I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Land Court of New Zealand
Waiariki District

A20210008317

WĀHANGA *Under*	Section 79, Te Ture Whenua Maori Act 1993
MŌ TE TAKE *In the matter of*	Waipapa 9 and Others
I WAENGA I A *Between*	THERESE GWEN BROOKING, ANNE MARIE KENDALL QSM, GAYLE RAUAMOA MCLEAN, ANTHONY RALPH MATARA ROTARANGI, SAM ANDREWS JNR AND WAIPAPA GROUP LIMITED ON BEHALF OF WAIPAPA 9 TRUST Ngā kaitono *Applicants*
ME *And*	MATTHEW LAWRENCE ANDREWS Te kaiurupare *Respondents*

Nohoanga: *Hearing* — On the papers

Whakataunga: *Judgment date* — 8 Apireira 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ C T COXHEAD
Judgment of Judge C T Coxhead

Hei tīmatanga kōrero
Introduction

[1] The trustees and general manager of Waipapa 9 Trust ("the applicants") filed this application pursuant to s 79 of Te Ture Whenua Māori Act 1993 ("the Act") seeking an order for costs against Matthew Lawrence Andrews totalling $49,630.39.

[2] The costs sought are in relation to proceedings which I concluded on 25 February 2020. The proceedings related to an application by Mr Andrews seeking a review of the Waipapa 9 Trust, and an application by the current applicants seeking the removal of Mr Andrews as a trustee. I dismissed Mr Andrews' application and ordered his removal as a trustee pursuant to s 240 of the Act.[1] The applicants seek costs for these matters.

[3] Mr Andrews submits that the applicants have brought this application following a significant and unreasonable delay and therefore seeks that it be dismissed.

Kōrero whānui
Background

[4] This application arises following the conclusion of two applications, the first being an application by Mr Andrews seeking a review of the Waipapa 9 Trust ("the trust"), and the second being an application brought by the current applicants seeking the removal of Mr Andrews as a trustee.

[5] The review application was filed by Mr Andrews on 14 November 2019 pursuant to s 231 of the Act. He sought the review of the Waipapa 9 Trust on the basis that:

(a) He was concerned with the imbalance of power between governance and operations;

(b) He submitted that there were insufficient checks, balances, processes and transparency to enable governance to make informed decisions; and

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1 232 Waiariki MB 172 (232 WAR 172).

(c) He submitted that a review would allow trustees to fulfil their roles and responsibilities.

[6] In response to Mr Andrews' review application, on 20 December 2019 the current applicants filed an application pursuant to s 240 of the Act seeking the removal of Mr Andrews as a trustee. The basis of their application was that Mr Andrews:

(a) Had not satisfactorily carried out his duties as a trustee;

(b) Was passing information to and assisting third parties for the purposes of those third parties taking action against the trust's wholly owned company, Waipapa 9 Kaitiaki Limited; and

(c) He had not complied with the terms of the trust order and code of conduct.

[7] On 24 February 2020 I confirmed that the Court hearing for the two applications would be closed, given the commercial nature of some evidence before the Court and the allegations and issues regarding individual employee matters.

[8] At the 25 February 2020 hearing I dismissed Mr Andrews' application for a review of the trust on the basis that the processes and procedures followed by the trust are sufficient.[2] At the same hearing I determined that despite his good intentions, Mr Andrews had not carried out his trustee duties satisfactorily and that the trust would not be able to function adequately if Mr Andrews were to continue in his role as trustee.[3] I therefore determined that it was appropriate to remove Mr Andrews as a trustee.[4] Having concluded the two applications, I directed the current applicants to confirm their position in relation to costs within the next 10 working days.[5]

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2 237 Waiariki MB 181-185 (237 WAR 181-185) at 183.
3 At 184.
4 At 184.
5 237 Waiariki MB 181-185 (237 WAR 181-185) at 184.

Ko te hātepe ture o te tono nei
Procedural History

[9] On 9 March 2020, the applicants filed a brief memorandum in response to my direction of 25 February 2020 as to their position in relation to costs. The applicants confirmed that they seek an order pursuant to s 79 of the Act for payment of costs by Mr Andrews. The applicants did not make submissions as to why costs should be awarded, rather, they sought that submissions be provided after the date for the filing of any appeal. The applicants noted that the minutes of the 25 February 2020 hearing had not yet been released.

