

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2011-485-821
[2022] NZHC 393**

UNDER	the Marine and Coast Area (Takutai Moana) Act 2011)
IN THE MATTER OF	an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	Ngāti Pāhauwera Development Trust Ngāti Pārau Ngāi Tahu ō Mōhaka Waikare Maungaharuru-Tangitū Trust (MTT)

On the papers:

Counsel: R N Smail and E A James for Ngāti Pāhauwera
K M Anderson and M J Dicken for MTT

Judgment: 8 March 2022

**JUDGMENT OF CHURCHMAN J
(COSTS)**

Introduction

[1] On 27 May 2020, I struck out part of an application for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) made by the Ngāti Pāhauwera Development Trust (Ngāti Pāhauwera), following an application by the Maungaharuru-Tangitū Trust (MTT). I reserved the issue of costs, inviting the parties to settle it themselves, expressing the preliminary view that this case might be one where costs should lie where they had fallen.

[2] On 10 June 2020, MTT applied for costs. That application is opposed by Ngāti Pāhauwera. It is therefore necessary to deal with the costs application. I apologise for the oversight which has resulted in the delay in issuing this decision.

[3] The strike-out application related to a map included within a memorandum filed by Ngāti Pāhauwera on 13 December 2018, labelled “Ngāti Pāhauwera High Court Application Area”. The area detailed in the map was larger than the boundaries detailed in their original application made in 2017.

[4] I concluded that the part of the Ngāti Pāhauwera’s application that comprised the extended application area should be struck out. This amendment effectively was a fresh cause of action that was sufficiently and clearly statute-barred to the point that it could be struck out as an abuse of process under s 107(3)(d) of the Act and r 15.1(1)(d) of the High Court Rules 2016 (HCR).¹ The amendment was also struck out on the basis that it was likely to cause undue prejudice and delay under s 107(3)(b) and r 15.1(1)(b).²

Positions of the parties

MTT

[5] MTT submit that reasonable costs should be awarded to MTT as it was the successful party. The Court found that the purported extension of Ngāti Pāhauwera’s application area was an abuse of process. Counsel rely on the High Court Rules, and the fundamental proposition that a Court is to apply the regime in the absence of some reason to the contrary.³ MTT seek to recover a portion of the time and resources committed to the strike out application, and rely on the fact that they did not in their conduct contribute unnecessarily to the time or expense of the overall proceedings. I accept that. Counsel for MTT also submit that none of the reasons for which the Court may refuse to make an order for costs apply to the current proceedings. For the reasons set out below, I do not accept that.

¹ *Re Ngāti Pāhauwera (strike-out application)* [2020] NZHC 1139 at [4].

² At [4].

³ *Manakau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, at [7].

[6] Ngāti Pāhauwera opposes the costs application for several reasons, and also argues that there are errors in MTT's submitted schedule of costs.

[7] Counsel submit that litigation under the Act has been recognised as raising matters of general public importance, including the relationship between tikanga Māori, common law and statute.⁴ As the number of substantive applications heard by the Court is still low, this status of general public interest has not been lost. The High Court Rules provide for a Court not imposing costs where the proceeding concerns a matter of genuine public interest beyond the interests of the particular unsuccessful litigant.⁵

[8] It is submitted that the circumstances of the strike-out application were novel, being the first case under s 107 of the Act to consider an amended application after the permissible filing date. As such, the guidance provided by the Court is of general importance beyond the interests of the litigants in question. Ngāti Pāhauwera refers to the presence of funding provided to applicants by Te Arawhiti (the Office for Māori Crown Relations) as evidence of the public interest aspect of the proceedings.⁶

[9] Counsel also argue that the application of normal costs rules may discourage litigation under the Act, thereby undermining the purposes of the Act. These purposes include providing for the exercise of customary interests in the marine and coastal area, recognising the mana tuku iho of tangata whenua, and acknowledging Te Tiriti o Waitangi.⁷

[10] In the alternative, counsel argue that if MTT is entitled to costs then their schedule of costs has a number of errors in it that mean the relevant amount is somewhat less than what is claimed, and or that the costs should be reduced by 50 per cent for the same reasons as noted above.

⁴ This is a developing issue for the Senior Courts, particularly where the takutai moana is concerned. See *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

⁵ High Court Rules 2016, r 14.7(e).

