IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150005241

UNDER	Section 79 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Herapeka Hinewehi Ahu Whenua Trust
BETWEEN	ALAN JOHNSTON Applicant
AND	MICHAEL JOHN ANDERSON, TREVOR OWEN ANDERSON, MARK CLEMENT JOHNSTON, DAVID PETER ANDERSON AND CHERIE ROBYN ANDERSON AS TRUSTEES OF THE HERAPEKA HINEWEHI AHU WHENUA TRUST Respondents

Judgment: 8 September 2016

RESERVED JUDGMENT OF JUDGE C T COXHEAD AS TO COSTS

Copies to: Mark Copeland, PO Box 6083, Whakarewarewa, Rotorua 3043, New Zealand

Introduction

[1] On 14 September 2015 Alan Johnston applied under s 231 of Te Ture Whenua Māori Act 1993 for a review of the Herapeka Hinewehi Ahu Whenua Trust. The applicant's primary concern for filing the application was that, over a number of years, the trustees had failed to keep the owners and beneficiaries informed and up to date with the operation of the Trust.

[2] At a hearing held on 11 November 2015 before Judge Harvey the applicant requested that the Court adjourn the application pending his appointment as a trustee in replacement of his brother, Mark Johnston.[1] The applicant considered that some of his concerns may be addressed following his appointment as a trustee. The application was subsequently adjourned pending to March 2016.

[3] The matter was heard before me on, 11 March 2016.[2] Counsel for the applicant advised that, as a trustee, the applicant had ultimately succeeded in resolving the substantive matters raised in the application.[3] In light of that success, counsel no longer sought to advance the application for review and instead sought a contribution of $5,000.00 by the respondent trustees towards the applicant's total legal costs of $8,832.69 (including GST and disbursements).

Issue

[4] The issue for determination is whether to award costs and if so what is an appropriate award.

Applicant's Submissions

[5] Counsel for the applicant submits that he has assisted the applicant in the matter for over 12 months, during which time counsel repeatedly requested information from the trustees and undertook various other activities. The trustees, he says, were uncooperative in responding to these requests.

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1 131 Waiariki MB 81-86 (131 WAR 81).
2 138 Waiariki MB 64-71 (138 WAR 64).
3 138 Waiariki MB 64-71 (138 WAR 64) at 65.

[6] In addition counsel states that when he first became involved in the matter, the applicant was a beneficial owner. It was not until at least a month after the applicant filed his application for review that it became apparent he would be appointed as a trustee (although, even then it remained uncertain).

[7] Counsel adds that had Mark not died, the applicant would not have been appointed a trustee and would have continued to progress the application in order to achieve key changes to the trust order and the trust's administration.

[8] Further counsel submits that following the appointment of the applicant as a trustee, the applicant succeeded in bringing about the aforementioned changes, which benefitted all the beneficial owners.

[9] Counsel submits that the applicant accrued reasonably significant legal costs prior to his appointment as trustee. As such counsel submits that an order for the respondent trustees to contribute towards the applicant's costs is appropriate.

Trustees' submissions

[10] The trustees advise that at the 27 February 2016 trustee meeting the applicant requested that the trust contribute to his costs. The trustees voted down his request because they had not instructed the applicant to proceed with a review nor had he discussed it with them.

[11] Further, the trustees argue that the application was not filed in accordance with the terms of the trust deed. These state that a party aggrieved by or unhappy with a trust decision can file to the Court within 14 days of providing notice of their intention to do so. The applicant submitted a document to the trust on 23 July 2015 and the trustees heard nothing further until notified by the Court on 20 October 2015.

[12] The trustees further stated that the application was premature; the applicant knew, before submitting the application, that he would succeed his brother as trustee and that he would have full access to the trust and the ability to make changes, yet he still proceeded with the application for review. Before the application's adjournment, the trust had already

discussed some of the applicant's suggested improvements, such as allowing video conferencing.

[13] The trustees consider that the application was unnecessary; the trustees were getting ready for a review of trust anyway, in accordance with the trust deed.

The Law

[14] Section 79 of Te Ture Whenua Māori Act 1993 sets out the Court's power to order costs:

> **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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> …

[15] The Court should approach the question of costs in two steps. First, it should consider whether an award of costs should be made. If the answer is yes, then it should go on to consider the appropriate quantum of costs.[4]

Should an award of costs be made?

[16] In determining the first question, the Court has unlimited discretion, but will be guided by the principle that, generally, costs follow the event. An award of costs may be inappropriate where this would frustrate the Court's important role of facilitating amicable relationships between parties who are involved together in ownership and/or 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.[5]

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

5 *Samuels v Matauri X Incorporation*, above n 4, at [10]; *Niao v Niao* (2004) 10 Waiariki Appellate MB 263 (10 AP 263); *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184); *Manuirirangi v Paraninihi Ki Waitotara Incorporation* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64); *Nicholls v Nicholls – Part Papaaroha 6B Block* [2011] Māori Appellate Court 64 (2011 APPEAL 64) at [8].

[17] In this case the application for review was bought on the basis that the trustees did not provide information when requested, including financial information relating to trust accounts. The applicant's family were not consulted about the new trust order acquired from the Court in 2011. The appointment of the Mark Johnston to represent the applicant's family's interests, following the new trust order, was effected under "devious circumstances". The trustees did not respond to concerns he expressed about Mark Johnston's appointment, leaving the applicant to feel excluded and alterations to certain terms in the trust deed, for example, requiring that elected trustees reside in New Zealand, were prejudicial to the applicant and other members of his family residing in Australia.

