IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-398
[2019] NZHC 2479

IN THE MATTER	of the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER	of an application of an order recognising Customary Marine Title and Protected Customary Rights
BY	LOUISA TE MATEKINO COLLIER AND OTHERS

On the papers:

Counsel: J Mason for Applicants
Interested Parties:
T Sinclair (Ngāti Manu and Ngāti Rangi, Ngāti Rahiri Hapū, Ngā Hapū o Ngāti Wai Iwi, Te Whānau o Hōne Pāpita Rāua Ko Rewa Ataria Paama, Ngāti Kahu Te Rarawa and Te Uriohina, O Ngā Hapū o Taiamai Ki Te Marangi)
M Tuwhare (Manapo Tangaroa)
A Tapsell (Te Rūnanga o Whangaroa)
C M Hockly (Te Whakapiko, and Te Parawhau)
J Bartlett (Ngāti Manu, and Ngāti Rongo o Mahurangi)
L Thornton (Ngāti Rehua and Ngātiwai ki Aotea, and Ngāti Maraeariki and Ngāti Rongo ki Mahurangi)
C Terei (Ngāti Hine, Ngāti Kawa and Ngāti Rahiri, Te Kapotai, and Te Aupōuri)
C Woodward (Te Uri o Hau Settlement Trust)
G Erskine (Ngāti Rehua-Ngāti Wai ki Aotea)
K H Dixon (Ngunguru Marae Trust, Ngāti Takapari, and Patuharakeke Te Iwi Trust Board)
J K Harper-Hinton (Te Waiariki, Ngāti Kororā and Ngāti Takapari, and Ngāti Te Ata)
R N Zwaan (Whakarara Māori Committee)
R Judd (Te Rūnanga o Ngāti Whātua)
D Ward and G Melvin for Crown

Judgment: 1 October 2019

JUDGMENT OF CHURCHMAN J
(Costs)

Introduction

[1] I gave a judgment dated 23 August 2019 in which the applicants were unsuccessful in their applications, one for their particular application to be treated as a test case and the other for two questions of tikanga to be referred to the Māori Appellate Court.[1] I invited the parties to agree costs but, in the absence of agreement, the interested parties who opposed the application had 14 days to file submissions and the applicants 14 days from service of those parties' submissions to reply.[2]

[2] On 2 September 2019, counsel for the applicants, Ms Mason, filed a memorandum in separate proceedings relating to the role of the Attorney-General addressing, among other things, the issue of costs in relation to this case. Essentially, she argued that costs should not be awarded against parties involved in proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

[3] In relation to the proceedings relating to the role of the Attorney-General, she sought a preliminary determination from the High Court under r 10.15 of the High Court Rules (HCR) for orders to separately determine a question of law as a preliminary matter in advance of hearing the substantive application. The question was: "In-principle, what approach will the Court take on the issue of costs in these proceedings?"

[4] By a minute of 5 September 2019, I declined Ms Mason's application to add the question in relation to costs to the hearing scheduled for 7 and 8 October 2019 in relation to the role of the Attorney-General.[3]

[5] On 6 September 2019, the Court received memoranda from three interested parties in these proceedings, namely:

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1 *Re Collier* [2019] NZHC 2096.
2 At [95].
3 Minute (No 3) of Churchman J, 5 September 2019, CIV-2017-485-218

(a) Freda Pene Reweti Whānau Trust (the Trust) on behalf of Ngāti Rehua-Ngāti Wai ki Aotea;

(b) The Ngātiwai Trust Board (the Board); and

(c) Te Waiariki, Ngāti Korora and Ngāti Taka Pari (Te Waiariki).

[6] Counsel for the Trust, Mr Erskine, sought costs on the application to be classified as category 3, band C, pursuant to rr 14.3 and 14.5 of the HCR or, in the alternative, on a standard 2B basis, while counsel for the Board, Ms Inns, and for Te Waiariki, Mr Revell, both sought them on a 2B basis.