⁶ Ngāti Pāhauwera has received funding under this scheme.

⁷ Marine and Coastal (Takutai Moana) Act 2011, s 4.

Relevant law and analysis

Relevant law

[11] The rules relating to costs in civil proceedings are found in the High Court Rules 2016. Rules 14.1–14.22 apply generally to every civil proceeding and to each “step” in the proceeding. Rule 14.1 provides:

14.1 Costs at discretion of court

- (1) All matters are at the discretion of the court if they relate to costs—
 - (a) of a proceeding; or
 - (b) incidental to a proceeding; or
 - (c) of a step in a proceeding.

[12] The principles governing the exercise of the general discretion given by r 14.1 are now well established.⁸ Questions of costs are ultimately a matter of discretion, the overall objective being to achieve an outcome that best meets the interests of justice. The discretion is not unfettered – it is qualified by the applicable costs rules (rr 14.2–14.10) and must be consistent with established principles. The costs regime is of a regulatory character and it is important that its integrity be maintained. There is accordingly a strong implication that the Court is to apply the regime in the absence of some reason to the contrary. Any departure must be a considered and particularised exercise of the discretion. Although the Court does not need to give reasons for a costs order that applies the regime, reasons (albeit brief) must be given for any departure. There is a presumption that costs on an opposed interlocutory application are to be fixed in accordance with the normal costs rules unless there are special reasons to the contrary.⁹

[13] Rule 14.2(1) is also relevant. It sets out the principles applying to determination of costs. Generally, the party who fails with respect to a proceeding or

⁸ Those principles emerge from *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305, (2012) 21 PRNZ 186 at [7] and [16]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606, (2004) 16 PRNZ 1047 (CA) at [21]–[24] and [28]; *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA) at [27]; and *Kinney v Pardington* [2021] NZCA 174 at [1].

⁹ Rule 14.8(1).

an interlocutory application should pay costs to the party who succeeds.¹⁰ An award of costs should reflect the complexity and significance of the proceeding.¹¹ Costs are to be assessed by applying the appropriate daily recovery rate to the time considered reasonable for which step reasonably required in relation to the proceeding or interlocutory application.¹² An appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding.¹³

Discussion

[14] I have previously discussed the principles relating to the award of costs under the Act and stated:¹⁴

It is entirely possible that there may be a sound public policy basis for not awarding costs in relation to a substantive application for an order under the Act itself, but the situation where an applicant files an interlocutory application to advance its own position that has significant potential detriment to the position of other applicants is different. Where parties are needlessly put to expense in defending an application which potentially could have produced outcomes adverse to them, they are entitled to apply for costs.

In addressing cases under the Act, the Court is constantly reminded by applicants of the limited funds available to pursue applications under the Act. The Court is also frequently reminded of the difference between the actual cost of running litigation and the amount of reimbursement available. Applicants should not have to expend their limited funds defending interlocutory applications that should not have been brought.

[15] An argument against an award of costs is that applicants under the Act have to come to Court to confirm their entitlement to rights that were guaranteed to them under the Treaty of Waitangi/Te Tiriti. It is argued that it would be contrary to the purposes of the Act if applicants doing so opened themselves up the possibility of having costs imposed upon them in the event of failure. It can be argued that a strict regime of costs following the event would tend to “mitigate against access to the Court”.¹⁵

¹⁰ Rule 14.2(1)(a).

¹¹ Rule 14.2(1)(b).

¹² Rule 14.2(1)(c).

¹³ Rule 14.2(1)(d).

¹⁴ *Re Collier* [2020] NZHC 51 at [46]-[47].

¹⁵ *Ahitapu – Trustee of Rawhiti 3B2 – Rawhiti 3B2* (2000) 5 Taitokerau Appellate Court MB 206 (5 APWH 266), as cited in *Edwards v Tatere – Mangatainoka No 1BC No 2C1* (2018) 186 Waiariki MB 44-60 (186 WAR 44) at [61].

[16] Balanced against this position in the current proceedings is the fact that Parliament has legislated explicitly regarding the date in which applications were due to be filed under the Act.¹⁶ That is one of the reasons for which the strike-out claim in the present proceedings was successful.¹⁷

[17] It is necessary to check the rationale for an award of costs against the purposes of the Act. I have stated previously:¹⁸

The durability of this legislation, and this purpose, is weakened if impermissible material changes are allowed to be made to applications under the Act after the limitation period has long since passed, because it may undermine the applications of other whānau, hapū, and iwi.

