IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20190003626

UNDER	Section 281, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Potikirua Incorporation
BETWEEN	HUHANA ARTHUR Applicant
AND	THE PROPRIETORS OF POTIKIRUA INCORPORATION Respondents

Hearing: 8 May 2019, 212 Waiariki MB 61-70
(Heard at Rotorua)

Appearances: C Bidois for the applicant

Judgment: 3 December 2019

JUDGMENT OF JUDGE C T COXHEAD AS TO COSTS

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He hōnore, he kororia ki te Atua, he maungārongo ki te whenua, he whakaaro pai ki ngā tāngata katoa tētahi ki tētahi

E tangi tikapa ana te kanohi ora mō rātou kua hoki ki te marinotanga, ki te urunga tē taka, tāoki mai rā koutou. Heoi, me pēnei noa te whakatau, ko rātou ngā mate ki a rātou, ko tātou te kanohi ora ki a tātou.

Hei tīmatanga korero – Introduction

[1] Huhana Arthur seeks an order for costs. Ms Arthur sought the assistance of the Court to compel the Committee of Management for Potikirua Incorporation (the Incorporation) to amend the Incorporation's share register to include her as a shareholder and to pay her monies due to her as a shareholder.

[2] On 2 August 2018 the Court issued orders for Ms Arthur's succession to shares in the Incorporation and for payment of funds held on her behalf. Those orders were sealed and forwarded to the Incorporation.

[3] Since October 2018 the Committee of Management had delayed giving effect to the Court order.

[4] As a last resort the applicant sought advice from legal counsel and an application was filed in an attempt to secure the Committee's co-operation.

[5] I convened a telephone conference on 8 May 2019. Those in attendance at the telephone conference included Mr Curtis Bidois, counsel for the applicant, Mr Tony Woodhouse, counsel for Dean Ihaia (an affected party), Mr Allan Waenga, Chairperson of the Potikirua Incorporation and Mr Eddie Matchitt, a committee member.

[6] The telephone conference concluded on the basis that the Committee would register Ms Arthur as a shareholder based on the Court order. This was duly completed and confirmed with the Court within a couple of days following the telephone conference.

Te rerenga a te kēhi nei – The case so far

[7] Mr Bidois seeks full indemnity cost on the basis that:

(a) The Committee of Management had failed over a period of eight months to give effect to sealed orders for succession despite the applicant's request.

(b) The applicant had exhausted all other avenues prior to lodging her application, including speaking to the Incorporation's Chairperson personally and having her solicitor produce the relevant regulation.

(c) While the Court has a role in facilitating on-going relationships between parties, this application was commenced in a similar manner to litigation in the ordinary Courts, that is by formal application supported by sworn affidavit and memorandum of counsel.

(d) Costs have unavoidably been incurred for those steps.

(e) Costs should not be a disincentive to parties seeking the Court's assistance where it is necessary.

(f) The applicant was the successful party.

(g) Although no formal hearing was necessary the applicant had already incurred substantial costs to prepare her case for hearing.

[8] Although they were given the opportunity, the incorporation did not formally respond to the application. They did comment that the non-registration of Ms Arthur as a shareholder was an oversight. I understood from this that they did not refuse to register Ms Arthur as a shareholder but rather they had delayed the registration given questions raised because of a potential counter-claim to those shares.

[9] While this matter did not go to hearing there has been an inconvenience to Ms Arthur which has resulted in her seeking legal advice and filing a Court application.

[10] I agree with Mr Bidois that costs should be awarded.

He aha te utu tika? What is an appropriate level for an award of costs in this case?

[11] Mr Bidois seeks full indemnity costs. The applicant's actual cost amounted to $6,255.97. Mr Bidois submits that full costs should be granted on the basis that:

(a) The Committee's refusal to comply with the sealed order of the Court over a period of 8 months could never be described as anything but "unreasonable" and was always lacking in merit.

(b) The Committee appears to have assumed that they have an over-riding discretion to determine who is admitted on to the register of shareholders. There was never any legal basis for that assumption.

(c) The Court is invited to take into consideration the grounds upon which indemnity costs can be awarded under the High Court Rules 2016 and that includes where a party has ignored or disobeyed an order or direction of the Court.

(d) In this case it is beyond dispute that the Committee wilfully ignored the succession order that had been made in the applicant's favour.

(e) The Incorporation Chairperson conceded that the Committee had knowingly refused to register the succession order and that this was done at the request of a fellow committee member, Tahanga Kemara, who was a cross-claimant for the Potikirua shares that were awarded to the applicant.

