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

A20210011169

WĀHANGA *Under*	Section 19, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Motatau 5E25F and others
I WAENGA I A *Between*	NGĀTI MOEREWA O MHKM MĀORI INCORPORATION Te kaitono *Applicant*
ME *And*	ATTORNEY-GENERAL OF NEW ZEALAND Te Kaiurupare Tuatahi *First respondent*
ME *And*	THE COMMISSIONER OF INLAND REVENUE, CRAIG ALEXANDER SANSON, AND DAVID JOHN BRIDGMAN Te Kaiurupare Tuarua *Second respondent*

Nohoanga: *Hearing*	8 December 2021, 247 Taitokerau MB 27-70 (247 TTK 27-70) (Heard at Whangarei)
Kanohi kitea: *Appearances*	R Hindriksen for C Sanson on behalf of the Liquidators of Shearing Services Kamupene Ltd Y Moinfar Young for the Attorney-General M Deligiannis for the Commissioner of Inland Revenue P Te Whata for the applicant
Whakataunga: *Judgment date*	26 May 2022

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

Hei tīmatanga kōrero
Introduction

[1] Shearing Services Kamupene Ltd ("SSKL") and Tarahau Farming Ltd ("TFL") are limited liability companies that own various parcels of General land in Te Taitokerau and Te Waipounamu ("the land"). Pessiman Pehimana Te Whata is a director of both companies.

[2] SSKL and TFL have been placed in liquidation due to significant tax debt, for SSKL, and judgment debt, for TFL. There are ongoing proceedings in the High Court concerning these matters. Craig Sanson and Malcolm Hollis are the liquidators for SSKL. There is no current administrator for TFL.

[3] In 2021, Mr Te Whata filed an application in this Court on behalf of Ngāti Moerewa o MHKM Māori Incorporation ("MHKM"). MHKM is not a Māori Incorporation constituted by this Court. At best, it is an unincorporated body representing unknown individuals.[1] Mr Te Whata asserts that MHKM is the ultimate holding company and owner of SSKL and TFL. Mr Te Whata's application sought the following relief:[2]

(a) An injunction restraining the liquidators from taking enforcement proceedings in the High Court;

(b) An injunction and related orders concerning trespass and injury to the land;

(c) An order to allow MHKM to undertake the voluntary administration of TFL;

(d) An order recognising the tikanga regulations of MHKM; and

(e) A declaration that the land is Māori customary land.

[4] On 23 September 2021, by consent, I granted a stay of the application as it relates to TFL.[3] On 8 December 2021, I granted an order striking out the application as it relates to SSKL ("the strike out decision").[4]

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1 247 Taitokerau MB 27-70 (247 TTK 27-70), at 63.
2 247 Taitokerau MB 27-70 (247 TTK 27-70), at 64.
3 238 Taitokerau MB 7 (238 TTK MB 7).
4 247 Taitokerau MB 27-70 (247 TTK 27-70).

[5] Mr Sanson, on behalf of the liquidators for SSKL, seeks costs against Mr Te Whata personally. The Attorney-General and Commissioner of Inland Revenue do not seek costs. This decision determines the following issues:

(a) Should I award costs?

(b) Should I award costs against Mr Te Whata personally?

(c) What amount of costs should be awarded?

Kaore a Mr Te Whata i urupare
Mr Te Whata has not responded

[6] I delivered the strike out decision orally. Mr Te Whata was present. I then directed Mr Hindriksen, for Mr Sanson, to file submissions on costs by 22 December 2021 and Mr Te Whata to file any submissions in response by 31 January 2022. Mr Te Whata agreed with that filing date. I also indicated I would make a decision on costs on the papers.[5]

[7] Mr Hindriksen filed submissions on costs on 15 January 2022. Taking this delay into account, Mr Te Whata should have filed his response by 24 February 2022.

[8] On 12 February 2022 Mr Te Whata filed a memorandum stating:

> We still have not received a ruling of the hearing dated 8 December 2021 the application for injunction A20210011169. Please give us an update.
>
> Ngatimoerewa indicated in the hearing it will appeal and has been waiting for the Courts ruling to be released. Ngatimoerewa cannot appeal nor answer to the costs of SSKL until the Court has provided a sealed ruling.

