

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

A20200008432

WĀHANGA <i>Under</i>	Section 79, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Lot 6 Deposited Plan South Auckland 34349
I WAENGA I A <i>Between</i>	VALENTINE NICHOLAS, WHAKAUE KI MAKETŪ MĀORI INCORPORATION AND NGĀTI TAI HAPŪ INCORPORATION Ngā Kaitono Pira <i>Appellants</i>
ME <i>And</i>	THE OFFICIAL ASSIGNEE Kaiurupare pira <i>Respondent</i>

Nohoanga: On the papers
Hearing

Kooti: Judge M P Armstrong (Presiding)
Court Judge T M Wara
 Judge D H Stone

Kanohi kitea: K Te Heuheu for V Nicholas
Appearances K Eastwood and S Cann for Official Assignee

Whakataunga: 25 August 2021
Judgment date

TE WHAKATAUNGA Ā TE KOOTI HĀNGAI KI TE UTU RŌIA
Judgment of the Court as to Costs

Hei tīmatanga kōrero

Introduction

[1] This appeal was heard on 12 February 2021, with our reserve judgment of 17 June 2021 dismissing the appeal. Counsel for the Official Assignee was directed to file submissions on costs, which were filed on 16 July 2021. A response was received from Whakaue ki Maketū Māori Incorporation on 22 July 2021.

Ngā take

Issues

[2] The first issue for determination is whether the Court should make an award of costs against the appellants, and if so, how much should be awarded.

[3] The second issue is, in the event costs are awarded, who of the three appellants is liable to pay them.

Ngā kōrero a te Kaiurupare

Submissions of the Official Assignee

[4] Counsel for the Official Assignee submits that costs should be awarded as an injunction was sought over General land to prevent seizure in respect of Proceeds of Crime Act 1991 proceedings. The Court held it did not have jurisdiction to make such an order and the original applicants, Ngāti Tai Hapū Incorporation, were found to lack standing as they had never owned the subject land. The appeal was dismissed and the Official Assignee was therefore the successful party. Thus, counsel submits that the appeal was without merit.

[5] In the first instance, the Official Assignee seeks indemnity costs because the appeal lacked merit and realism. His actual costs were \$53,223.53, excluding the costs associated with his unsuccessful strike out application. He seeks 80% of those costs, being \$42,578.82.

[6] In response to our request for submissions on the appropriate costs scale to be applied should we not award indemnity costs, counsel for the Official Assignee submits that the District Court scale would not be appropriate for this matter and that the most appropriate scale for comparison is that of the High Court. However, counsel maintained that indemnity costs are appropriate.

Ngā kōrero a ngā Kaitono Pira

Submissions of the Appellants

[7] Submissions regarding costs were received from the representative for Valentine Nicholas in the documentation filed with the appeal application. These sought costs against the Official Assignee in favour of Mr Nicholas. No further submissions have been received from Mr Nicholas or his representative following our direction of 17 June 2021 regarding costs.

[8] Whakaue ki Maketū Māori Incorporation \made submissions on 22 July 2021, however these related to the underlying claim and were not specific to the issue of costs.

[9] No submissions were received from Ngāti Tai Hapū Incorporation, which withdrew from the proceedings on 17 November 2020.

Ngā Ture

The Law

[10] Section 79(1) of the Act provides:

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.

[11] The legal principles that apply to an award of costs are well established and are set out in *Samuels v Matauri X Incorporation – Matauri X Incorporation*:¹

- a) The Court has an absolute and unlimited discretion as to costs;
- b) Costs normally follow the event;
- c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
- d) The Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may

¹ *Samuels v Matauri X Incorporation – Matauri X Incorporation* [2009] 7 Taitokerau Appellate Court MB 216 (7 APWH 216) 2016 Maori Appellate Court MB 369 at [10].

sometimes make awards of costs inappropriate. However, where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply; and

- e) There is certainly no basis for departure 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.

[12] The *Matauri X* decision goes on to summarise the relevant principles when determining how much a costs award should be:²

- a) The Court has a broad discretion.
- b) The Court should look to what is just in the circumstances and in doing so should have regard to the nature and course of the proceedings; the importance of the issues; the conduct of the parties; and whether the proceedings were informal or akin to civil litigation.
- c) 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.
- d) 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.
- e) The Court’s discretion as to the level of the contribution is broad, but a reasonable contribution will seldom be as little as 10% or as large as 80% or 90% on an objective analysis.
- f) Where proceedings involve counsel and are comprehensively pursued and contested within a relatively formal framework in a similar manner to civil litigation then an award of costs should be made.

[13] Therefore, a two step approach is required in determining costs. The Court must first determine whether costs should be awarded and if so, the appropriate contribution.