[7] The applications' submissions in response to those memoranda were received on 26 September 2019. They oppose the awarding of costs against them and also apply for costs against the Crown.

Should costs be awarded against the applicants?

[8] Although an award of costs is at the discretion of the Court, the general principle in relation to matters heard in the High Court is that the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds.[4] Put simply, costs follow the event.

[9] It is important to understand that the issue of costs here relates not to an application for coastal marine title (CMT) or protected customary rights (PCR) under the Act, but to a specific interlocutory application. There are strong public policy arguments that CMT or PCR applications should not have the standard High Court approach to costs applied to them. That is because the applicants for such orders have no option but to pursue such claims in order to preserve the rights granted to them under the Act.

[10] However, the same principles do not necessarily apply to all interlocutory applications made under the Act. That is particularly so where interlocutory

4 High Court Rules 2016, rr 14.1 and 14.2(1)(a).

applications are made which have a potential adverse effect on other applicants, and where those applicants are compelled to oppose the interlocutory application in order to preserve their own rights.

[11] In such interlocutory applications, there may well be significant aspects of the public interest and, provided the interlocutory application is pursued reasonably, it may be appropriate for the Court to take a similar approach to costs that is taken to applications for substantive orders under the Act.

[12] In assessing the approach that should be taken by this Court to both substantive and interlocutory applications under the Act, it is also appropriate to consider the approach taken to costs in other jurisdictions that the applicants in these proceedings may be familiar with. That is because some applicants may simply have assumed that the High Court would follow a similar costs approach to that taken in either the Waitangi Tribunal, the Māori Land Court or the Māori Appellate Court.

[13] It is noted that the Waitangi Tribunal does not have the power to award costs.[5] Section 79 of Te Ture Whenua Māori Act 1993 (TTWMA) provides for orders as to costs in proceedings before the Māori Land Court and the Māori Appellate Court. The principles that apply to an award of costs in that jurisdiction are well established and were summarised by the Māori Appellate Court as follows:[6]

> (a) the Court has an absolute and unlimited discretion as to costs;
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> (b) costs normally follow the event;
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> (c) a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
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> (d) the Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may sometimes make awards of costs inappropriate. However, where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply; and

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5 *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (May 2012) at [2.16]. See, also, Treaty of Waitangi Act 1975, sch 2, cl 8(1).

6 *Maruera v Te Rūnanga o Ngāti Maru (Taranaki) Trust* [2019] Māori Appellate Court MB 52 (2019 APPEAL 52) at [4], citing *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate 216 (7 APWH 216) at [9]-[14].

(e) there is certainly no basis for departure 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.

[14] However, the Māori Appellate Court has stated that, in dealing with costs in the lower Court, the objectives set out in s 17 of the TTWMA are relevant:[7]

> The objectives are wide and anticipate ready access to and involvement by the Court in cases where circumstances may give rise to the application of those objective. To award on the basis of a strict regime of "costs should normally follow the event" would tend to militate against access to the Court and be contrary to the objectives set out in section 17. The Court has a discretion as to costs under section 79 and in the Lower Court that discretion is used sparingly, a practice with which we agree.
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> Of course, there are cases where costs are merited and are awarded. These generally occur where proceedings arise from the fault or breach by one party of his legal obligations or duties or in the cases of or akin to a civil nature where two competing parties are involved.

[15] In her memorandum of 2 September 2019, Ms Mason claimed that the applicants were extremely concerned at "the suggestion in His Honour's decision dated the 23rd of August 2019 that they may be liable for costs". She noted that the High Court fees for applications filed under the Act had been waived, the proposition having been accepted by the High Court Registry that fees would cause the applicants undue financial hardship. The High Court is said to have been accommodating given the unique and specialised nature of the legislation, and the fact that there was a statutory deadline for the filing of the applications would could not have been met without that waiver having been granted.

