant of legal aid which had no bearing on the successful party's conduct or the merits of the case. There is no similar relief available where an award of costs is declined or reduced due to a grant from the special aid fund.

[26] For these reasons, we consider that the exceptional circumstances test, per s 45 of the LSA, does not apply where the unsuccessful party is in receipt of special aid.

What approach should be taken where there is a grant of special aid?

[27] When considering what approach should be taken, we return to the fundamental principle that the Court has an unlimited discretion as to costs. We consider that a grant of special aid is relevant to both stages of the inquiry on costs, being whether costs should be

awarded, and if so, in what amount. Given the varied circumstances in which special aid may be granted, we do not consider that an inflexible rule, or set of criteria, should be applied. Rather, a grant of special aid is a relevant factor to be taken into account on a case by case basis.

[28] By way of example, where special aid is awarded because the party is impecunious, and that party has acted reasonably, in good faith, and has advanced a meritorious case, but ultimately was unsuccessful, the court may consider that an award of costs is not appropriate. Conversely, where one or more of the factors listed in s 45 of the LSA, or other factors which bear adversely upon the conduct and merits of the aided party's case, are present, then an award of costs may be more likely, despite the impecuniosity of the aided party. Clearly the means, and conduct of the party in question, are highly relevant. However, these are relevant factors, rather than threshold factors, for the Judge to consider in the exercise of his or her discretion.

Should costs be awarded in this case?

[29] When Ms Taueki applied for special aid to assist with the prosecution of this appeal, she claimed that she was impecunious. No evidence was filed to support this. We took into account Ms Taueki's limited means in awarding a grant of aid. We also considered that all parties would benefit from receiving focused submissions from counsel to assist with the conduct of the appeal.

[30] We do not consider that Ms Taueki's limited means, or the grant of special aid, should prevent an award of costs in this case. In particular, we take into account that:

- (a) Ms Taueki was wholly unsuccessful;
- (b) She could not establish standing and so the appeal was always doomed to fail;
- (c) Arguments were advanced in the appeal which were not available on the face of the evidence filed in the lower Court; and
- (d) Ms Taueki is an experienced litigant. She has taken, and participated in, numerous proceedings before this Court, and the lower Court, concerning this

Trust. She is well aware of the costs parties are put to as a result of such proceedings, and that costs can be awarded against an unsuccessful party.

[31] For these reasons, we consider costs should be awarded against Ms Taueki. We note that the factors at paragraph [30] would likely meet the exceptional circumstances test as provided for in s 45 of the LSA. We reiterate, it is not necessary for such factors to be present to award costs against a recipient of special aid, these are simply factors that we have taken into account in exercising our discretion in this case

[32] We do consider that Ms Taueki's means, and the grant of special aid, are relevant as to quantum. We are prepared to reduce our original award in light of this.

Decision

[33] We order Ms Taueki to pay costs of \$10,000.00 to the second respondent, Horizons.

Pronounced at 4pm at Hamilton on Tuesday this 29th day of October 2019.

S Te A Milroy
JUDGE (Presiding)

C T Coxhead
JUDGE

M P Armstrong
JUDGE