[10] On 17 August 2020, the minutes of the 25 February 2020 hearing were distributed to parties. On 26 August 2020, counsel for the applicants filed a memorandum seeking that the Court redact the confidential information contained in the minutes. This was subsequently done, and the final minutes were issued on 14 December 2020.

[11] On 27 May 2021, the applicants filed a memorandum setting out their reasons for seeking costs. The applicants submit that this memorandum had been filed following the issuing of the final minutes on 14 December 2020 and the lack of an appeal application.

[12] On 4 June 2021 the applicants filed a formal application seeking costs.

[13] Counsel for Mr Andrews filed submissions opposing any award of costs on 10 August 2021. Mr Andrews submits that the application for costs was brought after a significant and unreasonable delay and should therefore be dismissed.

[14] On 8 September 2021, the applicants filed a memorandum in response to Mr Andrews' submissions addressing the delay in filing the application.

[15] On 8 September 2021 I advised that this matter would be heard on the papers.

Te kōrero a te kaitono
The applicants' submissions

[16] The applicants submit that costs should be awarded on the basis that the applicants have been successful in the previous applications; firstly, in the Court denying a review of the trust, and secondly, in the Court removing Mr Andrews as a trustee. Counsel submit that although Mr Andrews was unrepresented, the proceedings were akin to normal civil litigation and therefore there is no reason to depart from the ordinary approach that costs should follow the event.

[17] The applicants submit that Mr Andrews' application for a review of the trust lacked merit and that there was no basis to the allegations made against the general manager of the trust. The applicants submit that the allegations made by Mr Andrews were serious and therefore put significant strain on the applicants, including requiring them to respond to the allegations in a formal and comprehensive manner, filing and reviewing documents including confidential material, and filing the application for the removal of Mr Andrews as a trustee. The applicants submit that such costs could have been avoided had Mr Andrews not made the initial application for review of trust.

[18] The costs calculated by the applicants are:

(a) Legal fees: $48,433.40

(b) Office expenses: $855.75

(c) Disbursements: $341.24

[19] The applicants acknowledge that there was a delay in filling this application for costs but submit that in their 9 March 2020 memorandum they had indicated that they intended to seek costs. The applicants submit that in that memorandum, they specified that they would await the release of the final minutes and relevant appeal period before filing the application for costs.

[20] The applicants submit that due to their request on 26 August 2020 to have parts of the minutes redacted, they did not receive the final minutes until 14 December 2020.

It is submitted that an application for costs was not filed until the final minutes had been released and the period for an appeal to be filed had lapsed.

[21] The applicants submit that there is no prejudice to Mr Andrews resulting from the delay in filing the application as it was evident from the applicants' 9 March 2020 memorandum that they would be seeking costs.

[22] The applicants submit that there would be no dangerous precedent set by the Court awarding costs, given that immediately following the hearing the applicants had confirmed that costs would be sought. The circumstances of these proceedings, including the delay of the final minutes being issued, is submitted by the applicants to have resulted in a delay to costs being considered.

Te kōrero a te kaiurupare
The respondent's submissions

[23] Mr Andrews submits that costs should not be awarded due to the significant delay by the applicants in filing the costs application.

[24] Counsel for Mr Andrews submits that because of the delay, relevant legal principles concerning delay should be considered in addition to the already well-established principles regarding costs. Counsel draws from the recent Environment Court decision of *Queenstown Airport Corporation Limited* which adopted the principles set out in the Supreme Court decision of *Almond v Read*.[6] Counsel submits that the relevant factors considered in those decisions are:

(a) The length of the delay;

(b) The reasons for the delay;

(c) The conduct of the parties;

(d) The prejudice to the other party; and

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6 *Queenstown Airport Corporation Limited*, Re [2018] NZEnvC 248 and *Almond v Read* [2017] NZSC 80.

(e) The significance of the issues raised, both to the parties and more generally.

[25] Counsel for the respondent submits that although the applicants' memorandum of 9 March 2020 states that submissions as to costs would be filed after the date for filing an appeal had expired, there is no record of the Court responding to those submissions.