[16] Ms Mason further stated that it was her understanding that the usual costs for hearing days had also been waived again on the basis of the unique and special nature of the legislation and the applicants were, therefore, very concerned to see that the issue of costs had been raised with the obvious implication that they could be liable for the costs of the interested parties.

[17] Ms Mason advised that the applicants were, therefore, considering ceasing participation in all of their MACA proceedings until the issue of costs had been

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7 *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].

determined. It was said that they did not wish to proceed with any procedural steps which they view as merely progressing their applications only to discover subsequently that they are liable for substantial costs. She submitted that putting them in such a position would constitute a grave injustice. These submissions conflate the approach to be taken to costs issues in respect of costs relating to substantive applications under the Act, and to costs in relation to such interlocutory applications as parties may choose to bring.

[18] Responding to the costs applications, Ms Mason contended that the parties applying for costs have mistakenly assumed the position of parties in defended hearings. She argued that costs are only awarded to interested or overlapping parties in very unusual circumstances and cases in which costs have been awarded against a party in favour of an intervenor are comparatively rare.[8] Reliance was placed on *DN v Family Court at Auckland* in which the Court ruled the costs would lie where they fell, stating that, "Most interveners will take a position on an issue which will inevitably coincide with the interests of one party or another."[9]

[19] However, this submission misses the point that, with applications for recognition of customary interests under the Act, there are no defendants or respondents as such. In this context, the overlapping parties were those whose interests would be affected by any decisions made on the applications. They were advancing substantive claims in the same area. Their position was, in many respects, analogous to that of parties in defended hearings. This was not a situation in which their position would coincide with the interests of another party to the proceeding – there was no party other than the applicants. They could not afford to sit back and hope that someone else would advance their position for them.

[20] A striking feature of this interlocutory application is the large number of overlapping claims, 36 in all and the minimal support that the interlocutory application had among those most directly affected it. Only six of the overlapping claimants supported it, 20 opposed and the rest were neutral or did not express a view.

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8 See *Earthquake Commission v Insurance Council of New Zealand* [2015] NZHC 457 at [7].
9 *DN v Family Court at Auckland* [2019] NZHC 2028 at [18].

[21] Ms Mason also advanced an argument based on r 14.7(e) of the HCR which empowers the High Court to, among other things, refuse to award costs where the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding. She submitted that the applications qualified as "public interest" litigation as the applicants' intention was to benefit all New Zealanders, both Māori and non-Māori, by providing some certainty and clarity to their rights under the Act. Here, reliance was placed on *New Zealand Māori Council v Attorney-General*, in which the Privy Council concluded:[10]

> There remains the question of costs. Although the appeal is to be dismissed, the appellants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that Their Lordships examine and in the circumstances Their Lordships regard it as just that there should be no order as to the costs on this appeal.

[22] In response, Ms Inns acknowledged that there may be circumstances in MACA litigation where public interest considerations may justify a decision not to award costs against an unsuccessful applicant, but submitted that those considerations did not justify a departure from the usual rule that costs follow the event in this case. It was argued that this application for a test case was misconceived, the applicants failing to provide any evidence or cogent reason for why their application should be given priority over those of many other claimants and also failing to give proper attention to many practical issues with their proposal.

[23] Although Ms Mason referred to the limited financial resources of the applicants, Ms Inns pointed out that limited financial resources are a common issue for MACA applicants, including the Board, and this issue had been ventilated before the Waitangi Tribunal. She submitted that there was no reason why the limited financial resources of the Board and other MACA applicants should be expended in responding to a misconceived application, instead of the resources of those who brought the misconceived application. Whatever the public interest considerations may be in a contest over costs between a MACA applicant and the Crown, Ms Inns

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[10] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 at 525-526.

said there were no such considerations that should lead the Court to require the costs of this application to fall on the Board and other MACA applicants who opposed it, rather than the applicants. She contended that this conclusion was strengthened by the misconceived and ill-considered nature of the application.

