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

A20180004178
A20180008411

WĀHANGA *Under*	Sections 18(1)(a) and 67, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Okahu 3B2B2D and Okahu 4D
I WAENGA I A *Between*	FAR NORTH DISTRICT COUNCIL Te kaitono *Applicant*
ME *And*	DESLEY AUSTEN, ALEXANDRA BAKER, PARAIRE FLETCHER, CASSINO HADFIELD, DESMOND MAHONEY, RAIHA MANN AND TANIA MORUNGA AS TRUSTEES OF THE NGAKAHU-NGAKOHU WHĀNAU AHU WHENUA TRUST Ngā kaiurupare *Respondents*

Kanohi kitea: *Appearances*	G Swanepoel, for Applicant R Mark, for Respondents
Whakataunga: *Judgment date*	5 May 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ M P ARMSTRONG
Judgment of Judge M P Armstrong

Hei tīmatanga kōrero
Introduction

[1] On 31 May 2018, the Far North District Council (FNDC) filed an application seeking directions from the Court as to the process it should follow and with whom it should negotiate concerning access to the Kauri dam and pump station. At issue was realigning an existing easement to cross Okahu 4D which is administered by the trustees of the Ngakahu-Ngakohu Whānau Ahu Whenua Trust (the trustees). In response, the trustees filed an application to strike out the proceeding.

[2] On 3 July 2019, the FNDC withdrew its application. The trustees seek costs. This judgment determines whether costs should be awarded and, if so, in what amount.

Ngā whakaritenga
Procedural history

[3] In 1983, by declaration in the New Zealand Gazette (the first declaration), a pipeline easement was granted over land (now) owned by the trustees in favour of (now) the FNDC for the purpose of the Kauri dam. On 24 May 2018, I determined that the FNDC was entitled to use the land subject to the pipeline easement as a right of way (first decision).[1]

[4] The FNDC had been using the pipeline easement to conduct the pipes associated with the dam, and for access to the dam and the pump station. However, the route they had been taking did not accurately follow the easement corridor. Part of the route, described as a 'dog-leg', ran across Okahu 4D, which was not subject to the pipeline easement. Okahu 4D is administered by the trustees along with other adjoining blocks that are subject to the pipeline easement.

[5] At the hearing on 24 May 2018, the FNDC sought an order to realign the easement so that it includes the 'dog-leg' across Okahu 4D. There was no application before me seeking such an order. I advised counsel for the FNDC that without an application I could not grant the order sought. At the conclusion of that hearing, I directed the FNDC to file an application to bring that matter before me.

---

1 174 Taitokerau MB 125-158 (174 TTK 125-158).

[6] On 31 May 2018, the FNDC filed that application (the FNDC application).

[7] Following the 2018 hearing, the trustees located a second declaration made in 1987 (the second declaration) which amended the first declaration. The second declaration removed the FNDC's right to use the pipeline easement as a right of way.

[8] On 17 October 2018, the trustees filed an application seeking to recall my first decision, or alternatively a rehearing, in light of the second declaration. On 15 November 2018, the trustees filed an application to strike out the FNDC application.

[9] On 26 April 2019, I recalled my first decision. I then made a new determination taking into account the effect of the second declaration that the FNDC was not entitled to use the pipeline easement as a right of way.[2]

[10] On 22 May 2019, the FNDC advised that it was seeking to withdraw its application based, in part, on the discovery of the second declaration. The FNDC met on 27 June 2019 where a resolution was passed effecting this. Counsel for the FNDC then withdrew the application by email on 3 July 2019. The trustees sought costs and both sides filed submissions.

[11] Since then, numerous other applications concerning these parties have been filed.[3] Some have been determined, others are ongoing.[4] Unfortunately, in the mire of multiple proceedings, the current application seeking costs was overlooked. I apologise to the parties for the delay in dealing with this matter.

He aha te ture?
What legal principles apply?