[26] Counsel for Mr Andrews submits that the costs application should have been made two months after the Court minutes were initially distributed on 17 August 2020. The application for costs was made eight months after the distribution of the initial hearing minutes, counsel for Mr Andrews submits that this is a significant delay and therefore costs should not be awarded. In making this assertion, counsel for Mr Andrews submits that the following cases are examples where costs were not awarded due to a delay in filing the costs application:

(a) A delay of four to six months was considered too long by the Environment Court in *Central Otago District Council v Flanagan*, and costs were not awarded. [7]

(b) A delay of nearly one year after the Environment Court's decision and four months after the High Court's decision was considered too long by the Environment Court in *Christchurch International Airport Limited v Christchurch City Council*, and costs were not awarded.[8]

(c) A delay of more than three months was considered too long by the Environment Court in *Antunovich v Marine Helicopters Ltd*.[9]

[27] Counsel for the respondent submits that significant prejudice will be caused to Mr Andrews if the application for costs is granted. Mr Andrews submits that in all the circumstances, including the Court's initial directions, his decision not to appeal, and

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7 *Central Otago District Council v Flanagan* [2018] NZEnvC1.
8 *Christchurch International Airport Limited v Christchurch City Council* [2001] NZRMA 200.
9 *Christchurch International Airport Limited v Christchurch City Council* above n 8, at [3].

the amount of time passed, that he could not have anticipated that an application for costs would be made this late.

[28] Further to the issue of prejudice, counsel for the respondent relies on *Queenstown Airport Corporation Limited* in submitting that "a delay of this length occasions the risk that matters relevant to the exercise of the discretion to award costs and the quantum of costs, may be overlooked or misjudged" and that "the delay risks the matters relevant to the exercise of the discretion having become "stale".[10]

[29] If an order for costs were made, counsel for Mr Andrews submits that a dangerous precedent would be set and would potentially open the floodgates to other successful parties who have "sat on their hands" to apply for costs in reliance on this case.

[30] Counsel submits that in making its decision, the Court should consider that although Mr Andrews' application for a review of the trust was dismissed, it was not a hostile proceeding. It is submitted that as a trustee at the time, this was a course of action available to Mr Andrews and that trustees should not be deterred from filing a review application in similar circumstances in the fear that a costs award might be made against them. They say that Mr Andrews' application was made in good faith and he should not be penalised for that.

Te Ture

The Law

[31] The Court's jurisdiction to award costs stems from s 79(1) of the Act:

> **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.

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10 *Queenstown Airport Corporation Limited*, above n 6.

[32] The general approach to an award of costs is settled. The relevant principles were set out in *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation*.[11]

[33] In the determination of costs there is a two-stage approach, the first question being should costs be awarded? If the answer is yes, then the Court moves to consider the quantum.[12]

[34] The following general principles apply when deciding whether to award costs:[13]

(a) The Court has an unlimited discretion to award costs.

(b) Generally, costs follow the event.

(c) It may be inappropriate to award costs if it would frustrate the Court's 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.

[35] Then, in relation to quantum, the following general principles apply:[14]

(a) The Court has broad discretion as to quantum.

(b) Quantum should reflect a reasonable contribution to costs actually and reasonably incurred.

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11 *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].

12 *Samuels v Matauri X Incorporation –Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216)at [9].

13 *Karepa v Te Riini – The Kikorangi and Kareti Whānau Trust* (2016) 144 Waiariki MB 3 (144 WAR 3), citing *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [10].

14 *Nicholls v Trustees of the WT Nicholls Trust – Part Papaaroha 6B Block* [2014] Māori Appellate Court MB 2 (2014 APPEAL 2) at [8] and *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [13].

(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, having regard to a range of factors including 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 participation, the parties' legal situation, the 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 by pursuing a wholly unmeritorious and helpless claim or defence – this may justify a more liberal award of costs.

[36] In *Samuels v Matauri X Incorporation* the Court recognised that while there is some guidance to be had from the principles set out in other cases, the Court must come to its own view as to the costs to be awarded in any particular case depending on all the circumstances of that case.[15] This was also confirmed by the Appellate Court in *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust*.[16]

[37] I adopt these principles and apply this approach.

