

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT**

A20130007857

UNDER	Section 79, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Tiroa E and Te Hape B Trusts
BETWEEN	WAYNE GLEN HOANI KATU Applicant
AND	HARDIE PENI Respondent

Judgment: 7 September 2016

RESERVED JUDGMENT OF JUDGE C T COXHEAD AS TO COSTS

Introduction

[1] On 7 September 2015 I dismissed Mr Katu's application for the removal of Mr Peni from his role as trustee of the Tiroa E and Te Hape B Trusts (the Trusts).¹ Mr Peni now seeks an order for costs to recover 75 per cent of his legal expenses from Mr Katu.

Submissions on behalf of Mr Peni

[2] Mr Peni's arguments in support of his application for costs are set out in his second set of submissions dated 13 April 2016.

[3] Counsel submits that the law on costs as applied in the Māori Land Court is as set out in the Māori Appellate Court decision of *Samuels v Matauri X Incorporation*.²

[4] It was submitted that the application to remove Mr Peni as trustee was unsuccessful and no breach of trust had been established. The proceedings were difficult and hard fought, the allegations and evidence were detailed and specific, and the applicant had been represented for part of the proceedings. It is submitted that the case advanced by the applicant was critical of Mr Peni and the stakes were higher because the application related to financial matters.

[5] Counsel submits that the applicant did not seek to deal with this matter on the basis of the Court facilitating an ongoing and amicable relationship. Instead the application was advanced on a very adversarial basis, akin to normal litigation in the High Court. On this basis, the application can be distinguished from the others that were presented at the hearing.

[6] According to Mr Peni, the applicant continued with the application despite signs that the likelihood of success was not high. Mr Katu was aware of several factors relevant to the merits of the application including:

¹ *Katu v Peni – Tiroa E and Te Hape B Trusts* (2015) 105 Waikato Maniapoto MB 167 (105 WMN 167).

² *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) at [9]-[10].

- (a) A report by KMPG had found there were administrative issues only and no instances of fraud or illegality;
- (b) Mr Peni has reimbursed certain funds as recommended by KPMG;
- (c) Mr Peni was re-elected at the SGM in 2013; and
- (d) All payments to Mr Peni were made by the Trust and authorised by the trustees or another trustee.

[7] In light of these factors, Mr Katu had a number of opportunities between October 2013 and June 2015 to reconsider and withdraw his application but chose to continue with a contested hearing. It is therefore submitted that costs should follow the event.

[8] Regarding quantum, counsel submitted that it is appropriate to use the District and High Court scales in determining the level of costs to be awarded. The application was advanced on an adversarial basis and allegations of breach of trust or matters relating to trustees are ordinarily dealt with by the High Court. It was submitted that these proceedings are analogous to an application to the High Court under its inherent jurisdiction or pursuant to the Trustee Act 1956.

[9] Counsel submitted that the appropriate category for these proceedings is 2B on the basis that they were of average complexity. Counsel's written submissions include a table setting out the amounts recoverable for the District and High courts in category 2B, and a calculation of High Court costs for category 2A. However, because the scale costs exceed the amounts invoiced, counsel submits that a proportionate approach is appropriate. The full cost invoiced to the respondent is shown in the invoices submitted by counsel to be \$14,959.21. Taking into account a discount of \$1,132.50 for attendances related to trust issues or other applications before the Court, the respondent seeks to recover 75 per cent of the costs charged to Mr Peni, which he calculates as \$10,949.40.

[10] Mr Peni challenges the allegation made in Mr Katu's submissions of 29 April 2016 that he has breached his duties as a responsible trustee. The Court did not find that Mr Peni had breached his duties as a trustee and it is not for the parties in making submissions for

costs to attempt to re-litigate the substance of the case. The Court also found that Mr Peni's actions did not put the Trusts directly at risk and there had been no detriment to the Trusts.

[11] Furthermore, responding to Mr Katu's submission that his actions had implications for the reputation of the Trusts, counsel submitted that this is merely uncorroborated speculation. Counsel noted that the Court had found that the Trusts were not put at risk through the various process-related issues. The issue of land-owner support for the application is not relevant to the issue of costs and there is no evidence for this support as claimed by Mr Katu.

[12] The applications advanced by Mr Peni did not add to the cost of defending Mr Katu's application and this is not relevant to the question of whether Mr Katu ought to pay costs. Minimal time was recorded for Mr Peni in relation to the other applications and these were accounted for in calculating the costs sought by Mr Peni.

[13] The fact that Mr Katu has paid his own costs should not excuse him from paying an award of costs where such an award ought to follow the event. In summary, it is submitted that Mr Peni is out of pocket because of an unsuccessful application advanced by Mr Katu.

Submissions by Mr Katu

[14] Mr Katu agrees that the Court has an absolute and unlimited discretion as to whether to grant costs, and if so, the quantum to be granted. However, the applicant submits that s 79 of Te Ture Whenua Māori Act 1993 (TTWMA) and *Samuels v Matauri X Incorporation* (and the cases cited therein) demonstrate that while costs normally follow the event, sometimes an award of costs will be inappropriate and the Court should consider what is just in the circumstances. In doing so, the Court should have regard to matters such as the nature and course of the proceedings, the importance of the issues, the conduct of the parties, and the merits of the claim.

[15] Mr Katu submits that the Court should exercise its discretion to decline Mr Peni's application for costs. However, if the Court is minded to award costs, he submits that the quantum should be at the lowest end of the scale, at ten per cent, and certainly should not be the 75 per cent sought by the respondent.