[24] Mr Revell noted that the significance of the proceeding and its complexity are relevant to the award of costs,[11] and submitted that the application sought here was enormously significant to Te Waiariki as it involved the determination of the holding at tikanga of their ancestral lands. He added that the application was somewhat complex and evolving, which exacerbated the complexity and time expended on responding to it. Furthermore, the application was a surprise – Te Waiariki was not notified of the application before it was filed, despite the application stating that any customary marine title would be held on behalf of overlapping parties until a tikanga process was undertaken. There was, however, no agreement to that holding or the process. Te Waiariki and many others affected opposed the application, but the applicants chose to continue regardless. Mr Revell submitted that the application proceeded without a high level of consent whilst purporting to apply over Te Waiariki's territory and this fact alone is said to have been sufficient to draw attention to the merit of its continuation. The applicants, though, did not demur but instead filed lengthy submissions which Te Waiariki was obliged to read and respond in order to protect their rights and interests. Not objecting would have risked the orders sought being made by default.

[25] As is conceded by Ms Mason in her written submissions, one of the prerequisites for the Court exercising its power under r 14.7(e) to refuse to award costs where the proceeding concerned a matter of public interest, is that the party opposing costs acted reasonably in the conduct of the proceeding. In relation to this interlocutory application, it cannot be said that the applicants acted reasonably.

[26] Although Ms Mason submits that the applicants "undertook all reasonable steps to consult all other parties", the reality is that the interlocutory application was commenced without any consultation at all. The affected parties only knew about it

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[11] High Court Rules, r 14.2(1)(a).

after it had been filed. The test case application was also poorly thought out and the proposals put forward, both originally and, as the test case evolved, were unworkable.

[27] The scale of opposition of those 36 cross-applicants most directly affected by the test case proposal, became known to the applicants almost immediately. However, the applicants elected to press on with the application, notwithstanding the opposition of so many other parties.

[28] The decision to preserve with the misconceived test application compelled those other applicants adversely affected by it to expend their scarce resources in opposing it.

[29] A consistent theme in minutes issued by this Court in relation to proceedings under the Act has been the importance of maintaining the avenues of communication between the parties. The applicants, through their unilateral actions, have caused avoidable losses to the other parties affected by their interlocutory application. They cannot be said to have acted reasonably in the conduct of the proceeding. While Ms Mason has attempted to frame their application as having been pursued in the public interest, rather than seeking to benefit all New Zealanders, the applicants, having not been afforded priority status, were attempting to leapfrog over the other applications awaiting hearing under the Act. The interests pursued were those of the applicants alone, to the detriment of the overlapping applicants. They were effectively private interests being disguised as public ones. It was also clear that one of the issues that appeared to the influencing the applicants to file and persevere with the interlocutory application was their hostility towards the Crown having entered into direct engagement discussions with Te Uri o Hau (an overlapping applicant).

[30] As indicated in the substantive decision, the right of the Crown to enter into direct engagement is specifically conferred by s 95 of the Act. While the applicants might see s 95 as causing unfairness or injustice towards them, the solution to that problem is not to try and seek priority for their own claim or to have the Court stay the Te Uri o Hau direct negotiations (which was one of the outcomes sought by the applicants).

[31] The interlocutory application had two components to it. The second component was the request to refer questions of tikanga to the Māori Appellate Court. This request was also highly problematic.

[32] As noted in the substantive decision,[12] the applicants' submission that, "There were no restrictions or conditions to be placed on those who wanted to refer tikanga Māori issues to the Māori Appellate Court." was irreconcilable with the actual wording of the Act.

[33] Also, as noted in the decision,[13] the questions posed for referral to the Māori Appellate Court were closed questions of a nature unlikely to be suitable for referral to the Māori Appellate Court.

[34] As noted at [49] of the substantive decision, instead of asking which applicants held the test case area in accordance with tikanga, the proposed question were directed solely to whether the three Ngāpuhi hapū, who were the applicants, held the area.

