IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2014-485-11177
[2018] NZHC 3388

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

On the papers

Judgment: 18 December 2018

JUDGMENT OF CLARK J
(Costs)

Introduction

[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.

[2] Mr Waho brought proceedings to obtain declarations that he did not bring the Trust into disrepute and that his removal was unlawful.

[3] Judgment was issued on 31 July 2018.[1] Mr Waho succeeded in establishing he was unlawfully removed from office and I made a declaration to that effect.[2] I recorded Mr Waho's entitlement to costs but if the parties were unable to agree costs, counsel were invited to submit focussed memoranda. Memoranda have now been filed. Mr Waho seeks indemnity costs in the order of $549,000. The Trust submits costs should be ordered on a 2B basis.

[4] The issue arising from the parties' respective positions is whether Mr Waho is entitled to indemnity costs and, if so, in what amount.

The competing arguments

Mr Waho

[5] Mr Waho relies on cl 10.1 of the Trust Deed as entitling him to be indemnified by the Board against all losses and expenses incurred by him in the discharge of his duties as a trustee.

[6] Beyond the deed, Mr Waho identifies two further bases entitling him to indemnity costs:

(a) The Trustee Act 1956, s 38(2) of which provides for reimbursement to a trustee of all expenses reasonably incurred in the execution of the trusts or powers.

(b) An indemnity from trust funds is available to someone who brings before the Court a matter which it is in the interests of the trust to have brought before the Court.[3]

[7] In support of his argument that Mr Waho is entitled to indemnity costs, Mr Geiringer calls in aid the finding that Mr Waho acted "in conformity with the

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1 *Waho v Te Kōhanga Reo National Trust* [2018] NZHC 1935 [*Substantive judgment*].
2 At [104].
3 Citing application of that principle by the Supreme Court in *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354.

contractual and fiduciary obligation on each member of the Board".[4] The proceeding was, therefore, brought by Mr Waho in accordance with his duties and in an attempt to restrain a breach of trust by the Trust Board.

Trust's position

[8] The Trust resists Mr Waho's claimed entitlement to indemnity costs whether by virtue of the Trust Deed or otherwise. Mr Russell submitted any claim for indemnity under the provisions of the Trust Deed would require the Court to make determinations of fact, which would in turn need to be the subject of evidence about whether costs were properly incurred in the discharge of Mr Waho's duties as a trustee. At issue would be the plaintiff's interpretation of cl 10.1 and whether Mr Waho's action in taking the proceeding were costs "properly incurred" for the purposes of the clause. Mr Waho made no claim for compensation pursuant to cl 10.1 despite having had ample opportunity to do so. Nor has the Court heard evidence bearing on that issue.

[9] Mr Russell submitted the Court should award costs a 2B basis because the outcome in the High Court turned on a finding of fact rather than on a detailed argument and analysis of the law. As such, the proceeding should be considered to be one of average complexity requiring an average amount of time for each step. On that basis, the defendant estimates the quantum of costs is approximately $79,990.

Principles

[10] That trustees are permitted to recover out-of-pocket expenses incurred in the discharge of their duties is an established principle of trust law. As Hammond J observed in *Re O'Donoghue*,[5] that principle has been the law since at least 1802,[6] and is now codified in s 38(2) of the Trustee Act. 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

4 *Waho v Te Kōhanga Reo National Trust*, above n 1, at [103].
5 *Re O'Donoghue* [1998] 1 NZLR 116 (HC) at 120.
6 Citing Lord Eldon LC in *Worrall v Harford* (1802) 8 Ves 4 at 8.

> 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.

[11] Section 71 of the Trustee Act empowers the court to order the costs of any application under the Act be paid out of the property in respect of which it is made, "or to be borne and paid in such manner and by such persons as to the Court may seem just".

