

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT**

**A20180001769
Appeal 2018/2**

UNDER Section 58, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Koromatua 3A block and others, and an order
made at 154 Waikato-Maniapoto MB 128-152
dated 21 December 2017

BETWEEN GEORGE TAMA NICHOLLS
Appellant

AND SARAH JANE NICHOLLS, DELACE WILLIAM
JAMES, MARK STEVEN NICHOLLS,
KAHUTOROA MATAIA TUKERANGI, ARINI
PIRIHIRA TUKERANGI, VIV TAMA
NICHOLLS AND ANITA NORMAN
Respondents

Date: 19 April 2018

JUDGMENT OF THE COURT ON SECURITY FOR COSTS

Copies to:

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Introduction

[1] The respondents, the trustees of the WT Nicholls Trust, have applied for security for costs against the appellant, George Nicholls. They say that it is unclear whether the appellant could pay a costs award against him. They also argue that the appeal has little merit and that the trust wants to protect itself from further costs in circumstances where litigation has already been protracted and expensive. Counsel submits that the threshold requirements established in *Maiava v Matauri X Incorporation* are met.¹

[2] It appears from our file that the application for security for costs was sent to the appellant's counsel, Mr Kahukiwa, on 4 April 2018. No submissions have been received to date.

[3] The issue for determination is whether this application should be granted.

Discussion

[4] Security for costs can be granted where an appellant will be unable to meet an adverse award of costs. It is almost a corollary that such an order may mean that an appeal cannot proceed. Because access to the courts is an essential right, an action that denies anyone that option is never taken lightly.

[5] Key matters for our consideration include:

- (a) Can the appellant pay costs if his appeal is unsuccessful?
- (b) What are the merits and prospects of success of his appeal?
- (c) What are the overall interests of justice?²

Can the appellant pay costs if his appeal is unsuccessful?

[6] The respondents argue that:³

¹ (2010) 10 Taitokerau MB 106 at para 14

² *Maiava*, cited fn 1, at paragraphs 14-18. See also *Pace v Cain - Parish of Manurewa 196 and 197A Section 2B 4* [2017] Māori Appellate Court MB 342 (2017 APPEAL 342)

³ Filed 4 April 2018, at para 12

The Appellant during the course of this and previous proceedings has failed to provide information on his financial means and therefore it is uncertain on what basis the Appellant would be able to meet an award of costs if unsuccessful.

[7] As foreshadowed, litigation between these parties has been ongoing since 2012, with seven distinct stages in the proceedings, going back to 2012 as outlined in counsel's memorandum.⁴ It is said that the appellant has met none of the applicant's costs thus far, even though it appears that the decisions have consistently found in favour of the W T Nicholls Trust rather than Mr Nicholls.

[8] The only current information about the appellant's circumstances is contained in the Memorandum filed by counsel on 27 February 2018 to support a request for Special Aid:

Counsel is instructed that the applicant is now impecunious. The applicant is on a welfare benefit receiving fortnightly payments of \$422.00 after tax. He initially paid the filing fee of \$350 to his counsel to get his appeal underway which amount he borrowed from a family member.

[9] It is a reasonable inference that if the appellant cannot pay the filing fee for his appeal, then it is unlikely that he will be able to pay the \$5,000 security for costs currently sought, or the monies he was ordered to pay in the judgment of the Māori Land Court that is the subject of his appeal.⁵

What are the merits and prospects of success of his appeal?

[10] In his decision of 17 December 2017, Judge Coxhead related the history of the case.⁶ The proceedings concern use and occupation by Mr Nicholls (and others, earlier on) of Māori land comprised in the Oamaru Bay Holiday Park in Coromandel, which land is in the ownership of the W T Nicholls Trust. In brief, the trustees have been trying to get Mr Nicholls, who formerly lived on site and ran the holiday park, first to leave the land, and then to account to them for income he received from running the park. The Māori Land Court granted an injunction and an application for recovery of land in 2012.⁷ Mr Nicholls challenged those decisions in this Court and his appeal was dismissed in 2013.⁸

⁴ Memorandum of Counsel in support of application for security of costs in respect of appeal A201800001769, para 13

⁵ 154 Waikato Maniapoto MB 128-152 dated 17 December 2017

⁶ Ibid at 129-131

⁷ 50 Waikato Maniapoto MB 10-16

⁸ *Nicholls v Nicholls – W T Nicholls Trust* [2013] Māori Appellate Court MB 515

[11] The case was remitted back to the Māori Land Court for further proceedings concerning quantum and liability. An accountant's report was filed on 2 May 2016, which showed, inter alia, that there had been private drawings of at least \$400,000 between 2009 and 2015. However, there was uncertainty as to the basis on which Mr Nicholls operated the holiday park, and accordingly how much he owed the trust. Mr Nicholls filed an objection to the report, and the trust sought orders for recovery of the rental income along with mesne profits.

[12] Following a hearing in 2017, Judge Coxhead determined Mr Nicholls' liability to account to the trust. The ahu whenua trust was constituted after Mr Nicholls' occupation and business activities on the land commenced, and the judge determined matters of law concerning the pre- and post-trust situation. He applied the decision of this Court in *Monschau v Bamber – Tahorakuri A No 1 Section 33A2*.⁹ The judge decided that the Court had jurisdiction to order the recovery of rental income both pre- and post-trust. He also determined the basis for calculating Mr Nicholls' financial liability.

[13] The Notice of Appeal challenges the judge's approach on a wide basis. It is not apparent on their face that the points on appeal are all baseless. For example, it is contended that the decision does not explain how the judge determined that the amount that the appellant owes the trust should be calculated on a pro rata basis, without distinguishing between revenue and profit, nor taking into account any input of the appellant in generating the income. In any event, it is not the case here that, given the scale of Mr Nicholls' liability an appeal on the quantum and its calculation lacks any prospect of success.

What are the overall interests of justice?

[14] We are not satisfied that the criteria for security for costs orders established in the *Maiava* case are met. In particular, we do not agree with the assessment in the applicant's submissions that the appeal is 'unlikely' to succeed.¹⁰ We have assessed as far as possible the merits and prospects of success of the appeal, and consider that some of the points on appeal may prove persuasive. They are certainly arguable.

⁹ [2016] Māori Appellate Court MB 286 (2016 APPEAL 286)

¹⁰ Memorandum of Counsel in support of application for security of costs in respect of appeal A201800001769, para 17

[15] In conclusion, we have balanced the interests of the parties, and have considered the overall interests of justice. Those interests militate against a security for costs order in this case, for although it seems inevitable that the appellant must answer to the trust for monies he has received, it is by no means certain that the amount at which the judge set the debt is unassailable. The appellant may not be able to pay the debt currently, but even if that is so, a judgment debt will not go away. It would not be just if the appellant were to remain under the burden of a debt that may have been set incorrectly, and is effectively barred from challenging its legality.

[16] We are conscious that there are also elements of unfairness for the trust in this situation, and for its beneficiaries, who have been seeking accountability in difficult circumstances for some time. Justice often involves a difficult balancing exercise, though, and that is what we are required to perform here.

Decision

[17] The application for security for costs is dismissed.

Pronounced in Wellington at 2.15pm on Thursday the 19th day of April 2018

C M Wainwright
JUDGE
(Presiding)

L R Harvey
JUDGE

M P Armstrong
JUDGE