[35] Finally, while Ms Mason contended that Te Arawhiti's funding policy already includes funding for costs incurred in interlocutory proceedings and to award further costs would constitute double dipping, Mr Revell submits that the Ministry's MACA funding scheme had declined to assist Te Waiariki's objection to the application. While the Trust and the Board have not indicated that they have been declined funding, given their application for costs it would appear that they are not, at this point, in receipt of funding for their involvement in this particular proceeding. Awarding costs in these circumstances would not constitute double dipping.

[36] Accordingly, it is my view that this is a case in which the awarding of costs would be appropriate.

Should costs be reserved pending appeal?

[37] As the applicants are appealing the judgment, Ms Mason has requested that costs be reserved until the appeals have been finally determined. However, while the

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12 *Louisa Te Matekino Collier & Ors* [2019] NZHC 2096 at [76]-[78].
13 At [93].

Courts do have a general power to stay execution, this power should not be abused so as to delay payment.[14] If leave to appeal is granted and the applicants' appeal is successful, any order as to costs may then be set aside. I therefore decline to reserve the issue of costs until the appeal is heard (should leave be granted).

What costs should be awarded?

[38] This leaves the quantum of costs to be determined which then brings us to the issue of whether or not it is appropriate, given that these are proceedings in the High Court, to award High Court scale costs.

[39] Ms Mason's submission that the applicants are concerned that the issue of costs has been raised brings with it the implication that it was anticipated that, as in proceedings before the Waitangi Tribunal, costs would not arise in MACA proceedings. Had the applicants known otherwise, they may have been less willing to pursue their test case application. However, having elected to do so, other affected claimants were forced to respond to their application and thereby incur costs. Not awarding costs at all would result in parties failing to factor in this burden when deciding to pursue an application. A similar problem arises if only nominal costs are imposed.

[40] As noted above, the Board and Te Waiariki contended that costs on a 2B basis would be appropriate. Mr Erskine, however, argued for category 3 on the basis that the Court had previously indicated that "the issues raised by the application were complex and more suited to an oral hearing during which the propositions advanced could be fully tested and explored".[15] He explained that band C was sought as the time taken to address the application was compounded by the length of the applicants' submissions and the number of affidavits, the applicants' memorandum dated 5 November 2018 totalling 40 pages when a synopsis of argument, pursuant to r 7.39 of the HCR, must not exceed 10 pages.

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14 *Clayton v Currie* [2018] NZHC 2544 at [4], citing Andrew Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, Wellington, 2012) at [12.10.1].

15 *Re Collier*, above n 1, at [28].

[41] However, while the issues to be canvassed were of a level of complexity that it was not appropriate they be dealt with on the papers, they were not such as to meet the Category 3 description of "[p]roceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court". As for the length of submissions and the number of affidavits filed, while I accept this will have increased to some extent the time involved in opposing the application, I do not see it as sufficient to bring the proceedings up to band C. Accordingly, if High Court scale costs were deemed appropriate, I would be inclined to categorise costs on the application as 2B.

[42] Mr Erskine also sought an award of increased costs pursuant to r 14.6(3)(b)(ii) on the basis that the applicants "contributed unnecessarily to the time or expense" of the application by "taking or pursuing an unnecessary step or an argument that lacks merit". He argued that the grounds for doing so are apparent in the judgment, one example being that the test case proposal was unworkable.[16] Another reason given was that the applicants had commenced the application "unilaterally without any prior discussion with overlapping applicants" and the applicants then continued to pursue or persist with the application notwithstanding the opposition of a clear majority of the affected applicants.[17] This failure to obtain consent is said to have been compounded by the fact that, as recorded in a minute of Collins J,[18] Ms Mason had indicated that she intended to confer with other counsel before making the application and this prior discussion did not occur.

[43] However, it is the applicants' actions in pursuing this test case application, that arguably lacked merit and could be described as ill-considered, without consultation with affected parties that mean the award of costs on this interlocutory application are warranted. The awarding of increased costs over and above this is not warranted in the circumstances.