[12] In *Carmine v Ritchie*, Gilbert J observed it is well settled that a trustee, who is concerned that a power to remove a trustee has been exercised contrary to the best interests of the beneficiary, should apply to the Court for directions as to whether the purported removal was valid.[7] The trustee should place material facts before the Court and outline the nature or her or his concern. And, a trustee is entitled to an indemnity for costs reasonably and properly incurred in making such an application.[8]

[13] In *O'Keeffe v Jones*, Palmer J summarised the position in this way:[9]

> If a trustee is successful in litigation brought as a trustee, and their position was reasonably taken, costs would ordinarily be payable from the trust property. If a trustee is unsuccessful, and their position was not reasonably taken, they will not be payable from the trust property.

[14] Thus, although a trustee may be entitled to an indemnity, it will only be for costs reasonably and properly incurred.[10] The assessment of the reasonableness of costs is fact-dependent.[11] Not all costs incurred by a trustee are necessarily reasonable. As Lindley LJ observed in *Re Chapman*:[12]

> A trustee may be honest, and yet, from over-caution or some other cause, he may act unreasonably; and if… his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he thereby causes his *cestuis que trust* expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his *cestuis que trust*.

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7 *Carmine v Ritchie* [2012] NZHC 2279 at [3].
8 At [3].
9 *O'Keeffe v Jones* [2018] NZHC 2482 at [19] citing *Burnside v Burnside (No 2)* [2017] NZHC 1678 at [9].
10 *Re O'Donoghue*, above n 5, at [121].
11 At 121.
12 *Re Chapman* (1895) 72 LT 66 (CA) cited in *Re O'Donoghue*, above n 5, at 121.

[15] Costs are reasonably incurred if a reasonable observer would expect those costs to be incurred.[13] Reasonable costs are assessed by reference to the appropriate time for each step and median hourly rate reasonably applicable to it.[14] The result must be fair and just.[15]

[16] The principle that expenses must be properly incurred[16] —

> necessarily requires a trustee, if called upon, to demonstrate that the expenses arose out of an act falling within the scope of his trusteeship; whether it was something that his or her obligations required the trustee to undertake; and whether the expense incurred was, in all the circumstances, "reasonable".

[17] But, where a trustee's actions appear to be regular, the burden of proving unreasonableness falls on the party asserting unreasonableness.[17]

Is Mr Waho entitled to indemnity costs?

[18] 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.

[19] I am satisfied Mr Waho is entitled to indemnity costs, whether by operation of cl 10.1 of the Trust Deed or s 38(2) of the Trustee Act. Critical to my assessment of Mr Waho's entitlement to indemnity costs is the conclusion I reached at [103] of the substantive judgment:[18]

> The evidence has satisfied me that Mr Waho 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 the relevant Ministers allegations of serious wrongdoing by TPO and trust Board members, and to take timely steps to address the allegations. There was no objectively

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13 *Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859 (HC) at [205].
14 At [209].
15 At [205].
16 *Re O'Donoghue*, above n 5, at 121.
17 At 122.
18 *Substantive judgment*, above n 1, at [103].

> supportable factual foundation for the Board's assertion Mr Waho had brought the Trust into disrepute.

[20] Mr Waho filed proceedings on 28 August 2014. He had not, at that stage, been removed as a trustee. But, at a special meeting of the Board, a majority of members voted in favour of a resolution that Mr Waho had brought the Trust into disrepute and there was to be a further meeting to determine whether he should be removed.

[21] By his August 2014 claim Mr Waho sought to invoke the Court's inherent jurisdiction to supervise trusts and he sought the removal and replacement of Mrs Olsen-Rātana as a trustee or removal and replacement of all trustees. As well, Mr Waho sought an order restraining the Trust from removing him as a trustee without the leave of the Court.

[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.[19]

[23] Mr Waho also applied for an interim injunction restraining the Board from removing him as a trustee without the leave of the court, requiring the Board to inform him of all board meetings and to allow his participation as a board member. Mr Waho was unsuccessful in the High Court. By the time his appeal was heard in the Court of Appeal Mr Waho had been removed.

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19 *Substantive judgment*, above n 1, at [74].

[24] Mr Waho's appeal against the High Court's refusal to grant an injunction was unsuccessful. That is because the majority determined the balance of convenience against Mr Waho. His removal from the Board did not endanger his personal interests or place him at any personal disadvantage:[20]

> Instead, it allows him to pursue his allegations of wrongdoing by fellow trustees freed from the constraints of collective responsibility.

