IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2014-485-11177
[2019] NZHC 1440

UNDER	(in part) the Trustee Act 1956
BETWEEN	TONI JAMES DAVIS WAHO Plaintiff
AND	TE KŌHANGA REO NATIONAL TRUST Defendant

Hearing: On the papers

Counsel: F E Geiringer and J K Mahuta-Coyle for Plaintiff
N J Russell for Defendant

Judgment: 21 June 2019

JUDGMENT OF CLARK J
(Costs award)

Introduction

[1] In a judgment delivered on 18 December 2018 I concluded the plaintiff, Mr Waho, was entitled to indemnity costs.[1] The sum remained to be determined. The defendant Trust had resisted indemnity costs on a number of grounds, including that some of the costs claimed were unreasonably incurred. Because I had derived little assistance from the memorandum of submissions on behalf of the defendant, I referred the costs issue back to the parties with a request that the defendant:[2]

(a) identify the costs it considered to be unreasonable;

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1 *Waho v Te Kōhanga Reo National Trust* [2018] NZHC 3388 [*Costs liability judgment*].
2 At [34]; and [36]–[37].

(b) identify the respects in which Mr Geiringer's summary of the settlement discussions was said to be inaccurate; and

(c) disclose the full extent of its legal costs and those of Ms Olsen-Rātana who was originally the first defendant in the substantive proceeding.[3]

[2] Having considered the further materials submitted on behalf of both parties I have concluded Mr Waho is entitled to be indemnified for all of the costs he incurred over the period leading up to and for the purpose of this litigation. The costs, which were incurred between March 2014 and September 2017, total $549,221.33.

[3] In the remainder of this judgment I set out my reasons for reaching this view.

Background

[4] The background is intricate and fairly well covered in the substantive judgment. It is not necessary to rehearse that background here. The opening paragraphs of the costs liability judgment give sufficient context:

> [1] Until he was removed in 2014 the plaintiff, Toni Waho, was a trustee of Te Kōhanga Reo National Trust, a trust dedicated to the use and retention of Te Reo. The Trust Board decided to remove Mr Waho on the grounds he had brought the Trust into disrepute by, in particular, behind the Trust's back, going to Ministers with allegations of wrongdoing by Trust Board members and by members of the Board of Te Pātaka Ōhanga Ltd, the Trust's commercial arm.
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> [2] Mr Waho brought proceedings to obtain declarations that he did not bring the Trust into disrepute and that his removal was unlawful.
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> [3] …Mr Waho succeeded in establishing he was unlawfully removed from office and I made a declaration to that effect…Mr Waho seeks indemnity costs in the order of $549,000. The Trust submits costs should be ordered on a 2B basis.

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3 *Waho v Te Kōhanga Reo National Trust* [2018] NZHC 1935, (2018) 4 NZTR 28-035 at [103]–[104] [*Substantive judgment*].

Some preliminaries

[5] There has been no appeal from the substantive decision. It is relevant to record that fact as my findings about the conduct of the Board underlay the conclusions I reached in the costs liability decision.[4] For example:

> [22] As against the lethargic approach of the Trust Board to the serious issues confronting it at the time, Mr Waho acted reasonably and in pursuance of his duties as a trustee in commencing proceedings. Pursuant to their contractual and fiduciary duties the trustees were required to deal expediently with the Rākai allegations. Instead, they sought to remove Mr Waho for allegedly "making serious allegations to the Minister of Education" when in fact Mr Waho had advised ministers – quite correctly – that the Board had taken no collective action in response to the Rākai allegations. Indeed, the Minister of Education, the Hon Hekia Parata, and the Associate Minister of Education, the Hon Sir Pita Sharples, viewed Mr Waho's actions as a requirement of his trusteeship and relied on Mr Waho as someone on the Board in whom they could have confidence to act with integrity.