[18] The same principles that apply to substantive proceedings are not as persuasive in the context of an interlocutory application. I am therefore of the view that MTT are entitled to some costs in relation to this interlocutory application. The application they brought to strike out the larger map application was successful. I consider their application to fall within the same category of applications in *Re Collier*, in which both the High Court and Court of Appeal thought it just to award costs in respect of a failed interlocutory application in proceedings under the Act.¹⁹

[19] I am also drawn to this conclusion by the principle that so far as possible the determination of costs should be predictable and expeditious.²⁰ While the determination of costs in this matter has not proceeded expeditiously, predictability and consistency necessitate that there be some form of costs liability where an application falls into the same category as in *Re Collier*.

[20] However, there is some force in Ngāti Pāhauwera's submission that, because of the novelty of the Act and uncertainty about exactly how its provisions would be applied, there is a public interest in moderating any award of costs to have regard to these matters, as envisaged by r 14.7(e).²¹ The case did concern a matter of genuine

¹⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 100(2).

¹⁷ *Re Ngāti Pāhauwera (strike-out application)* [2020] NZHC 1139 at [72].

¹⁸ At [72].

¹⁹ See *Re Collier* [2019] NZHC 2479; and *Re Collier* [2020] NZCA 536.

²⁰ Rule 14.2(g).

²¹ See *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350 13 October 2021, in which the Court refused to award costs on an unsuccessful application on the basis that the proceeding concerned a matter of public interest. See also *New Zealand Climate Science*

public interest beyond the interests of the immediate litigant (given the quantity of applications under the Act yet to be heard by the Courts), and while the amended application was ultimately without merit, I am not of the opinion that Ngāti Pāhauwera acted unreasonably.

[21] In *Re Collier*, scale costs were reduced by 75 per cent for what I described as an “ill-conceived” interlocutory application. I also noted that, as the liability of parties for costs in respect of interlocutory applications in proceedings under the Act became more widely known, discounts from scale of this magnitude would not necessarily be appropriate. Ngāti Pāhauwera’s position in respect of this interlocutory application, although ultimately unsuccessful, could not be said to have been as ill-conceived as that of the applicant in *Re Collier*. Balancing that against the fact that liability for costs in respect of interlocutory applications under the Act has been spelt out clearly by the High Court in *Re Collier*, and confirmed by the Court of Appeal in the same case, justice can be done by awarding a similar discount of 75 per cent against 2B scale costs. I note the Court of Appeal’s view in *Re Collier* was that:²²

The Judge’s decision to award modest costs in favour of those parties who successfully opposed the interlocutory application was plainly within the scope of his discretion. No seriously arguable error of principle is identified.

Schedule of costs

[22] My calculation of the appropriate amount of costs calculated on a 2B basis, with the daily recovery rate of \$2,390 is:

Education Trust v National Institute of Water and Atmosphere Research Ltd [2013] NZCA 555 at [11].

²² *Re Collier* above n 19, at [23].

Step No.	Description	Time allocation	Total
22	Filing interlocutory application	0.6	1,434
25	Preparation by applicant of bundle for hearing	0.6	1,434
10	Preparation for first case management conference (including discussion about discovery)	0.4	956
11	Filing memorandum for first or subsequent case management conference or mentions hearing	0.4	956
13	Appearance at first or subsequent case management conference	0.3	717
24	Preparation of written submissions	1.5	3,585
28	Obtaining judgment without appearance	0.3	717
29	Sealing order or judgment	0.2	478
Disbursements		Filing fee for interlocutory application	200
Total			\$10,477

Result

[23] \$10,477 discounted by 75 per cent produces a figure of \$2,619.25. I therefore make an order for costs and disbursements on the strike-out application in the sum of \$2,619.25 payable by Ngāti Pāhauwera to MTT.

Churchman J

Solicitors:

Smail Legal Ltd, Auckland for Ngāti Pāhauwera

DLA Piper, Wellington for Maungaharuru-Tangitū Trust

Kāhui Legal, Wellington for Ngāti Pārau

Tamaki Legal Ltd, Auckland for Ngāi Tahu ō Mōhaka Waikare