[9] Mr Te Whata was present when I delivered my decision. The minute from that hearing was sent to Mr Te Whata on 7 April 2022. That minute contained the strike out decision and my directions requiring submissions on costs. A further 7 weeks has passed since the minute was distributed. Mr Te Whata has not filed submissions on costs, nor has he filed an appeal against the strike out decision.

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5 247 Taitokerau MB 27-70 (247 TTK 27-70), at 69.

[10] Mr Te Whata has had sufficient time to respond to the submissions on costs. He has chosen not to. I now proceed to decide costs.

He aha te ture?
What legal principles apply?

[11] Generally, considering costs is a two-step approach, whether to award costs, and if so, in what amount. In *Trustees of Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee & Tahamata Incorporation*, Judge Harvey (as he was then) summarised the relevant principles:[6]

> 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, Manuirirangi v Paraninihi Ki Waitotara Incorporation*, and *De Loree v Mokomoko and others – Hiwarau C* and they identify the following principles:
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> (a) the Court has an unlimited discretion as to costs:
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> (b) Costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
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> (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 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;
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> (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;
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> (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 of 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.
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> (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
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> (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.

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

[12] I adopt this approach.

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

[13] Generally, costs follow the event. This proceeding has been prosecuted akin to civil litigation in the mainstream courts. The parties are not connected by whakapapa and there are no factors that displace the presumption in favour of costs.

[14] I find that costs should be awarded in this case.

E whakaae ana au ki te tono utu i a Mr Te Whata?
Should I award costs against Mr Te Whata?

[15] MHKM is the named applicant in this proceeding. In my strike out decision, I found that:[7]

> MHKM is not a Māori Incorporation constituted by this Court. At best, it is an unincorporated body representing unknown individuals. An unincorporated body such as this has no legal personality. Legal proceedings cannot be prosecuted in the name of an unincorporated body.

[16] Despite that, I found this was not sufficient, on its own, to strike out the application. Rather, if that was the only ground relied on, I would have given Mr Te Whata the opportunity to amend the application substituting MHKM for the individuals MHKM purports to represent. Ultimately, that was not necessary as the application was struck out on other grounds.[8]

[17] Mr Hindriksen argues that costs should be awarded against Mr Te Whata personally. He submits that Mr Te Whata is the 'real party' in this proceeding or alternatively he was granted leave to be heard.

[18] There are few decisions in this Court or the Māori Appellate Court which have considered an award of costs against a non-party. In *Housing New Zealand Ltd v Tawhai,*[9] the applicant sought costs against the respondent, Ms Tawhai, and also against the trustees

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7 247 Taitokerau MB 27-70 (247 TTK 27-70), at 63.
8 247 Taitokerau MB 27-70 (247 TTK 27-70), at 64.
9 *Housing New Zealand Ltd v Tawhai* (2011) 33 Taitokerau MB 11 (33 TTK 11).

of a whanau trust she was associated with, but who were not a party to the proceeding. The late Judge Ambler accepted that this Court had jurisdiction to award costs against a non-party but declined to do so as the grounds were not made out.

[19] Per s 79(1) and (3) of Te Ture Whenua Māori Act 1993 ("the Act") I can award costs against:

(a) Any person who is or was a party to the proceeding;

(b) Any person to whom leave has been granted to be heard; and

(c) Where I am satisfied a party acted not only on his or her own behalf, but on behalf of other persons having a similar interest in the proceeding, I can award costs against those other persons.

[20] I consider Mr Te Whata falls into all three categories.

[21] The approach taken in the High Court provides some guidance. Rule 14.1 of the High Court Rules 2016 provides that all matters are at the discretion of the Court if they relate to costs. This is similar to the wide discretion of this Court on costs. In *Fankhauser v Strongline Buildings Ltd*, the High Court applied the following principles concerning costs against a non-party:[10]

(a) While costs orders against non-parties are exceptional, that means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.