[6] I concluded Mr Waho's entitlement to be indemnified for his costs arose from the Trust Deed and s 38(2) of the Trustee Act 1956. For convenience I set out both the relevant clause in the Trust Deed and s 38(2).

[7] Clause 10.1 of the Trust Deed provides:

> **10. Indemnity**
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> 10.1 The Board members, Secretary, Te Whare Punanga Korero, and all officers of the Board shall be indemnified by the Board from and against all losses and expenses properly incurred by them in or about the discharge of their duties. No Board member shall be liable for any loss provided that the same does not arise from his or her own wilful default or personal dishonesty.

[8] Section 38(2) provides:

> A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust: provided that the court may on the application of the trustee allow such costs as in the circumstances seem just.

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[4] The fact there had been no appeal against the High Court judgment led the Court of Appeal to a similar observation in *Davis v White* [2017] NZCA 585, [2018] NZAR 226.

[9] I turn to consider the parties' competing contentions. In doing so I adopt the defendant's heads of argument.

Costs relating to the interlocutory application for interim relief

[10] The Trust's position is that this Court should decline to award indemnity costs in respect of Mr Waho's failed interlocutory application for interim relief. The Court of Appeal ordered,[5] and Mr Waho paid, the Trust's costs on a band A basis. Counsel for the Trust, Mr Russell, argues that to indemnify Mr Waho for the interlocutory costs would be to "cut across the jurisdiction of the Court of Appeal", effectively reverse the Court of Appeal's order and "undermine the purpose of the costs regime" pursuant to which the order was made.

[11] In terms of the effect of the interlocutory proceedings on the quantum that Mr Waho claims, the Trust estimates 2.5 per cent (or $31,100) of the Trust's total costs were incurred during the interlocutory proceedings ($22,577 before the High Court and $8,522 for the appeal).

[12] Mr Russell correctly submits that by "awarding costs at the final disposition" of the interlocutory proceeding the Court of Appeal has "drawn a line under the matter and … rendered final judgment for that aspect of the proceeding". But I do not agree that in the particular context of Mr Waho's entitlement, indemnification for the costs of the interlocutory proceeding risks undermining either the purpose of the costs regime or the Court of Appeal's jurisdiction.

[13] Mr Waho's entitlement to be indemnified sits outside the costs regimes under the High Court Rules 2016 and Court of Appeal (Civil) Rules 2005. Those rules give effect to the principle that a losing party must pay costs to a winning party.[6] The established principle of trust law that permits trustees to recover out-of-pocket expenses incurred in the discharge of their duties (a principle that has been the law

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5 *Waho v Olsen-Rātana* [2014] NZCA 612.

6 High Court Rules 2016, r 14.2(a); Court of Appeal (Civil) Rules 2005, r 53A(1)(a); and *Weaver v Auckland Council* [2017] NZCA 330 at [20].

since at least 1802, and is now codified in s 38(2) of the Trustee Act 1956)[7] is distinct from the litigation costs regimes under the rules of court.

[14] The Trust argues the only principled basis by which Mr Waho can seek indemnity for costs in relation to the interlocutory proceeding is to seek recall of the Court of Appeal's judgment. Relying on *Crawford v Edwards*[8] and *Sharma v Wati*[9] the Trust argues Mr Waho is barred from seeking to recover costs in respect of an application that has been finally concluded.

[15] The short point is that the issue at the heart of those cases concerned the time by which a party who wishes to claim the reserved costs of an interlocutory proceeding must do so. Edwards J decided it is too late to claim such costs after final judgment in the action has been given. I gain no assistance from those authorities. They do not concern any question of indemnity but only the manner by which, and the time within which, parties must make their applications for costs on interlocutory proceedings.