(f) There is no room for the Court to conclude that the Committee's refusal to comply with the order was the result of an innocent misunderstanding.

(g) The members of the Committee had discussed Mr Kemara's request and agreed to it knowing that they would be acting in contravention of the Court's order.

(h) It is submitted that in this situation the Committee has acted in flagrant disregard for its own legal obligations and the rights of shareholders and it should be responsible for all legal costs.

(i) In these circumstances the Committee has been unlawfully impeding the applicant's rights as a shareholder for a period of eight months.

Te ture – Law

[12] The Court's jurisdiction to award costs stems from s 79(1) of Te Ture Whenua Māori Act 1993:

> **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.

[13] The approach to determining an award of costs has two steps: first, whether costs should be awarded, and second, at what level. The applicable legal principles were set out by the Māori Appellate Court in *Samuels v Matauri X Corporation*.[1]

[14] On the first step – whether costs should be awarded – the following principles provide guidance:[2]

(a) The award of costs is wholly within the Court's discretion;

(b) Generally, costs follow the event;

(c) The Court has a role in facilitating friendly relationships between land owners and whānau, this should supersede any order of costs where otherwise that role would be frustrated. That said, where an application is pursued in a similar way to civil litigation, an award of costs becomes an appropriate starting point.

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1 *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216).

2 *Flutey v The Executors of the Estate of Jim Huirua Sullivan – Papatupu 2A No 2* (2017) 366 Aotea MB 263 (366 AOT 263) at [33].

[15] On quantum, the following points are guidance:[3]

(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 per cent, but an 80 per cent or 90 per cent contribution will seldom be reasonable;

(d) the Court should consider what is just in the circumstances, regarding 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 parties' conduct and sense of realism, and whether the proceedings were informal or akin to civil litigation; and

(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.

Kupu whakatau – Decision

[16] The Committee were faced with a decision. On one hand, the order for succession by Ms Arthur was clear. However, the Committee were aware of the possibility that a cross-claim could be filed by Mr Dean Ihaia, a possibility that has yet to be extinguished. Further, the shareholding in question is significant at 2505.55 shares.

[17] There is no doubt the Committee should have taken steps to register Ms Arthur's shareholding. However, I do not think that there has been anything sinister in the Incorporation's Committee members actions. Instead, with the knowledge of the potential cross-claim, the Committee chose to be cautious and allow the potential claimant time to seek advice. The consequence of this was the delay in registering the order.

[18] Some context can be given to the Committee's delay in registering Ms Arthur. Kararaina Waenga passed away in 2016. An application for succession was filed on 12 March 2018. The applicant was Dean Ihaia, a mokopuna of Kararaina. On 1 May 2018 orders were made with regards to Kararaina Waenga's land interest as per her will. It then came to the Court's attention that the deceased had additional interests in the Potikirua

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3 Above n 2 at [38].

Incorporation. Orders with regards to those interests were made on 2 August 2018 in favour of Ms Arthur. It was close to a two year period between the deceased passing away and the Incorporation shares being dealt with.

[19] Once issues were clearly explained to the Incorporation they have proceeded, very quickly to register the shares in the name of Ms Arthur.

[20] In my view while Ms Arthur has had to wait eight months to become a shareholder in the Incorporation that delay has caused little detriment. While she was not registered as a shareholder immediately and did not obtain access to those funds which were due to her as a shareholder that situation has now been remedied. The inconvenience to her has been that she has had to seek legal advice and has had to wait eight months, but her dividends, shares and her rights were unaffected.

[21] The further determent to Ms Arthur was her having to pay a lawyer and then file a Court application to have her entitlement upheld. The Committee have put the valid Court order to the side to allow someone to investigate a potential claim against that order. Some might say they have chosen to ignore the Court order. That has costs Ms Arthur a lot in lawyers' fees.

[22] Fortunately, the matter did not proceed to a hearing nor were any major steps required which would have incurred even further costs. In fact, everything was agreed to by telephone.

[23] While acknowledging that Ms Arthur was put to some expense it is my view that full indemnity costs are not appropriate in this circumstance.

[24] Taking all matters into consideration the Incorporation is to pay costs of $2500.00 plus GST to Ms Arthur.

I whakapuaki i te 10.30am i Rotorua te 3rd o ngā rā o Hakihea i te tau 2019

C T Coxhead
JUDGE