(b) The discretion will not be exercised against pure funders.

(c) Where the non-party not merely funds the proceeding, but substantially also controls or is to benefit from it, justice will ordinarily require the non-party to pay the costs of the successful party.

(d) The basis for this is that the non-party is not just funding a party to enable access to justice, but is himself the real party.

[22] I already found that, as an unincorporated body, this application could not be prosecuted in the name of MHKM. If the application continued, I would have required

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[10] *Fankhauser v Strongline Buildings Ltd* [2014] NZHC 2629, at [14].

MHKM to be substituted with the individuals it purportedly represents. While that did not occur, that likely would have included Mr Te Whata.

[23] Mr Te Whata signed the application as 'kaiwhakawa for the applicant'. Kaiwhakawa is the Māori word for Judge. Mr Te Whata is not a judicial officer or a member of the bar. Mr Te Whata also signed a declaration in support of the application. He appeared on behalf of MHKM at a judicial conference and at the hearing of the strike out application. He prepared and filed all documents on behalf of MHKM in this proceeding. Mr Te Whata also has a personal interest in this proceeding. He is the sole director and shareholder of SSKL and is a director of TFL.

[24] Mr Te Whata substantially controlled, and stood to benefit from, this proceeding. I find that he is the 'real party' and can be subject to an award of costs per s 79(1) of the Act. I also find that, even if MHKM was a legitimate party, the proceeding was also brought on Mr Te Whata's behalf, he has a similar interest in the proceeding, and can be subject to an award of costs per s 79(3) of the Act.

[25] Section 70(1) of the Act states:

> **70 Representation of parties, etc**
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> (1) Any party or other person entitled to appear in any proceedings in the Court may appear—
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> (a) Personally; or
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> (b) By a barrister or solicitor of the High Court; or
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> (c) With the leave of the Court, by any other agent or representative.
>
> …

[26] Rule 5.9 of the Māori Land Court Rules 2011 states:

> **5.9 Notice of intention to appear**
>
> (1) Any person who is not named as a party to an application and who wishes to appear and be heard in connection with an application must file in the Court and serve on the applicant a notice of intention to appear that complies with rule 5.9(2).
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> (2) The notice must—

(a) be in form 5; and

(b) state whether the person supports or opposes the application; and

(c) state the grounds for supporting or opposing the application; and

(d) be given not later than 5 working days before the application is to be heard.

(3) The Court, in awarding costs in the application, may take into account a failure to file and serve a notice of intention to appear.

[27] Mr Te Whata did not file a notice of intention to appear. To the extent he appeared in this proceeding on behalf of, or to support, MHKM, he could only do so with my leave. Though he is not a barrister or solicitor, I allowed Mr Te Whata to be heard to avoid unnecessary formality, and to ensure he had an opportunity to present his case.[11] Even if Mr Te Whata did not fall into the other two categories, he has been heard at every step with my leave and can still be subject to an award of costs per s 79(1).

[28] I find that I should award costs against Mr Te Whata personally.

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

[29] Mr Hindriksen argues that actual costs total $34,775.80. He seeks an award of 80 percent of those costs or $27,820.64.

[30] Generally, a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred. If a party has acted unreasonably, a more liberal award may be made but there is no invariable practice.

[31] There are no scale costs in the Māori Land Court Rules 2011. The scale costs in the District Court and High Court Rules do not apply but they can provide a useful guide to assess what is reasonable. In this case, Mr Hindriksen's actual costs far exceed the scale costs in the District Court and High Court Rules. However, this was no ordinary proceeding.

[32] I struck out this proceeding as it related to SSKL as it was untenable. Despite that, the proceeding was still complex. The documents filed in this proceeding were significant.

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[11] Te Ture Whenua Māori Act 1993, s 66(2).

They set out a detailed factual record of commercial and property transactions, tax liability, and litigation in multiple jurisdictions over a prolonged period. The liquidators for SSKL, and their counsel, had to undertake significant work to respond to the proceeding and to advance their strike out application. The strike out application raised difficult issues of standing, jurisdiction, and merit all against a complex factual background. In these circumstances, I consider the actual costs claimed are reasonable.