[16] The right of a trustee to indemnity extends to costs properly incurred in the execution of the Trust, that is, costs that have been both "honestly and reasonably incurred".[10] Any doubt is to be resolved in favour of the trustee.[11]

[17] I bear in mind Kós J's cautionary observation in *New Zealand Māori Council v Foulkes*: that excessive costs lie beyond the scope of indemnity. Every dollar paid in trustees expenses is a dollar denied to beneficiaries.[12]

[18] Equally relevant in this case is the principle that:[13]

> ... anything less than a full indemnity for costs properly incurred must leave the indemnitee with part of the liability for which the indemnifier is prima facie responsible. In the absence of a contrary indication it is not to be assumed that the parties intended such a result.

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7 See *Re O'Donoghue* [1998] 1 NZLR 116 (HC) cited in *Costs liability judgment*, above n 1, at [10].
8 *Crawford v Edwards* (1900) 18 NZLR 714 (SC) at 715.
9 *Sharma v Wati* HC Auckland CIV-2006-404-2976, 14 October 2008 at [11]–[15].
10 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Thomson Reuters, London, 2018) at 1151, citing *Re Beddoe* [1893] 1 Ch 547 (CA) at 562.
11 At 1151, citing *Easton v Landor* (1892) 62 LJ Ch 164 (CA) at 165.
12 *New Zealand Māori Council v Foulkes* [2015] NZHC 489 at [31].
13 *Beecher v Mills* [1993] MCLR 19 (CA) at 7–8.

[19] I concluded in the substantive judgment that Mr Waho acted "in conformity with the contractual and fiduciary obligation on each member of the Board".[14] The proceeding, therefore, was "brought by Mr Waho in accordance with his duties and in an attempt to restrain a breach of trust".[15]

[20] In this case, by operation of cl 10.1 of the Trust Deed and s 38(2) of the Trustee Act, I have determined Mr Waho is entitled to be reimbursed for out-of-pocket expenses incurred in the discharge of his trustee duties.

[21] Thus, in order for the Trust to demonstrate that Mr Waho is disentitled to be indemnified for the costs of the interlocutory proceeding it must show that the costs were not reasonably incurred. The threshold is high. The question is whether Mr Waho proceeded in an unreasonable manner in the interlocutory proceedings or whether he acted, for example, from an improper collateral motive.[16]

[22] Decisive against the defendant's position are the developments between the hearings in the High Court and Court of Appeal, and the reason the majority dismissed Mr Waho's appeal:

(a) Following a resolution by the Board of trustees on 27 August 2014 that Mr Waho had brought the Trust into disrepute, Mr Waho filed proceedings seeking interim relief to restrain the Board from removing him.

(b) The High Court dismissed Mr Waho's application for interim relief.[17]

(c) On appeal the Court of Appeal determined, by a majority, that the High Court had erred in its approach to the threshold requirement for removal.[18] Nevertheless, the appeal was decided against Mr Waho. That is because, by November 2014 when Mr Waho's appeal was heard, he had been removed from the Board. The balance of convenience was

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14 *Substantive judgment*, above n 3, at [103].
15 *Costs liability judgment*, above n 1, at [7].
16 *Re O'Donoghue*, above n 7, at 122.
17 *Waho v Olsen-Rātana* [2014] NZHC 2729.
18 *Waho v Olsen-Rātana*, above n 5, at [36].

> therefore determined against him with the result that Mr Waho's appeal was dismissed.[19]

[23] I regard the band A costs and disbursements which Mr Waho was ordered to pay as falling within the spectrum of out-of-pocket expenses in respect of which Mr Waho is to be indemnified. Mr Waho was unsuccessful at the interim stage only because he had been removed. But at trial Mr Waho established his removal from office was unlawful. As I have mentioned, the evidence showed:[20]

> Mr Waho had acted not only with a sense of personal integrity but in conformity with the contractual and fiduciary obligation on each member of the Board to disclose to relevant Ministers allegations of serious wrongdoing by TPO and trust Board members, and to take timely steps to address the allegations.