[14] A further step in this matter is determining which of the appellants should be liable for payment of costs. In *McClutchie-Morrell v Te Runanga o Ngati Porou*, Judge Clark considered the issue of where liability for costs fall and whether the Māori Land Court could make a joint and several costs award for a matter with three applicants:³

² *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) at [9]. See also *Trustees of Tautuku Trust v Cairns – Part 3 Block XIII Tautuku Survey District* (2017) 42 Te Waipounamu MB 284-289.

³ *McClutchie-Morrell and Ors v Te Runanga o Ngati Porou* (2011) 13 Tairawhiti MB 121 (13 TRW 121) at [36] citing Rule 14.14 of the High Court Rules and Rule 4.13 of the District Court Rules 2009.

In High Court and District Courts civil cases awards of costs are on a joint and several basis, unless the Court otherwise orders. Whilst I acknowledge there is no equivalent in TTWMA or in the Māori Land Court Rules 1994 I consider the wording of s 79(1) to be sufficiently broad as to enable the Māori Land Court to make an award of costs on a joint and several basis.

[15] Although the default position in the High Court is joint and several liability, it is not mandatory. In *Haven v Lombard*, Peters J held that the matter was “not a case for an order that each defendant is jointly and severally liable for all costs.”⁴ In that case, there were multiple defendants. One was involved only in the early stages, others defended up until the trial and two defended the matter at all stages. Of these two, one had no costs awarded against them. Peters J held that the main defendant should be liable for eighty percent (80%) of the costs scale awarded, with those with lesser degrees of involvement contributing in decreasing increments.⁵

[16] We adopt these principles.

Kōrerorero *Discussion*

Should costs be awarded?

[17] Costs generally follow the event. The Official Assignee was required to respond to the appeal, which was dismissed. The main appellant, Mr Nicholas, and the Official Assignee were both represented at the appeal hearing.⁶ There is no reason to depart from the principle that a reasonable contribution to Official Assignee’s actual and reasonable legal costs is payable by the appellants.

What is an appropriate quantum?

[18] These proceedings were akin to a civil litigation in the High Court. The appeal was without merit and was dismissed. Although the loss of the property has been a source of *mamae* to the whānau, the Māori Land Court and Māori Appellate Court were not the correct

⁴ *Haven Insurance Limited v Lombard and Ors* [2021] NZHC 255 at [29].

⁵ At [31].

⁶ Mr Nicholas was represented by a lay representative.

forum to attempt to prevent the seizure and sale of that property. Those factors may support an award of indemnity costs.

[19] However, when considering a claim for indemnity costs, we must be satisfied that the costs sought were actually and reasonably incurred. An unsuccessful party is not required to pay costs at a 'Rolls Royce' standard. Counsel for the Official Assignee did not file an invoice confirming the actual costs incurred. Nor were we provided with a sufficient breakdown of costs such as an hourly rate, and the time spent on each step. This is despite the fact that we raised this omission in our directions on costs. In the absence of this information we cannot determine whether the costs claimed were actually and reasonably incurred. As such, we turn to consider scale costs to assess what is reasonable in the circumstances of this case.

[20] Counsel for the Official Assignee calculated an award under High Court 2B scale at \$10,157.50 for preparation for the appeal and the appearance of two counsel. Our calculations are that the High Court 2B scale would allow costs of \$17,566.50. This is an appropriate quantum for costs in these circumstances.

Who should be liable?

[21] It is open to us to make the award on a basis we consider reasonable, including on a joint and several basis for the three appellants.

[22] Ngāti Tai Hapū Incorporation withdrew from the proceedings after initially filing them on behalf of Valentine Nicholas. Their involvement ceased on 17 November 2020 date, in the early stages of the appeal and prior to the hearing. They should not be liable for any of the costs award.

[23] Whakaue ki Maketū Māori Incorporation was involved throughout the proceedings, with the most recent submissions received on 22 July 2021. Although self-represented, the Incorporation continued to be part of the Court proceedings resulting in additional attendances by the Official Assignee. Therefore, Whakaue ki Maketū Māori Incorporation should be liable for 25% of the costs award.

[24] Valentine Nicholas is the main appellant in this matter and should bear the remainder (being 75%) of the costs award. If not for his claim and the subsequent appeal, these proceedings would not have been brought before the Court.

Kupu whakataua

Decision

[25] Costs are awarded in favour of the Official Assignee on a 2B basis of the High Court scale at \$17,566.50, with \$13,174.88 payable by Valentine Nicholas and Whakaue ki Maketū Māori Incorporation liable for the remaining \$4,391.62.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

M P Armstrong

JUDGE

(Presiding)

T Wara

JUDGE

D H Stone

JUDGE