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

**A20130005807**
**A20130005808**

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| UNDER | Sections 19(1)(a) and 20 of Te Ture Whenua Māori Act 1993 |
| IN THE MATTER OF | TE PURU NO 5 BLOCK |
| BETWEEN | TUHAITI TE WANI AND MATEKINO GAYE RUARANGI THORP<br>Applicants |
| AND | JIMMY PETERS<br>Respondent |

Hearing: 27 November 2013 (69 Waikato Maniapoto MB 279-304)
10 September 2014 (86 Waikato Maniapoto MB 119-142)
19 November 2014 (90 Waikato Maniapoto MB 81-103)
(Heard at Thames)

Decisions: 10 December 2015 (112 Waikato Maniapoto MB 49-68) - Reserved Decision No 1
6 May 2016 (119 Waikato Maniapoto MB 275-280) - Reserved Decision No 2

Appearances: Mr C M Bidois, counsel for the applicants
Mr P F Majurey, counsel for the respondent

Judgment: 03 August 2016

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**RESERVED JUDGMENT (NO. 3) OF JUDGE S R CLARK**

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## Introduction

[1] These proceedings have thus far produced two reserved judgments. In the first I reached the position that the trustees of the Te Puru No 5 Block were estopped from denying Jimmy Peters a right to occupy part of the block. That right however was conditional upon Mr Peters paying "rent" of $350.00 per annum and his portion of rates.[1] I went on to express reservations about the accuracy of the quantum evidence filed by the applicants and directed that they file further evidence on that issue.

[2] In the second decision I assessed the quantum evidence filed by the applicants. I arrived at a point whereby I fixed the amount owing by Mr Peters to the trust at $6,304.48. I made it clear that his right to occupy the block depended upon him paying the arrears and directed that he do so by 5.00pm, Friday 3 June 2016.[2]

[3] On 7 June 2016, counsel for the applicants filed a memorandum indicating that the sum of $6,310.00 had been deposited into the trust bank account. In the same memorandum, counsel indicated that they were seeking instructions with respect to costs.

[4] I issued a direction to the parties on 13 June 2016 referring to the fact that the applicants had been in receipt of Special Aid funding since November 2014. I opined that the Court would not normally grant costs in favour of a party who was in receipt of Special Aid funding, although in exceptional circumstances that may occur.

[5] I directed the filing of a memorandum on behalf of the applicants no later than 4.00pm, Tuesday 21 June 2016. Counsel for the respondent was given until 4.00pm, Tuesday 5 July 2016 to file any reply.

[6] Counsel for the applicants filed a memorandum on 21 June 2016 seeking an award of 50 per cent of their costs incurred prior to the grant of Special Aid funding. In practical terms the applicants seek $488.75.[3]

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[1] *Te Wani v Peters – Te Puru No 5 Block* (2015) 112 Waikato Maniapoto MB 49 (112 WMN 49).
[2] *Te Wani v Peters – Te Puru No 5 Block* (2016) 119 Waikato Maniapoto MB 275 (119 WMN 275).
[3] Counsel for the applicants attached a tax invoice dated 29 November 2013 to his memorandum. The invoice totals $977.50 including GST, 50 per cent of which is $488.75.

[7] Counsel for the respondent filed submissions on 8 July 2016 opposing those costs and submitting that they should "lie where they fall".

[8] In this decision I consider whether or not the applicants are entitled to an award of costs incurred prior to a grant of Special Aid.

**Applicants' submissions**

[9] Counsel for the applicants set out six reasons as to why they are entitled to costs, in summary they are:

a) The applicants were the successful party and are entitled to a reasonable contribution towards their costs;

b) The litigation in these proceedings was not dissimilar to litigation in the ordinary courts and the same cost principles should apply;

c) The respondent had, over a period of years, enjoyed the use of money that he was ultimately ordered to pay, without interest;

d) The costs were reasonably and actually incurred, in order to comply with a direction made by His Honour Judge Coxhead at a hearing on 27 November 2013;[4]

e) The respondent's prolonged refusal to pay rental/rates apportionments was an exceptional circumstance and had an effect on other licence holders who had also refused to pay;

f) A modest award of costs would demonstrate to other owners in occupation, that those who breach the terms of occupation can expect to pay something over and above the simple arrears amount.

[4] 69 Waikato Maniapoto MB 297 (69 WMN 297).