[24] The significance of those findings for the immediate issue is that the interlocutory application for interim relief was made in the discharge of Mr Waho's powers as a trustee. His position was reasonably taken and the cost of doing so is not to be borne by Mr Waho but by the Trust.

Should indemnity costs be offset?

[25] The defendant denies there is an evidential foundation upon which the Court can determine Mr Waho "properly incurred all of his legal expenses in performing his duties as a trustee".

[26] Further, the defendant contends that by raising a claim under cl 10.1 of the Trust Deed at the costs phase, rather than as part of the substantive claim, the plaintiff has deprived the defendant of the ability to make submissions or call evidence to contest the plaintiff's entitlement to an award under cl 10.1.

[27] The defendant submits the total indemnity costs awarded to the plaintiff should be reduced by $142,093, or by 25 per cent of the total legal fees incurred by the plaintiff. That sum is said to be made up of two amounts: $27,461, representing the

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19 At [43] and [49].
20 *Substantive judgment,* above n 3, at [103].

plaintiff's costs for the interlocutory proceeding; and $114,632, reflecting costs incurred by the plaintiff as a result of taking "unnecessary steps" in the proceedings.

[28] I have already dealt with, and determined, the argument that Mr Waho should not be reimbursed for the costs of the interlocutory proceeding. The remaining question under this head of argument, therefore, is whether costs should be offset by $114,632 to reflect the plaintiff's "unnecessarily" incurred costs.

[29] In the costs liability judgment I said there was no question in my mind:[21]

> … that Mr Waho is entitled to be indemnified for the costs of bringing a proceeding which had, as its ultimate end objective, the proper administration of a charitable trust …

[30] Once a Court has established an indemnity is available, any remaining discretion may only be exercised on public policy grounds or as part of an assessment as to whether the costs are objectively reasonable.[22] The Trust argues there should be a set-off because the plaintiff incurred costs for steps which the Trust says were unnecessary. The operative principle requires me to assess the reasonableness of the amount of solicitor-client costs incurred.

[31] The defendant identifies three particular steps as being unnecessary for the proceeding as a whole. Mr Russell submitted this was not a matter of whether the specific costs incurred by the plaintiff are of a reasonable amount but rather "whether a reasonable person would believe that it was necessary to take the particular step…and whether that step was properly or reasonably undertaken".

(i) *Costs for evidence of little value*

[32] The argument is that costs should be disallowed in relation to evidence that ultimately was not referred to in the substantive judgment, or was ruled inadmissible. Mr Russell submitted that some briefs of evidence appeared to have been of little assistance because they were not referred to in the substantive judgment. As well, the inclusion of briefs of evidence for Catherine Dewes and Lorraine Hale was

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21 *Costs liability judgment*, above n 1, at [26].
22 *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [35].

unnecessary and resulted in both sides incurring avoidable costs. While they were ruled admissible their necessity in the proceedings is "questionable" because the evidence appeared to repeat evidence contained in other briefs and they were not referred to in the substantive judgment.

[33] The same argument is made regarding the common bundle of evidence.

[34] Mindful of the fact these arguments are "equally applicable" to the defendant's own briefs of evidence and document bundles, the defendant submits the inclusion of its evidence was necessary to provide context and to respond to Mr Waho's claims that the defendants had misled the Serious Fraud Office (SFO) and Minsters of the Crown.

[35] The first point is that "evidence of little value" does not meet the test of unreasonableness. The test is not whether a reasonable person would believe it was necessary to take the particular step but whether the particular cost was reasonably incurred. Overly cautious, albeit honest conduct may be unreasonable but the trustee must only bear the expense of such conduct if it reaches the threshold of being "vexatious, oppressive, or otherwise wholly unjustifiable".[23] Mr Waho's decision to lead this evidence cannot be regarded as "unreasonable" in this sense.