[16] Mr Katu submits that Mr Peni has clearly breached his duties as responsible trustee, and that both the Court and the respondent have accepted that this occurred. The respondent had used the Trusts' credit card which was a breach of their policy, he had used the card inappropriately and contrary to the bank's policy. The KPMG report had also identified many instances where the respondent's expense claims were not properly approved or were incomplete, and Mr Peni himself had acknowledged that he claimed expenses inappropriately.

[17] Mr Katu submits that there was merit in bringing these issues to the Court's attention. The Court's findings and Mr Peni's acknowledgement of inappropriate behaviour show that although the Court found that these matters were "not sufficient to warrant the drastic removal" of Mr Peni as a trustee per s 240, there was merit in that the applicant sought accountability and transparency in relation to the respondent's breach of trustee duties. Mr Katu submits that the Court's findings and Mr Peni's acknowledgements are enough to warrant the exercise of the Court's discretion to decline the application for costs.

[18] According to Mr Katu, this type of behaviour has serious implications for the Trusts' reputation with creditors and beneficiaries. The land-owners supported the application and Mr Peni's conduct in bringing his own proceedings to remove four other trustees contributed to the litigious nature of the proceedings by adding to the time, energy and resources expended in the litigation. Mr Katu paid for his own legal costs in respect to this matter. Therefore the respondent should pay for his own legal costs.

[19] Mr Katu submits that overall the proceedings brought by the applicant have benefitted the trust because the respondent and the other trustees are now on notice regarding their duties as to the use of trust assets and their own personal use, and about the need to adopt appropriate processes and policies for claiming expenses. The Court was able to encourage a way forward and provide timely advice to a trust in disarray. The trust was advised that it had to attempt to resolve governance and operational matters for itself and that there are dangers that arise when trustees are fractionated.

[20] Mr Katu asks the Court to exercise its absolute and unlimited discretion to decline the respondent's application for costs. It is submitted that an award of costs is inappropriate in this set of complex and tumultuous proceedings. Mr Katu believes there was merit in his

seeking accountability and transparency in relation to Mr Peni's breach of trustee duties as found by the Court, and as accepted by Mr Peni himself. Furthermore, the respondent added to the difficult and hard-fought nature of the proceedings by applying for the removal of four of the other trustees. It is submitted that in these circumstances, it is just that the parties bear their own costs.

The Law

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

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.

...

[22] 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.³

Should costs be awarded?

[23] Mr Peni seeks costs on the basis that the application for his removal was unsuccessful.

[24] The Court found, and Mr Peni acknowledged, that he had claimed expenses inappropriately and it may not have been prudent for Mr Peni to act in the manner that he did. However, he had not deliberately misled the Trusts or used Trust monies for his own benefit. While it was evident that there had been some inappropriate behaviour by Mr Peni, these actions did not put the Trusts directly at risk, nor had those actions been to the detriment of the Trusts.

³ *Samuels v Matauri X Incorporation – Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) at [9].

[25] I found the claims concerning the credit card, fuel card and vehicle usage could not be sustained. I also found that given Mr Peni had repaid all expenses claimed improperly there was no basis for the claim concerning expenses. I therefore dismissed the application to remove Mr Peni as trustee.

[26] These proceedings were put on the basis of normal civil proceedings, there was some complexity to the matters and the allegations and evidence were detailed. The applicant had been represented for part of the proceedings and the respondent was also represented.

[27] I am of the view that costs should be awarded.

Quantum of costs

[28] Counsel for Mr Peni provided a comparison of what the respondent would potentially receive in costs if the matter were before the High Court on a 2A (\$11,646.00 including disbursements of \$1,508.00) or a 2B basis (\$19,610.00 including disbursements of \$1,508.00).

[29] It is noted that the costs the respondent could potentially receive in the High Court exceeds the amounts invoiced. Therefore, counsel seeks to recover 75 per cent of the costs charged to Mr Peni in the amount of \$10,949.40.

[30] Mr Katu submits that if costs are to be awarded the quantum should be at the lowest end of the scale, at 10 per cent, and certainly should not be at 75 per cent set by the respondent.

[31] In my view it is understandable (but not necessarily acceptable), that when faced with the KPMG Report, expense claims and vehicle issues, that Mr Katu would seek to bring these proceedings. It is reasonable that Mr Katu would have sought to keep the trustees accountable.

[32] However, there were a number of occasions when matters could have been resolved internally without the need for Court proceedings.

[33] In my view a high quantum in terms of costs would do nothing to promote or encourage better relations between Mr Peni and his supporters, and Mr Katu, and those who supported him and the application. A high award of costs will simply fuel the strained relations between Mr Peni and Mr Katu, and the Trustees and Mr Peni. The ongoing tensions between Mr Peni and Mr Katu and the Trust dissuade me from imposing costs at the higher end of the scale.

[34] I think that an award of 40 per cent of the costs charged to Mr Peni (discounting for attendances related to Trust issues or other applications before the Court) is appropriate in these circumstances.

Decision

[35] Based on the information provided to the Court, the total cost to Mr Peni, including GST and disbursements but excluding \$1,132.50 as costs relating to other applications, was \$13,826.70. A 40 per cent contribution to Mr Peni's costs would equal \$5,530.68. I consider this amount to be a reasonable contribution to Mr Peni's costs in these circumstances.

[36] Pursuant to s 79 of Te Ture Whenua Māori Act 1993 I order that the applicant (Mr Katu) is to pay \$5,530.68 in contribution to Mr Peni's costs, including disbursements and GST.

[37] A copy of this decision is to be sent to all interested parties.

Pronounced at 9.05am in Rotorua on this 7th day of September 2016.

C T Coxhead
JUDGE