[25] Importantly, the majority expressed the view it was impossible to say at that early stage with the necessary degree of confidence that Mr Waho did not have a seriously arguable case he was wrongly removed.[21] And, indeed, it transpired Mr Waho did, in fact, have a successful case.

[26] There is no question in my mind 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 which is "a trust for the promotion or advancement of social purposes".[22]

Are the costs claimed reasonable?

[27] I am unable to assess the reasonableness of Mr Waho's costs on the basis of the submissions and material before me.

Parties' positions

[28] In his 10 page memorandum of submissions in support of an award of indemnity costs, Mr Geiringer addresses each of five objections he understands the Trust Board takes to paying Mr Waho's fees:

- discovery of SFO documents;
- inclusion of the SFO claim;
- delays in the proceeding;

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20 *Waho v Olsen-Rātana* [2014] NZCA 612, (2014) 3 NZTR 24-022 at [47].
21 At [42].
22 *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [29].

- unclear pleadings; and

- inadmissable evidence.

[29] Mr Geiringer submitted that if the Trust Board argues Mr Waho's costs are unreasonable, the Board needs to disclose the full extent of its expense on the dispute, both for itself and for Ms Olsen-Rātana.

[30] Mr Geiringer referred to the fact Ms Olsen-Rātana sought an order for costs in her favour of $53,848.50 yet all of her costs were met by the Trust Board.

[31] Finally, Mr Geiringer summarised Mr Waho's multiple settlement attempts before and during the trial. It is said all of Mr Waho's offers of settlement required the Board to part with less money than it is required to pay under the substantive judgment:

(a) Mr Waho apparently asked the Board to settle the dispute with him in 2015 seeking only repayment of costs which, at that time, were under $100,000.

(b) On 12 May 2017, a few days into the trial, Mr Waho offered to settle the dispute with an apology from him to the Trust Board for challenging its decision before the court. Mr Waho sought nothing by way of honorarium and costs of $175,000 representing half of the costs incurred at that time.

[32] The defendant "agrees that such discussions occurred" but it takes issue with the way they have been described. Mr Russell submitted that no evidence had been provided to the Court in support of the plaintiff's argument about the relevance of settlement. Consequently, the defendant's position is that without an evidential basis, the Court is unable to make an award of costs under r 14.10 of the High Court Rules. I return to this submission shortly.

[33] Mr Russell submits if a claim were to be made under cl 10.1, the defendant would be entitled to call evidence on a range of grounds, including without limitation:

(a) Whether legal expenses incurred for the purposes of a discontinued claim against Ms Olsen-Rātana were properly incurred for the purposes of cl 10.1 of the Trust Deed;

(b) Whether costs incurred for aspects of the claim against the defendant which were ultimately withdrawn prior to or during the trial hearing were properly incurred for the purposes of the Trust Deed;

(c) Whether costs incurred for the purposes of the plaintiff's unsuccessful application for an interim injunction were properly incurred for the purposes of cl 10.1 of the Trust Deed;

(d) Whether costs incurred by the plaintiff for the purposes of preparing evidence that was ultimately excluded at the hearing were properly incurred for the purposes of cl 10.1 of the Trust Deed;

(e) Whether any costs that were properly incurred for the purposes of cl 10.1 of the Trust Deed were reasonable. In this context, the defendant would be entitled to call evidence and make submissions that the proceeding was conducted inefficiently and that it was put to undue expense, particularly as regards discovery that was undertaken in respect of aspects of the claim that were ultimately withdrawn.