[36] Nor can either party assume the evidence had no utility solely because that evidence was not expressly referenced in the judgment. My judgment was consciously (relatively) brief. As I noted in the overview:[24]

> As presented over the course of the hearing, in over 5500 pages of documentary evidence, in pleadings which continued to be amended during the hearing and in the oral testimony of witnesses, the factual background traces back over many years covering internal and external investigations and inquiries, suspicions and allegations and, at times bitter disputation. In this overview I set out only the key events leading to Mr Waho's removal.

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23 *Re O'Donoghue*, above n 7, at 121 citing *Re Chapman* (1895) 72 LT 66 (CA) at 68.
24 *Substantive judgment*, above n 3, at [6].

[37] And there were occasions where I decided the key issue did not require resolution of contested evidence;[25] or that it was not necessary to engage with the evidence on behalf of either party bearing on a particular point.[26]

[38] The point is that evidence taken as a whole may assist in providing context, or in reinforcing other evidence. Inferences as to the utility of evidence should not be drawn from a mere absence of comment about the evidence.

[39] Mr Russell further submitted the costs incurred in preparing the briefs of evidence from Dr Bryce Edwards and Morgan Godfrey should be disallowed as the evidence was ruled inadmissible. The Trust contends costs should be reduced by $7,790 to account for the inclusion of this unnecessary and unhelpful evidence.

[40] Beyond the fact that "unnecessary costs" are not the same as "unreasonable costs" the submission overlooks the fact that while the opinion evidence of those two putative witnesses was disallowed, I ruled that the documents to which both Mr Edwards and Mr Godfrey referred in their briefs could be received in evidence, and that Mr Geiringer was able to make submissions about them. The documents were in the public domain and had been included in the common bundle. There was no need for them to go in through witness briefs.[27]

[41] Overall, the preparation of this evidence was far from "unreasonable" and any cost incurred by the defendant in responding to the material presumably would not have been wasted because the documents associated with the briefs, and the submissions which Mr Geiringer was still to make, may have warranted a response from the defendant, even without the ultimate opinion evidence.

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25 At [19].

26 For example at [98], referring to the evidence which the plaintiff adduced to support his argument the Trust had not been brought into disrepute.

27 *Waho v Olsen-Rātana* Rulings of Clark J 1 August 2017 at [8]–[14].

(ii) *Costs incurred in preparing for the vacated 10 October 2016 fixture*

[42] The Trust's position is that both parties incurred unnecessary costs in preparing for the vacated 10 October 2016 trial. In vacating the fixture I did observe that both parties were in default of the timetable.

[43] Mr Geiringer attributed to the defendant substantial fault for the delay and abandonment of the 10 October 2016 date. While it was the plaintiff who requested the adjournment, the request is said to have been reasonable in circumstances where:

(a) the defendants filed and served their briefs of evidence (respectively) 25 and 26 working days late;[28]

(b) the first defendant's list of documents for inclusion in the common bundle was due on 8 July on 2016 but not provided until 30 September 2016 (12 weeks late and one week before the scheduled trial);

(c) the documents finally nominated by the defendants included hundreds of duplicates, hundreds of "plainly irrelevant" documents, and a large number listed with erroneous details; and

(d) Ms Olsen-Rātana nominated 637 documents for inclusion in the common bundle three working days before the plaintiff's opening submissions were due. She simultaneously provided late discovery of 96 documents all of which were to be included in the common bundle with no explanation offered as to the late discovery.

[44] An adjournment in the circumstances was virtually inevitable. The question is, who should bear the cost? I consider the costs were associated with steps taken in the proper execution of the plaintiff's duties and the plaintiff is entitled to be indemnified for those costs.

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[28] The reference to "defendants" is a reference to Tina Olsen-Rātana and the Trust.

[45] It is no answer to a claim for reimbursement of properly incurred costs to say "we too bore the costs of these litigation steps". Mr Waho, alone, bore the moral and financial burden of taking the very steps Ministers expected individual trustees to take and, indeed, expected the Board to take. The Hon Pita Sharples, Associate Minister of Education, said in evidence:[29]

> If anything, the fact that we knew we could rely on Mr Waho to act in a proper manner and raise these concerns with us was reassuring. It suggested that there was someone on the Board in whom we could have confidence to act with integrity. As we said in our letter, we viewed Mr Waho's actions as a requirement of his trusteeship.