[33] I also consider Mr Te Whata acted unreasonably. He filed a wholly unmeritorious and hopeless application resulting in it being struck out. During the course of the strike out hearing, Mr Te Whata raised new issues, not pleaded, and which were not supported by any evidential foundation.

[34] Mr Te Whata should have known better. While he is not a barrister or solicitor, he is an experienced lay advocate. He has responded to, and prosecuted, numerous applications concerning these companies in the High Court and the Court of Appeal. Mr Te Whata should have known his prospects of succeeding in this application were grim, particularly given his involvement in an earlier proceeding before the late Judge Ambler. I commented on this in my strike out decision:[12]

> There is merit to Mr Hindriksen's argument that the proceeding is vexatious and an abuse of process. It is hard to escape the view that, in reality, this proceeding does not concern Māori land or the Māori Land Court. These issues actually relate to limited liability companies, tax, debt and insolvency law. Mr Te Whata has taken steps to prevent the liquidators from recovering due debts in the High Court and the Court of Appeal. Those attempts have largely been unsuccessful.
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> Mr Te Whata has now filed this proceeding in an attempt to cut across what is already happening in the High Court. There is merit to Mr Hindriksen's argument that this is both vexatious and an abuse of process.
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> I also note that this is not the first time these issues have been raised in this Court. In 2015, an application was filed on behalf of MHKM seeking an injunction preventing the Commissioner of Inland Revenue from taking further action against SSKL and TFL. An order was also sought determining that certain land was Māori customary land. That application related to the proceedings before the Taxation Review Authority and the High Court concerning SSKL's tax liability.
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> Those applications were determined by the late Judge Ambler in 2016. Judge Ambler dismissed that application for similar reasons that this proceeding is going to be struck out. There are some differences between that application and the one before me. Firstly, Mr Te Whata was not the applicant in that proceeding. That application was brought by Vernon Ruwhiu on behalf of MHKM. However, Mr Te Whata was

[12] 247 Taitokerau MB 27-70 (247 TTK 27-70), at 67-68.

> still involved in that proceeding. Mr Te Whata's ongoing and intimate involvement with SSKL and TFL has already been addressed in the background to this decision and in more detail in Mr Sanson's affidavit. Mr Te Whata's direct involvement in that earlier proceeding is also acknowledged in Judge Ambler's decision.
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> Judge Ambler heard that application on 16 December 2015 where he reserved his decision. Mr Te Whata then filed an application seeking leave to appeal against Judge Ambler's decision as he did not grant an injunction on the day of the hearing. Judge Ambler declined to grant leave on the basis that he had not made a decision at that time. Although Mr Te Whata was not the named applicant in the substantive proceeding before Judge Ambler, this demonstrates that he was directly involved in that proceeding and ultimately he is aware of the outcome of that decision. In fact, Mr Te Whata referred to that decision today.
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> Judge Ambler's earlier decision should have alerted Mr Te Whata to the significant hurdles he faced filing the present application. That he did so anyway, in the surrounding circumstances of this case, further supports that this proceeding is vexatious and an abuse of process.

[35] Ultimately, I did not make a final decision on whether the proceeding was vexatious or an abuse of process as I struck it out on the grounds the arguments put forward were untenable. However, this is still highly relevant to an award of costs.

[36] Taking all of these factors into account, I consider an award of 80 percent of actual costs is appropriate in this case.

Kupu whakatau
Decision

[37] Per s 79 of the Act, I grant an order requiring Pessiman Pehimana Te Whata to pay costs to Craig Sanson on behalf of the liquidators of Shearing Services Kamupene Ltd in the amount of $27,820.64.

I whakapuaki i te wa 1:30pm ki Whangārei i te rā 26th o Haratua i te tau 2022.
Pronounced at 1:30pm in Whangārei on this 26th day of May 2022.

M P Armstrong
JUDGE