Assessment

[34] Regrettably, I have derived very little assistance from the memorandum of submissions on behalf of the defendant. The submissions which it is said the defendant is entitled to make could have been made but were not. The defendant could have, but has not, identified the costs it maintains are unreasonable. The overarching submission is that while the plaintiff has identified the correct applicable rules there is no evidential foundation upon which to determine the plaintiff properly incurred all of his legal expenses in performing his duties as a trustee. The further objection is that Mr Waho did not request an award of compensation in his statement of claim and should have done so. This has deprived the defendant of the ability to contest the point. Specifically it is said the defendant has had no opportunity to make submissions

on the interpretation of cl 10.1, whether the plaintiff was under a duty to challenge the lawfulness of his removal, and whether the costs incurred for the purposes of cl 10.1 were reasonable. These are but three of the seven matters on which the defendant maintains it has no opportunity to call evidence or make submissions.

[35] I find the defendant's approach to this exercise perplexing. The opportunity to do what the defendant says it has no opportunity to do, was provided when counsel were invited to submit memoranda in support of their respective positions as to costs. They have done so. It is not necessary to have a hearing and call evidence in these matters. Applicants for costs attach documentary evidence supporting their claims as Mr Waho has done in this instance.

[36] I ask the defendant, therefore, to identify the costs it considers are unreasonable and to identify the respects in which Mr Geiringer's three-paragraph summary of the settlement discussions, is inaccurate. There is no doubt that where a party has unreasonably refused to settle that will be taken into account in determining a costs award.[23]

[37] Unless the defendant raises a valid objection to doing so I ask also that the defendant disclose the full extent of the legal costs both in respect of itself and in respect of Mrs Olsen-Rātana. As Dobson J observed in *Williams v Waimate District Council* 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".[24]

[38] I make the following further observations which may inform counsel's approach:

(a) Discovery applications occupied much of 2015 and 2016. The matter was adjourned due to Mr Waho's health between November 2015 and February 2016.[25] A fixture set down of 10 October 2016 was vacated.

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23 For example, High Court Rules 2016, r 14.6(3)(v) states increased costs may be awarded where a party has unreasonably failed to accept a settlement offer.

24 *Williams v Waimate District Council* [2013] NZHC 2922 at [84].

25 *Waho v Olsen-Rātana* HC Wellington CIV-2014-485-11177, 6 November 2015 (Minute of Collins J).

Mr Geiringer attributed responsibility for his inability to prepare in time to the defendants' delay in providing a draft index for the common bundle and other defaults. There had been default by all parties in meeting the timetable.[26]

(b) On 10 March 2017, the third day of trial, Mr Waho was asked during cross-examination to confirm his understanding that, as at the end of 2017, none of the existing trustees would be on the Board. They were to be replaced. This was news to Mr Waho. This late discovery affected the formulation of Mr Waho's claim and the relief he sought. On 11 March 2018, following legal argument occupying half a day, I granted leave to Mr Waho to amend his statement of claim and to discontinue against Mrs Olsen-Rātana who was, up to that point, the named "first defendant.[27]

Outcome

[39] Mr Waho is entitled to indemnity costs. The amount is yet to be determined. Clearly, and consistent with principle, the entitlement is only to those costs properly incurred. Mr Geiringer has attached schedules and the barristers' invoices which contain detailed descriptions of the professional services rendered.

[40] The defendant should identify the costs it maintains are not properly, or reasonably incurred, the reasons for its position and the further information requested at [37] above. That memorandum should be filed by 15 February 2019. Mr Geiringer may file a memorandum in reply within 10 working days of receipt of the defendant's memorandum. Again, memoranda should be no more than 10 pages.

Postscript

[41] When finalising this judgment on the morning of 18 December it was brought to my attention that on 17 December, around midday, Mr Geiringer had filed a memorandum in reply to Mr Russell's. My concern is to issue this decision without

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26 *Waho v Olsen-Rātana* HC Wellington CIV-2014-485-11177, 5 October 2016 (Minute of Clark J).
27 *Substantive judgment*, above n 1, at [38].

delay so the next phase in the exercise (assessing the reasonableness of the costs claimed) can be progressed. Mr Russell would have had little notice of the content of Mr Geiringer's memorandum. I mean no disrespect to Mr Geiringer in recording that this decision is issued without regard for Mr Geiringer's memorandum which Mr Russell may respond to when he makes submissions in accordance with the timetable I have directed.

Karen Clark J

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