[46] In addition to the heavy personal burden which Mr Waho bore (including reluctantly standing against his colleagues) he incurred necessary and therefore reasonable costs in respect of which the law requires him to be indemnified.

(iii) *Costs incurred in relation to withdrawn claims*

[47] The defendant submits the plaintiff incurred unnecessary costs in bringing claims that were ultimately withdrawn. In seeking to resist these claims the defendant incurred unnecessary costs that, but for the claims, it would not have incurred. These costs should not only be excluded from an award of indemnity costs but an allowance, it is said, should be made for the unnecessary costs the defendant incurred.

[48] The defendant argues that where a successful party's actions necessitate that certain steps be taken by the unsuccessful party, it "would be unreasonable and contrary to policy for the successful party to have the benefit of costs if that party's later actions render nugatory the steps undertaken by the unsuccessful party in response to the original actions". Mr Russell refers by way of example to r 14.7(f) of the High Court Rules.

[49] An allowance is sought in the sum of $103,725 (or approximately eight per cent of the defendant's total costs) to reflect the costs unnecessarily incurred by the defendants in defending those parts of the claim that were withdrawn. The two claims which the defendant submits should never have been made in the first place

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[29] *Substantive decision*, above n 3, at [74].

were that the defendants (the Trust and Ms Olsen-Rātana) misled the SFO and, misled responsible Ministers of the Crown in relation to allegations of wrongful acts against the Trust and Te Pātaka Ōhanga Ltd (TPO). The Trust complains that it was put to considerable expense in discovering SFO documents which ultimately were not necessary.

[50] Mr Waho had pleaded that the Board had not referred the Rākai allegations to the SFO for its investigation. I recorded in the substantive judgment "the evidence establishes Mr Waho was correct in making that claim … The Board was simply wrong, therefore, to resolve Mr Waho's 'serious allegations' were shown to be unfounded by the SFO investigation".[30] It might be thought that the only relevant documents would have been those which cast light on the question whether the Board had referred the Rākai allegations to the SFO. And, as Mr Geiringer observed, the documents that were discovered were almost entirely irrelevant to the issue raised in the statement of claim in relation to the SFO.

[51] Mr Russell relies on r 14.7(f) of the High Court Rules to support the Trust's position that costs may be refused to a successful party if the party has contributed unnecessarily to the expense of the proceeding by failing in any of the respects set out in r 14.7(f)(i)–(v).

[52] But r 14.7(f) is not relevant to the matters which this judgment concerns. Rule 14.7 creates exceptions to rr 14.2–14.5 so that, notwithstanding those rules, the Court may refuse to order costs, or may reduce costs otherwise payable, in the circumstances set out at r 14.7(a)–(g). Rule 14.6(1)(b) (indemnity costs) is the relevant rule in this matter. Rule 14.6 is self-contained and is not subject to the exceptions in r 14.7 upon which the Trust relies.

[53] The circumstances in which Mr Waho abandoned his allegation that the Board had misled Ministers require some mention.

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30 *Substantive judgment*, above n 3, at [95].

[54] On 10 May 2017, when Mr Waho was being cross-examined, he was asked whether it was his understanding that, as at the end of year 2017, no existing trustee would remain on the Board. Mr Waho was unaware of this important information.

[55] The revelation that all of the trustees would leave by the end of 2017 impacted on the relief sought in the statement of claim: that Ms Olsen-Rātana be removed and replaced, and such orders under the Trustee Act "as are expedient to serve the purposes of the Trust". There were arguments about whether the defendants had met their continuing discovery obligations. I requested that the Court be updated as to the position by way of affidavit.