**Respondent's submissions**

[10] The respondent submitted that:

a) The applicants had adopted a scatter gun approach throughout and continually changed their position;

b) In contrast, the respondent's position was consistent throughout;

c) The Court actually found in favour of the respondent on a majority of issues;

d) The applicants' quantum evidence was inaccurate and sought to overcharge the respondent, albeit unwittingly;

e) The respondent had paid the arrears prior to the expiry of the due date;

f) The applicants only sought to outline one exceptional circumstance which was not supported by evidence. Ultimately the applicants ran their case in a way that wasted time and costs through unmeritorious and hopeless arguments.

**Legal principles**

[11] Section 79(1) of Te Ture Whenua Māori Act 1993 ("the Act") is relevant. It reads as follows:

> **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.

[12] Section 79 provides the Māori Land Court with a broad jurisdiction to grant costs in any proceedings. The leading authorities are *Nicholls v Nicholls – Part Papaaroha 6B*

*Block*,[5] *Riddiford v Te Whaiti*,[6] *Manuirirangi v Paraninihi Ki Waitotara Incorporation*,[7] *De Loree v Mokomoko – Hiwarau C*,[8] and *Samuels v Matauri X Incorporation*.[9]

[13] From those cases the following principles can be identified:

a) The Court has an unlimited discretion as to costs;

b) Costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;

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;

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 at the discretion of the Judge, but there is no invariable practice;

e) An award of costs at the level of 80 per cent 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 party's legal situation, the degree of success achieved by the respondent and the time required for effective preparation;

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[5] *Nicholls v Nicholls – Part Papaaroha 6B Block* [2011] Māori Appellate Court MB 64 (2011 APPEAL 64).
[6] *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184).
[7] *Manuirirangi v Paraninihi Ki Waitotara Incorporation* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64).
[8] *De Loree v Mokomoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249).
[9] *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216).

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

g) Where the unsuccessful party has not acted unreasonably it should not be penalised by having to bear the full costs of his/her adversary as well as their own solicitor and client costs.

[14] In a determination of costs the Court takes a two stage approach. The first question is should costs be awarded? If the answer is yes, then the Court moves to consider the quantum.

**Costs and the Special Aid Fund**

[15] In *Wairoa District Council v Wairau – Kaiwaitau 7C 2B* costs were sought against a party who was in receipt of Special Aid funding. [10] In that case Acting Chief Judge Isaac, as he then was, drew an analogy between the Māori Land Court Special Aid fund and persons in receipt of legal aid funding. The Legal Services Act 2000 provided that costs should only be made against persons in receipt of legal aid funding in exceptional circumstances.

[16] Chief Judge Isaac held that it would be unwise to distinguish Māori Land Court Special Aid funding from the legal aid regime. He held there must be exceptional circumstances to justify an award of costs against a person in receipt of Special Aid funding.

[17] In *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamatā Incorporation,*[11] Judge Harvey was asked to consider an award of costs against parties in receipt of Special Aid funding. After referring to the *Wairoa District Council* decision, he held that a grant of Special Aid funding does not act as a shield against an award of costs.

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[10] *Wairoa District Council v Wairau – Kaiwaitau 7C 2B* (2009) 128 Wairoa MB 168 (128 WR 168).
[11] *Trustees of the Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamatā Incorporation* [2014] 319 Aotea MB 238 (319 AOT 238).

[18] Recently in *Gemmell v Gemmell – Mohaka A4 Trust*,[12] the Māori Appellate Court made comments about the two authorities referred to above. They confirmed the principle that Special Aid funding is not a shield against an award of costs. They went on to make an obiter comment doubting the correctness of an approach whereby costs can only be awarded against someone in receipt of Special Aid in "exceptional circumstances".

[19] In this case the applicants seek costs incurred prior to the grant of special aid. To date there are no authorities which discuss an award of costs in those circumstances.

[20] However when one considers the broad scope of s 79 and the unlimited discretion it bestows upon the Court, there appears to be nothing in principle which prevents a successful party from seeking costs incurred prior to a grant of Special Aid.

[21] One can well imagine a situation in which a party has conducted proceedings to a certain point and then as a result of their financial circumstances they need to apply for a grant of Special Aid. If that party is ultimately successful there appears to be no reason why they cannot seek a contribution towards those costs incurred prior to the grant of Special Aid. It may well be that in such a situation, there will be arguments as to whether or not any such funds should or could be charged in favour of the Chief Registrar of the Māori Land Court.[13] However in the circumstances of this case I am not required to determine that issue.

**Should an award of costs be made in favour of the applicants in this case?**

[22] The applicants seek an award of costs for 50 per cent of their costs incurred prior to the grant of Special Aid. In the circumstances of this case I decline to make a costs award in favour of the applicants.

[23] First, I do not agree with the applicants' characterisation of themselves as "the successful party". Whilst I ultimately found that Mr Peters owed the trust $6,304.48, many of the applicants' substantive arguments changed over the course of the proceedings and many did not succeed.