[12] An assessment of costs generally requires a two-step approach: whether to award costs; and, if so, in what amount. The relevant principles concerning these steps were

---

2 190 Taitokerau MB 187-200 (190 TTK 187-200).
3 A20180001046, A20190006909, A20200006099, A20190007688, A20190007687, A20190006911, A20190006910.
4 See 229 Taitokerau MB 66-107 (229 TTK 66-107).

summarised by Judge Harvey in *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tamahata Incorporation*.[5]

[13] In this case, the FNDC withdrew its application before it was heard. In *Royal Forest and Bird Protection Society of New Zealand v Northland Regional Council,* the High Court considered an application for costs where the plaintiff discontinued the proceeding.[6] Toogood J held:

> [7] Costs are at the discretion of the Court. Generally, costs go to the successful party. However, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant unless the Court orders otherwise. That presumption may be displaced if there are circumstances which make it just and equitable to do so. The following points emerge from the combined effect of the relevant authorities:
>
> (a) The reasonableness of the parties' stances will be taken into account; whether it was reasonable for the plaintiff to bring and continue the proceeding and whether it was reasonable for the defendant to oppose it. It is not sufficient for the plaintiff to show merely that it had reasonable grounds to believe it would be the successful party.
>
> (b) Conduct prior to the commencement of the proceedings may be relevant.
>
> (c) The Court will not consider the merits of the respective cases unless they are so obvious that they should influence the costs outcome.
>
> (d) The reason for discontinuing the proceeding may be relevant. For example, there may have been a change of circumstance rendering continuation of the proceeding unnecessary.

[14] I adopt this approach.

Ngā kōrero mō ngā kaitiaki
Submissions for the trustees

[15] Mr Mark, for the trustees, argues that generally costs follow the event and an award should be made here. Mr Mark also referred to the scale costs in the District Court Rules, which provide guidance.

---

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

6 *Royal Forest and Bird Protection Society of New Zealand v Northland Regional Council* [2019] NZHC 449.

[16] Mr Mark submits he was instructed in May 2019 to prepare the strike out application, which was filed and served. He also contends that, prior to receiving those instructions, he provided an opinion to the trustees on the extent of the right of way and pipeline easements and the position regarding the 'dog-leg'. His fees total $3,500.00 plus GST.

[17] Mr Mark seeks an award of two thirds of actual costs, being $2,656.50 plus the following disbursements:

(a)	Title searches	$322.00
(b)	A survey of the dog leg area	$506.00
(c)	Filing fee for the strike out application	$200.00

Ngā kōrero mō te kaunihera
Submissions for the FNDC

[18] Mr Swanepoel, for the FNDC, argues that costs should lie where they fall. He submits it was reasonable for the FNDC to bring the proceeding and it was also reasonable to withdraw it. Mr Swanepoel contends that the FNDC should not be required to pay the costs of the trustees' strike out application as it would have been unsuccessful.

E whakaae ana au ki te tono utu?
Should I award costs?

[19] Mr Swanepoel argues it was reasonable for the FNDC to file its application as it was instructed by the Court to do so. Mr Swanepoel is overstating the purpose of my direction.

[20] At the hearing on 24 May 2018, I had to consider the effect of the first declaration and whether the FNDC were entitled to use the pipeline easement as a right of way. During the course of that hearing, Mr Swanepoel sought an order to realign the easement corridor to include the 'dog-leg' across Okahu 4D. I advised Mr Swanepoel that I could not do so as there was no such application before me. I directed the FNDC to file that application so that I could consider the order they were seeking.

[21] I did not direct the FNDC to file the application because of my personal view of the circumstances. I was simply addressing a procedural defect where the FNDC was seeking an order without first filing an appropriate application. Ultimately it was up to the FNDC to

decide whether to file the application. It did so and it cannot hide behind my direction to shield it from that decision.

[22] Despite that, at the time the application was filed, the FNDC was relying on the effect of the first declaration. I had made a decision that the FNDC were entitled to use the pipeline easement as a right of way. The FNDC were seeking to realign the easement to include the 'dog-leg' to regularise what had been used as the existing route for many years. The FNDC wanted to confirm access to the dam and pump station, which is part of the local public infrastructure. On this basis, it could be said the FNDC were acting reasonably, and in the public interest, by filing the application.

[23] It is also clear that, at that time, neither the FNDC nor the trustees were aware of the second declaration, which removed the FNDC's right to use the pipeline easement as a right of way. Once I made a decision on the effect of the second declaration, the FNDC promptly advised it would seek to withdraw its application. It then did so once a formal resolution had been passed at the next FNDC meeting. On the face of it, withdrawing the application in these circumstances is also reasonable.

[24] If this was all that occurred, I would have determined that this is a rare case where the presumption in favour of costs had been displaced. However, that is not the end of the matter. This is because of the unusual nature of the application that the FNDC actually filed.