[56] The point for present purposes is that leave was given to Mr Waho to amend his claim. Mr Geiringer observed at the time that the position was highly unsatisfactory; the case now had about it an air of "potential futility" because of the distinct possibility the trustees against whom Mr Waho sought supervisory orders might no longer be trustees when judgment was delivered. This was one of the many reasons for granting leave to amend. The amendment included discontinuance against Ms Olsen-Rātana, the first defendant.

[57] From that point, Mr McClelland's former role as counsel for the first defendant was at an end. Following the lunch adjournment the Court was advised the Trust was to be represented by Mr McClelland QC, Mr Russell and Mr Jones.

[58] That is the brief backdrop to the withdrawal of the claim against Ms Olsen-Ratāna and with it, the specific allegation that the Board had misled Ministers. In any event it is implicit in the substantive findings that Ministers had indeed been misled as to relevant facts:[31]

(a) Dr Sharples' evidence was that any allegations of financial impropriety were directly relevant to what was being discussed at the meeting with Ministers on 18 March 2014. Had the information been properly drawn to his attention the Ministerial statement would not have been issued in

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31 *Substantive judgment*, above n 3.

the form it took.[32]

(b) It was of particular concern that the Board itself had not raised the issues which Mr Waho raised in his letter to Ministers.[33]

(c) I regarded as misplaced the defendant's focus on Mr Waho's failure at a Ministerial meeting to draw their attention to his letter. The defendant's focus overlooked the only material point "which is that the Board was cognisant of issues that, at the very least, the Board should have brought to the Ministers' attention."[34]

[59] The Trust has not established that the costs associated with the making and withdrawal of these claims is remotely unreasonable or that indemnifying Mr Waho for the costs associated with the claims is contrary to public policy.

(iii) *The relevance of settlement discussions*

[60] The Court is asked to take into account, in its assessment of the "reasonableness" of Mr Waho incurring costs of this "magnitude", Mr Waho's efforts to settle the dispute. Initially, the defendant contended there were inaccuracies in Mr Geiringer's summary of the settlement discussions. In the costs liability decision I asked the defendant to identify the respects in which Mr Geiringer's summary of the settlement discussions was inaccurate. The Trust complains only that Mr Geiringer's summary excluded efforts by the defendants to settle the dispute.

[61] I was directed to correspondence between the parties. It is not necessary that I engage in the minutiae of the settlement discussions. Two points, however, have particular significance:

(a) Mr Waho offered to settle the dispute on terms more favourable to the Trust than those contained in the substantive judgment. The recent disclosure by the Trust of its legal expenses show that it incurred

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32 At [69].
33 At [71].
34 At [73].

approximately $1.8 million in legal fees after Mr Waho's settlement offer.

(b) The settlement offer by the defendant required Mr Waho to make a public statement retracting his allegations against the Board. He declined to do so. The Board would not agree to make any public statement contrary to the Board's position which was that Mr Waho had been removed because the Board considered he brought the Trust into disrepute. And it was unwilling to make any contribution towards his legal costs or offer any other compensation.

[62] I do not accept Mr Geiringer's broad submission that Mr Waho is entitled to indemnity costs "irrespective of the settlement offers he made". Had Mr Waho's settlement offers or refusals to accept settlement been demonstrably unreasonable, that may have impacted on the principle that he is otherwise entitled to be indemnified for his costs. But that is a hypothetical and not a point engaged in my assessment. Nothing before me suggests unreasonableness in Mr Waho's approach to settlement or the position he took during those discussions.

Indemnity costs for the costs proceeding

[63] Mr Waho also seeks costs incurred in the current costs proceeding, totalling $34,261.75. Seeking to enforce one's right to indemnity must be within the scope of Mr Waho's duties as trustee. The defendant has not disputed this, or argued otherwise. It follows Mr Waho is also entitled to be indemnified for these costs.