[38] The respondent's primary submission is that the application for costs was filed after a significant delay and should therefore be dismissed. Unlike the general approach to awarding costs, which is well settled, the Court has not previously considered what additional principles may be relevant when there is a delay in filing an application for costs. As a starting point, the Court has a wide discretion in determining the costs to be awarded and in doing so must consider all circumstances of the case. A delay in filing the application for costs is a relevant factor to consider in exercising that discretion.

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15 *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Court MB 206 (7 APWH 216) at [32].

16 *Taueki v Horowhenua 11 (Lake) Māori Reservation Trust* [2019] Māori Appellate Court MB 652 (2019 APPEAL 652) at [30].

[39] The Environment Court's decision in *Queenstown Airport Corporation Limited* was cited by counsel for the respondent as setting out relevant factors to consider where there has been a delay in filing a costs application. Counsel for the applicant did not challenge these factors in their submissions in reply.

[40] The issue for determination by the Environment Court in that case was whether an application for an extension of time in which to file an application for costs should be granted. The Environment Court followed the Supreme Court decision of *Almond v Read*, which concerned the question of an extension of time for filing an appeal.[17] These factors are set out as follows:[18]

> (a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant. Obviously, the longer the delay, the more the applicant will be seeking an "indulgence" from the court and the stronger the case for an extension will need to be.
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> (b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.
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> (c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.
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> (d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome*. Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.
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> (e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally*. If there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

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17 *Queenstown Airport Corporation Limited*, above n 6, at [8].
18 *Almond v Read* [2017] NZSC 80, at [38].

[41] The Environment Court accepted that those factors could be applied generally in any situation where a court is asked to extend time, and summarised the factors as follows:[19]

(a) The length of the delay;

(b) The reasons for the delay;

(c) The conduct of the parties;

(d) The prejudice to the other party; and

(e) The significance of the issues raised, both to the parties and more generally.

[42] The Māori Appellate Court has similarly accepted the principles from *Almond v Read* in determining whether to grant leave to appeal out of time in accordance with s 58(3) of the Act.[20] In addition to these factors, the overarching consideration that the Māori Appellate Court must consider is where the interests of justice lie.[21]

[43] I agree with the parties that the factors from *Almond v Read* are applicable considerations where there has been a delay in filing an application for costs and apply them alongside the normal costs principles below.

Kōrerorero
Discussion

[44] All parties were on notice that a costs application could potentially be filed when I made my directions at the 25 February 2020 hearing that the parties had 10 working days to confirm their position in relation to costs.

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19 *Queenstown Airport Corporation Limited*, Re [2018] NZEnvC 248 at [9].

20 *Ngakoti v Department of Conservation – Ngaiotonga A3* [2019] Māori Appellate Court MB 213 (2019 APPEAL 213); *Tairua v Aati – Estate of Mere Hare Kerepeti* [2020] Māori Appellate Court MB 224 (2020 APPEAL 224); Te Maari v Hamon - Lot 5 Deposited Plan South Auckland 15580 [2021] Maori Appellate Court MB 10 (2021 APPEAL 10).

21 *Robertson v Gilbert* [2010] NZCA 429 at [24]; *Koroniadis v Bank of New Zealand* [2014] NZCA 197 at [19] and *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224 at [19].

[45] The applicants confirmed on 9 March 2020 that they intended to file submissions as to costs after the relevant appeal period had expired. From that time, Mr Andrews therefore knew that a costs application would be filed and when it would be filed. As it has turned out, the applicants did not file their application setting out their reasons for seeking costs until 27 May 2021.

[46] The applicants submit that the delay has caused no prejudice to Mr Andrews, given that he was essentially on notice since 9 March 2020 that they would be seeking costs. Further, the delay with the final Court minutes being issued has resulted in a delay to the filing of the application.

[47] In my view, the delay in the minutes being issued is not good reason for a delay in the filing of the application for costs. It is noted that large parts of the minutes have been redacted due to confidentiality reasons. While the minutes may have been of some use in the finalising of a costs application, they do not appear to have been essential. The minutes have only been referenced in the applicant's costs submissions to the extent that the minutes were confidential. They have not been used to any substantial extent in the submissions that have been made by the applicant.