[25] At the 2018 hearing, the FNDC sought an order to realign the pipeline easement to include the 'dog-leg' across Okahu 4D. I directed them to file that application. However, the resulting application did not actually seek an order realigning the easement. Rather, it sought a:

> …direction from the Court as to the process Council should follow and with whom it should negotiate regarding:
>
> a. Its notice to the Ngakahu trustees under the Public Works Act 1981 to regularise access over land used, but over which Council does not have a right of way access in block 4D; and
>
> b. The widening of the pipeline right of way access to ensure that the vehicle access does not encroach on land not included in the existing right of way easement;

> c. Determining what compensation should be paid, or alternatively, explore alternative solutions for the mutual benefit of the Trust and Council. For example: In return for the granting of the easements sought above which secures Council's access to the dam and agreement for the power lines for the water pump to remain where they are and be maintained as and when required, Council agrees to surrender the right of way easement over Okahu 3B2B2A, 3B2B2B, 3B2B2C, 3B2B2D, 3C, 3B2A, 4A and 4D

[26] The FNDC did not actually seek an order to realign the easement. Instead, it sought a direction from me as to the process it should follow, and with whom it should negotiate, to realign the easement.

[27] The trustees' sought to strike out the FNDC application, at least in part, on this basis. The strike out application pleads:

> The Public Works Act 1981 provides for the process by which a local body can seek an easement and there is no need for the FNDC to seek directions regarding the process it should follow and with whom it should negotiate. The Trustees of the Ngakahu / Ngakohu Ahu Whenua Trust are authorised by Trust Deed to conduct negotiations and make binding decisions over the land affected by the FNDC application.

[28] I agree with those pleadings. The Public Works Act 1981 provides a clear process for a local authority to acquire land, including an easement, for public works. The FNDC know that this land is vested in the trustees who administer the land on behalf of the beneficial owners. There is no obvious reason to seek directions from me on such matters. I cannot be satisfied that the FNDC acted reasonably by filing its application seeking these directions.

[29] In these circumstances, the FNDC has not displaced the presumption that the trustees are entitled to costs.

He aha ngā utu e whakawhiwhi ana?
What costs should be awarded?

[30] Mr Mark seeks costs for filing the strike out application and for the opinion he prepared for the trustees. Mr Swanepoel argues the FNDC should not pay costs for the strike out application as it would have been unsuccessful.

[31] I have already determined that the trustees are entitled to costs. They incurred costs preparing and filing the strike out application. They took these steps in response to the FNDC application. The strike out application raised a legitimate issue and it was reasonable for the trustees to file it. The trustees are entitled to costs for that.

[32] The trustees are not entitled to costs for the legal opinion Mr Mark prepared. Mr Mark advised he was instructed on the FNDC application in May 2019, and he provided the opinion to the trustees before that.[7] Those costs were not incurred in response to the FNDC application. The trustees cannot claim costs for that now, based on a subsequent application filed, even if the subject matter is related.

[33] Mr Mark seeks an award of two thirds of actual costs. However, he has not broken down what costs were incurred for providing the opinion and what costs were incurred for preparing the strike out application. He has only referred to total costs of $3,500.00 plus GST. Copies of the relevant invoices were not filed. I cannot make an award based on actual costs as I do not know the actual costs incurred in relation to the strike out application.

[34] In these circumstances, the scale costs in the District Court Rules provide a useful guide. Mr Mark argues that on a 2B basis the costs for preparing and filing an interlocutory application is $712.00. I agree with his assessment and I consider an award of $712.00 is appropriate.[8]

[35] Mr Mark also seeks disbursements for the filing fee, title searches and a survey. The trustees are entitled to costs for the filing fee. Mr Mark has not set out what the titles searches and the survey relate to. It appears that those relate to the legal opinion rather than the strike out application and it is not appropriate to include those disbursements.

---

7 Submissions of Mr Mark on costs, 12 August 2019, para [2].

8 The daily recovery rate for a category 2 proceeding at the time the FNDC withdrew its application was $1,780.00 per day. That rate increased to $1,910.00 per day on 1 August 2019. Despite that, Mr Mark properly applied the earlier rate in force at the time the FNDC withdrew its application.

Kupu whakatau
Decision

[36] Per section 79 of Te Ture Whenua Māori Act 1993, I grant an order that the Far North District Council must pay to the trustees of the Ngakahu-Ngakohu Whānau Ahu Whenua Trust costs in the amount of $912.00.

[37] Applications A20180004178 and A20180008411 are dismissed.

I whakapuaki i te wa 2:00pm ki Whangārei i te rā 5th o Haratua i te tau 2022.

Pronounced at 2:00pm in Whangārei on this 5th day of May 2022.

M P Armstrong
JUDGE