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[12] *Gemmell v Gemmell – Mohaka A4 Trust* [2015] Māori Appellate Court MB 657 (2015 APPEAL 657).
[13] The person responsible for the administration of the Special Aid Fund.

[24] The applicants initially argued that there was no occupation order, lease or written licence in place, at best Mr Peters had an oral contractual licence. Those arguments were defeated when, belatedly, a copy of the lease came to light.

[25] The applicants then argued that the lease document was not authentic; if it was authentic it was unlawful and invalid. Despite Mr Peters having occupied the block for a number of years and making part rental payments, the applicants also denied that an estoppel arose. I found that the lease was authentic, that it was signed ostensibly on behalf of all trustees, and although it was ultra vires the trust order then in place an estoppel arose in favour of Mr Peters. Pursuant to that estoppel I held that Mr Peters was entitled to remain in occupation subject to him paying rent of $350.00 per annum and his portion of rates.

[26] Although I ultimately found that Mr Peters owed the trust a sum of money, it was not clear what that sum was until such time that I issued my second reserved decision fixing the quantum. Following the quantum being fixed, Mr Peters then arranged for the arrears of rental to be paid to the trust. Given that those arrears have been paid, there currently exists no basis upon which I can make orders in favour of the applicants for the recovery of the land and/or a permanent injunction against Mr Peters.

[27] Second, there has been a lack of accuracy in some of the claims advanced by the applicants. One example is the evidence provided on the quantum issue. In the first reserved decision I recorded that the quantum evidence I had at that time was not accurate and I was unable to determine the amount owing by Mr Peters. Thus I directed the filing of further evidence on that point.[14]

[28] In the second reserved decision I assessed the quantum owing by Mr Peters. In doing so I had to examine four separate items of evidence filed on that point by the applicants. Many of the figures put before the Court varied. Initially the effect of the limitation period and the fact that the claims were for rating years (1 July – 30 June) rather than calendar years were not taken into account. In addition, rebates provided by Thames-

[14] *Te Wani v Peters – Te Puru No 5 Block*, above n 1, at [68] – [73] inclusive.

Coromandel District Council had not been taken into account. This required me to carry out my own assessment of quantum to arrive at the figure owing by Mr Peters.[15]

[29] Third, the applicants place particular emphasis on the fact that Mr Peters has "enjoyed the use of the money that he was ultimately ordered to pay without interest" and that Mr Peters' refusal to pay had an effect of encouraging other licence holders to not pay their rental.

[30] A difficulty with that argument is that it was not clear on what basis Mr Peters was entitled to occupy the block until the outcome of the first reserved decision was known. Then there was doubt as to what was the amount owing to the trust. The quantum was not crystallised until I issued my second reserved decision. Mr Peters can hardly be criticised for retaining money prior to the quantum issue being resolved.

[31] Furthermore there can be little complaint that Mr Peters has not paid interest when the provisions of the lease did not allow for the payment of interest and, I note, nor did the applicants ever claim interest in any of their proceedings. This Court has no jurisdiction to make an award of interest when it is not claimed by the applicants.

[32] Fourth, the applicants submit that an award of costs is warranted to establish a precedent as an example to other licence holders who refuse to pay. How third parties might perceive an award of costs in this case, is not a ground warranting an award of costs.

[33] I accept that there is a degree of frustration on the part of the applicants in the positions adopted by Mr Peters. From their perspective he appeared to be in occupation of the block and was refusing to pay rental and rates for that privilege. He was, at least until he obtained counsel, attempting to run an argument that he could occupy at will, ignore the fact that the block was vested in trustees and he had a whakapapa right to do so. Such arguments were doomed to fail.

[34] However, as the case evolved it became clear that in 2004 the then trustees and Mr Peters attempted to formalise his occupation. Unfortunately that knowledge appeared to be lost following the resignation and replacement of trustees and was contributed to by the

[15] *Te Wani v Peters – Te Puru No 5 Block*, above n 2, at [7] – [14] inclusive.

lack of accurate records held by the trust, including the lease. Those circumstances however do not warrant an award of costs in favour of the applicants.

**Decision**

[35] There are no grounds to award costs in favour of the applicants for those costs incurred prior to the grant of Special Aid.

[36] This now concludes applications A20130005807, the s 19(1)(a) injunction proceedings and A20130005808, the s 20 recovery of land proceedings. Those applications are now dismissed.

Pronounced in open Court at 12.05 pm in Hamilton on the 3rd day of August 2016.

S R Clark
**JUDGE**