[18] At the hearing I put it to counsel that my understanding of the basic premise underlying the costs application was that, before becoming a trustee, the applicant felt he had no option but to apply for a review of trust. However, given the way events unfolded, he ultimately achieved the changes he sought in his application through negotiation and discussion with the trustees rather than through Court orders. I put it to counsel that the argument being advanced was that, even though success did not flow from Court orders, the applicant was nevertheless successful, so an award of costs should follow.

[19] Counsel accepted my summary in part, but submitted that the applicant's success derived not only from resolutions passed at trustee meetings, but also from the fact that the Court, at the adjournment application, had "made certain orders… which essentially applied what my client was asking for".[6]

[20] I note that the transcript of the hearing before Judge Harvey on 11 November 2015 demonstrates that this is not correct. Judge Harvey only made an order to adjourn the application. He did make comments indicating that he broadly accepted, in principle, the legitimacy of what the applicant was requesting. However, he did not make orders to that effect. Nor was he presented with sufficient evidence of the alleged deficiencies of the trust deed or the trust's administration upon which he could make such orders. The parties did not present such evidence because the application had become one for adjournment pending discussion with the trustees.

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6 138 Waiariki MB 64 (138 WAR 64) at 68.

[21] The established principle is that costs should follow the event.[7] In *Big Hill Station Ltd v Trustees of Awarua o Hinemanu Trust* the Court discussed the jursidction to award costs following the withdrawal and dismissal of applications as follows: [8]

> [38] This Court has awarded costs following the withdrawal and dismissal of applications on a number of occasions. The jurisdiction to do so is provided for in s 79(1) of the Act. In addition, the High Court rules provide for costs where a plaintiff discontinues proceedings. Rule 15.23 provides that unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay the costs of and incidental to the proceeding up to and including the discontinuance.
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> [39] In *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* the Court of Appeal summarised the general approach to be applied in considering applications for costs where a notice of discontinuance has been filed. Importantly, it was held that the court does not speculate on the merits of a case it has not heard. That aspect would only influence the court's decision on costs in exceptional cases where the merits are clear. Moreover, the reasonableness of the stance of the parties has to be considered.

[22] While the proceedings were ultimately withdrawn, it is important to consider the parties' relative success. If the success is balanced between the parties, costs should lie where they fall. However, if only one party is successful, then costs may be justified for part or all of the proceedings, but at a reduced rate.[9]

[23] This Court has on previous occasions recognised that there are circumstances when filing an application in Court will be the only avenue available to a beneficiary or shareholder to influence events or push for change. Such an applicant should not be put out of pocket if they are successful.[10]

[24] I sympathise with the applicant's submission that before his brother's tragic passing and his subsequent appointment as trustee, he saw no other option but to file an application. He argued that, until that point, he had no success in simply talking to the trustees. While I cannot determine whether the applicant would have succeeded had he continued to pursue the matter in Court, I note that the reason the matter was not so pursued related to unforeseen intervening circumstances. Specifically, the applicant's brother's unexpected death, leading to the vacant trustee position which the applicant took

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7 *Samuels v Matauri X Incorporation – Matauri X Incorporation* [2009] 7 Taitokerau Appellate Court MB 216 (7 APWH 216)

8 *Big Hill Station Ltd v Trustees of Awarua o Hinemanu Trust* (2015) 43 Takitimu MB 218 (43 TKT 218)

9 *Kapiti High Voltage Coalition Inc v Kapiti Coast District Council* [2014] NZHC 1281; *Wheeldon v Body Corporate 342525* [2016] NZHC 862.

10 *Manuirirangi v Paraninihi Ki Waitotara Inc – Paraninihi Ki Waitotara Inc* [2002] 15 Whanganui Appellate Court MB 64 (15 WGAP 64).

up, and the applicant's subsequent decision to use this new avenue to try and resolve the matter collegially. The fact that this ultimately worked was beneficial for all parties.

[25] In this case the applicant's success was ultimately achieved outside of Court, following an adjournment, after which, the applicant withdrew the substantive application. There was no Court order that the parties seek to resolve the issues along the lines proposed by the applicant, nor any order indicating that the applicant's contentions had been found to be correct or well-founded. As noted in *Ford v First National Real Estate Network Ltd*, in similar circumstances:[11]

> ... [there is the] general principle that the party who fails with respect to a proceeding should pay costs to the party who succeeds. Because this matter did not proceed to trial, neither party has succeeded or failed. The plaintiff has succeeded in that it has, by the second defendant's actions, obtained at least part of the outcome which it sought. That, however, is not sufficient to put the plaintiff in the category of a successful plaintiff. The outcome does not carry with it any implication that the first defendant has been unsuccessful.

[26] I accept, without assessing the merits that the applicant has achieved success in the sense that he achieved what he wanted. I also find that the respondents have been successful in avoiding court proceedings. Both parties success was achieved out of Court. Importantly, both parties adopted a spirit of compromise by agreeing to try and resolve matters out of court. This was to the benefit of everyone.

[27] Given both the applicant and the respondents achieved a degree of success I find that there should be no costs award and costs should lie where they fall. As such there is no need for me to consider the question of quantum.

Outcome

[28] The application for costs is dismissed.

Pronounced at 2.15pm in Rotorua, this 8th day of August 2016

C T Coxhead
JUDGE

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[11] *Ford v First National Real Estate Network Ltd* (2006) 18 PRNZ 432 (HC).