[48] Both the applicants and the respondent were aware of the orders that were made – they confirmed this in their submissions. It is presumed that Mr Andrews ceased being a trustee following the Court hearing in February. There was no need to wait for the finalisation of the minutes for Mr Andrews removal to operate. Therefore, it is somewhat unclear as to why the minutes were required before a costs application could be completed but not needed for the removal of Mr Andrews.

[49] Further, I do not accept that waiting for the time in which to file an appeal has expired is good reason to delay the filing of the costs application. The time in which to file an appeal does not prohibit the filing of an application for costs. If the matter was appealed, the appeal itself would not prohibit the Court from considering a costs application.

[50] In my view, there has been a considerable delay in the filing of the costs application. The reasons given in terms of waiting for minutes to be finalised and the expiration of the appeal period are not, good reasons, in these circumstances, for delaying the filing of a costs application.

[51] However, even though there was considerable delay in the filing of the application, it is clear that Mr Andrews was on notice, that a costs application would be filed. The Court's initial directions for parties to confirm their position within 10 days clearly signalled that costs could potentially be an issue. The applicants confirmed to Mr Andrews on 9 March 2020 that submissions regarding costs would be filed and when it would be filed. It should not have come as a shock to Mr Andrews when the costs application was filed, although given the delays, Mr Andrews may have mistakably thought, and maybe hoped, that the trustees had given up on their intention to seek costs. Importantly, I do not think that the delay has caused Mr Andrews any prejudice. As I say, he knew that a costs application was going to be filed.

[52] The circumstances are such that the delay is not cause for the application for costs to be dismissed.

Should costs be awarded? And if yes - at what amount should costs be set?

[53] It is submitted by counsel for the applicants that proceedings were akin to normal civil litigation. That is true from the perspective of the applicants, who had legal counsel. Mr Andrews was unrepresented and, with all due respect to Mr Andrews, did struggle with the legal processes and proceedings. Counsel for the applicants progressed matters on a civil litigation basis and while Mr Andrews was making best efforts, he followed the process that had been set by counsel rather than progressing his application in a civil litigation manner, which would have been the case if he had legal representation. The short point is that the proceedings were akin to civil litigation because counsel, which it is expected that they would do, progressed matters on a civil litigation basis and Mr Andrews was expected to engage on that basis. It was not due to Mr Andrews seeking to progress the matters on a contested litigation basis.

[54] I do accept that because of Mr Andrews lack of knowledge of legal processes, this meant that the applicants counsel was required to respond to the allegations in a formal and comprehensive manner. The trust has been put to some expense in defending Mr Andrews application and then prosecuting their own application to have Mr Andrews removed.

[55] It should also be acknowledged that counsel, to their credit, took a flexible approach rather than seeking to take a pedantic legalistic approach to the proceedings, which did allow Mr Andrews to put his case to the Court.

[56] Importantly the trust, while being a significant commercial operation, is still a Māori Land Trust where the owners are owners because of their whakapapa connections.

[57] Mr Andrews, in my view, was genuine and sincere in the application that he put before the Court. However, his application was misguided. He would have been assisted if he had legal counsel. However, this does not depart from his genuine concerns with regards to the operations of the trust.

[58] Although the trust is a significant commercial operation, this is still a situation where the Court should be looking to facilitate amicable relationships between parties. The trustees and Mr Andrews are clearly connected by whakapapa. Being removed as a trustee has clearly caused Mr Andrews whakamā and a significant award of costs would not assist in repairing the relationships between the trustees and Mr Andrews and potentially the relationship between some owners and Mr Andrews. But this must be balanced against the fact that the Trust has been put to significant costs in the proceedings.

[59] I am of the view that costs should be awarded to the applicants but that the costs should be at a lower level of the total costs incurred.

Kupu whakataunga
Decision

[60] The application is granted, and Mr Andrews is ordered to pay the applicants costs of $8,000.00.

[61] The Case Manager is directed to distribute a copy of this judgment to all parties.

I whakapuaki i te wā 2:00pm ki Rotorua i te rā 8th o Apireira 2022.

C T Coxhead
JUDGE