[64] I turn from the parties' particular contentions to make the following broad observations.

Observations

[65] Although it has been said that the time and other pressure on Judges leaves "room for robust judgment" as to the reasonableness of the costs claimed I have

scrutinised the costs and schedule of attendances attached to Mr Geiringer's memorandum.[35]

[66] Mr Geiringer's global invoice, covering a three-and-a-half year period, contrasted with Mr Mahuta-Coyle's invoices which detailed the hours spent and his charge-out rate. I conducted a comparative exercise taking as a base Mr Mahuta-Coyle's invoices and cross-referencing his areas of attendance to the same time periods covered by Mr Geiringer's invoice.

[67] At a fundamental level this exercise was unnecessary because the defendant does not claim there has been any improper charging of Mr Waho by his counsel. Rather, the broad area of grievance is that steps taken by Mr Waho were unnecessary and therefore contributed to unreasonable costs.

[68] There were one or two areas where it was unclear whether or not there had been a doubling up of attendances but standing back I had the strong impression that where Mr Mahuta-Coyle had undertaken the initial work in discrete areas (for example, seeking particulars) Mr Geiringer's role had been that of senior counsel supervising, reviewing and finalising the work.

[69] I have also borne in mind the level of costs incurred by the Trust. I recorded in the costs liability decision Dobson J's observation in *Williams v Waimate District Council* that the level of costs incurred by the unsuccessful party is a "potentially useful comparator in assessing the reasonableness of costs claimed by a successful party".[36]

[70] The defendant has advised that during the period commencing with the filing of the statement of claim until the close of proceedings on 11 September 2017 (or discontinuance against Ms Olsen-Rātana) costs were approximately:

(a) for the Trust $1,260,117; and

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35 *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (CA) at 191,887.

36 *Williams v Waimate District Council* [2013] NZHC 2922 at [84], cited at [37] of *Costs liability decision*, above n 1.

(b) for Ms Olsen-Rātana $581,731.

[71] The figures show the defendant 'outspent' the plaintiff by a significant margin. The magnitude of costs incurred by the defendant tend to support the reasonableness of the $549,221.33 incurred by the plaintiff.

Outcome

[72] Having brought before the Court a matter which was in the interests of the Trust to have brought before the Court Mr Waho is entitled to be indemnified fully for his expenses. The defendant has not discharged the onus on it of demonstrating Mr Waho's costs were unreasonably incurred.

[73] Mr Waho is also entitled to be indemnified for the costs of arguing this costs dispute which Mr Geiringer accurately described as "protracted". Mr Waho has been invoiced $34,261.75, being the total of Mr Mahuta-Coyle's invoice ($8,004.00) and Mr Geiringer's invoice ($26,257.75). It must be said, however, that both sets of invoices include charges unrelated to this costs dispute. For example, both counsel record attendances arising out of their review of the substantive judgment in July 2018 and, in Mr Geiringer's case, there are two or three attendances that pre-date delivery of the judgment. Although legitimate, and apparently minor attendances, those expenses were not incurred for the purpose of this costs dispute.

[74] Ultimately, however, the point must be that Mr Waho only becomes disentitled to be indemnified for those costs if they are unreasonable. The defendant did not raise any particular objection to these claims.

[75] I conclude, therefore, that the further sum of $34,261.75 (which includes GST) is for work covered by the indemnity and for which Mr Waho is to be reimbursed.

[76] The Trust notes it has already made an interim costs payment to the plaintiff of $270,000. I do not understand this to be disputed by Mr Waho. Accordingly, it is appropriate that this amount be taken into account when calculating the final quantum.

[77] The defendant is to pay the plaintiff's costs and disbursements of $583,483.08,[37] less the sum of $270,000 representing the payment already made to Mr Waho.

Karen Clark J

Solicitors:
Bennion Law, Wellington for Plaintiff
Chen Palmer, Wellington for Defendant

[37] The amount includes GST.