[44] Accordingly, it is my view that scale costs, given the applicants' apparent misunderstanding that costs did not need to be factored into their calculations when

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16 At [45].
17 At [44(b)].
18 *Re Elkington* HC Wellington CIV-2017-485-218, 18 July 2018 (Minute No 5 of Collins J) [First Case Management Conferences] at [33].

deciding whether to pursue their application for a proposed test case, should be reduced by 75 per cent. Now that potential liability for costs has been clarified, a reduction of this nature may well not be applied in any future case.

Costs against the Attorney-General

[45] Where the Attorney-General appears as an intervener in any civil proceedings and argues any question of law or of fact arising in the proceedings, the Court may order that the Attorney-General pay any costs thereby incurred by the other party.[19]

[46] The factors likely to be relevant in determining whether such an order would be appropriate are:[20]

> (a) Whether the case involves a matter of substantial public importance. This will be critical if costs are sought to be paid from public funds.
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> (b) Whether the applicant represents a field of interest relevant to the proceeding beyond their private or personal viewpoint.
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> (c) Whether the applicant has provided material assistance to the Court by presenting evidence or submissions on an issue or issues not adequately covered by other parties or at all.
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> (d) Whether any of the principles guiding an award of costs under Part 14 of the High Court Rules may be applicable by analogy. This may be particularly relevant in cases where an order is sought against a party rather than from public funds.

[47] Ms Mason submitted that, in the applicants' circumstances, the factors apply as follows:

(a) the proceedings involve a matter of high public importance, being for the benefit of all New Zealanders' both Māori and non-Māori, by providing some certainty and clarity to their rights under the MACA Act;

(b) the applicants represent a number of whānau and hapū within Ngāpuhi, the largest of all iwi, and sought to progress their case in a manner which benefits all Māori applicants. It is not a private interest; and

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19 Senior Courts Act 2016, s 178(2)(c).

20 *Earthquake Commission v Insurance Council of New Zealand* [2015] NZHC 457 at [6].

(c) no other party in the proceedings have made the requests the subject of the judgment and, as such, only the applicants have provided material assistance to the Court on these issues.

[48] In relation to the claim that the applicants represent a number of whānau and hapū within Ngāpuhi, and sought to progress their case in the manner which benefits all Māori applicants, the comments above in relation to the private interest nature of the claim are relevant.

[49] The applicants represented only three of some 110 Ngāpuhi hapū. They had not sought or obtained the consent of all the other Ngāpuhi hapū to commence the interlocutory application. The interlocutory application potentially seriously adversely affected non-Ngāpuhi claimants within the area covered by the test case application. It is therefore untenable to claim that the interlocutory hearing benefitted all Māori applicants.

[50] In relation to the claim that only the applicants provided material assistance to the Court on the issues that were the subject of the interlocutory application, the reality is that application was ill-conceived and a number of the premises upon which it was based were unjustified. The application did not result in any material assistance either to the Court or any other applicants.

Result

[51] The applicants are ordered to pay costs as follows:

(a) $2,987.50 to Freda Pene Reweti Whānau Trust on behalf of Ngāti Rehua-Ngāti Wai ki Aotea;

(b) $358.50 to the Ngātiwai Trust Board; and

(c) $1,508.69 to Te Waiariki, Ngāti Korora and Ngāti Taka Pari.

[52] No costs order is made against the Attorney-General.

Churchman J

Solicitors:
Phoenix Law Ltd, Wellington for Applicants

Interested Parties:
Foster & Milroy, Hamilton
Chen Palmer, Wellington
Afeaki Chambers, Auckland
Tamaki Legal, Auckland
Tukau Law and Consultancy, Northland
Annette Sykes & Co, Rotorua
Lyall & Thornton, Auckland
Dixon & Co Lawyers, Auckland
Crown Law Office, Wellington