IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA547/2017
[2018] NZCA 471

BETWEEN	NGĀTI TE ATA Appellant
AND	THE MINISTER FOR TREATY OF WAITANGI NEGOTIATIONS First Respondent
	THE QUEEN Second Respondent
	NGĀTI TAMAOHO SETTLEMENT TRUST Third Respondent
	REGISTRAR-GENERAL OF LAND Fourth Respondent

Hearing:	15 October 2018
Court:	Asher, Brown and Clifford JJ
Counsel:	J P Kahukiwa for Appellant S M Kinsler and S L K Shaw for First and Second Respondents No appearance for Third and Fourth Respondents
Judgment:	1 November 2018 at 2 pm

JUDGMENT OF THE COURT

A The application for waiver of security for costs is granted in part.

B The appellant is to pay one set of security for costs of $6,600, to be paid into Court within 15 working days of delivery of this judgment.

C The first, second and third respondents' application for strike-out is adjourned.

D There is no order for costs on these applications.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant Ngāti Te Ata seeks a waiver of payment of security for costs. It has appealed a judgment of Whata J delivered on 25 August 2017, dismissing its application for review under the Judicial Review Procedure Act 2016. The proceeding relates to a notice given by the Minister for Treaty of Waitangi Negotiations (the first respondent) under s 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Act).[1] There are two payments of security of $6,600 at issue, for the first and second respondents on the one hand, and for the third respondent on the other. The first, second and third respondents oppose the application for a waiver, and seek an order striking out the appeal on the basis that security for costs has not been paid.

[2] Ngāti Te Ata put its application for waiver on the basis that it is an iwi, and that the Act ascribes it with mana whenua in Tāmaki Makaurau. It submits that it is appropriate that it pursues rights ascribed to it. It refers to the Supreme Court judgment in *Ngāti Whātua Ōrākei Trust v Attorney-General*,[2] and submits that decision has reinforced the importance that Māori claims of right properly brought, particularly in relation to land, should be heard by the courts. It submits that it is suffering from the historical wrongs of the Crown, which has diminished its land base. It claims that it has not yet reached a settlement with the Crown and has insufficient money to pay security.

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1 *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058.
2 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 at [46] and [76].

Approach

[3] The position relating to security for costs in an appeal was discussed in *Reekie v Attorney-General*[3] where the statement of Bowen LJ in *Cowell v Taylor* was quoted:[4]

> The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.

As was stated in *Reekie*, in New Zealand the default position has always been that security for costs should be provided in relation to appeals.[5]

[4] The amount of security that is ordered in appeals to this Court, which is presently set at $6,600, is modest, and should be within the means of most appellants and their supporters. Security will be dispensed with only in exceptional circumstances.[6] The position was discussed in *Reekie*:

> [19] An application to dispense with security is likely to be based on one of two broad grounds:
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> (a) costs are unlikely to be ordered against an appellant and, for this reason, security should not be required; or
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> (b) the appellant either cannot pay or will suffer severe hardship if payment is required.
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> …
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> [27] Under the principles which the judges of the Court of Appeal currently apply when reviewing dispensation decisions:
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> (a) it is for the appellant to show impecuniosity;
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> (b) impecuniosity is not in itself enough to warrant dispensing with security;
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> (c) security is the norm and security should be dispensed with only in exceptional circumstances;

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3 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.
4 *Cowell v Taylor* (1885) 31 Ch D 34 (CA) at 38.
5 *Reekie v Attorney-General*, above n 3, at [6].
6 At [27]–[28].

(d) a reduction in the amount of security required may, in some cases, meet the justice of the case; and

(e) some assessment of the merits of the case is required, along with an assessment of whether the appeal raises issues of public interest.

(Footnotes omitted.)

[5] Therefore if a claim has a public interest benefit, this can be a reason in favour of waiving security for costs on the basis that it may be that no costs order will be made against the appellant, even if unsuccessful.[7] Proceedings relating to the vindication of rights under the New Zealand Bill of Rights Act 1990, and in respect of the claims of iwi under the Treaty of Waitangi, can fall into this category.

[6] If the proceedings do not have this public interest quality, the starting point for waiver of security for costs is establishing impecuniosity. If there is no impecuniosity, there is generally no need for a waiver, given that the rules are set up to protect respondents in general for their fees if they are successful, and assuage the risk of not being able to recover costs from an unsuccessful appellant. In assessing impecuniosity the court will not only have regard to the actual financial position of the particular appellant, but will also look at other potential funders who might be expected to contribute. As was observed in *Reekie*:

> [43] An appellant without liquid assets may be required to borrow money to provide security. It might be appropriate to investigate whether it is reasonable for another party (such as a related family trust or a close relative) to provide funding. If a trust associated with the appellant or a close relative has the resources but is unwilling to provide security, it may suggest that dispensation is inappropriate. Proof that security cannot be provided may require full disclosure of financial circumstances and the sources of funding relied on by the appellant to support his or her general lifestyle.
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> (Footnotes omitted.)

This case

[7] Mr Kahukiwa for the appellant submits that this is a public interest case. He submits there are serious issues to be determined and Ngāti Te Ata has a right to know of its legal position. It would be beneficial, it is said, to understand the exact nature

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7 At [40]–[41].

of a power to dispose of land in Tāmaki Makaurau. This would be beneficial not just to mana whenua iwi and hapū of Tāmaki Makaurau, "but also because of the scarcity of land and the pressure on housing". It has, he submits, implications for the broader population of Aotearoa.

[8] We accept without determining the matter that there may well be issues of wider public interest to be determined in this case. We note that this was a submission made in the High Court to persuade Whata J not to make a costs order.[8] He did not accept that submission and held that the usual rules should apply, ordering costs against Ngāti Te Ata.[9] He was fortified by the fact that no other iwi had joined the proceeding.[10] Their involvement might have been expected if the litigation genuinely raised a matter of wider importance. Second, the allegations showed that at its heart this was an inter-iwi dispute.[11] He stated:[12]

> Duties of rangatiratanga and kaitiakitanga may demand litigation together with strong statements in evidence underscoring claims to taonga tuku iho. But, by seeking redress in this Court affecting the rights of other iwi, the usual costs principles, including of predictability, are engaged.

There is therefore no basis for exempting the appellant from paying security on the basis of this being a case in the public interest.

[9] A further factor working against a complete exemption from paying security for costs is that the payment will also be for the benefit of another different iwi, the third respondent Ngāti Tamaoho Settlement Trust (Ngāti Tamaoho), which opposes Ngāti Te Ata in this appeal. It would seem to be unjust that as a private entity Ngāti Tamaoho could not get the protection of security for costs.

[10] As to impecuniosity, Ngāti Te Ata has not filed any affidavit setting out its financial position. Mr Kahukiwa, while relying on his client's impecuniosity, frankly admits he can put forward no evidence to support that claim. We are unable to accept

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8 *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations* [2018] NZHC 915 at [1].
9 At [4]–[5].
10 At [3].
11 At [3].
12 At [3].

an assertion of impecuniosity from the bar, particularly given that it is far from self-evident that security for costs could not be paid.

[11] The appellant is an unincorporated body (and this may in due course give rise to issues as to its standing).[13] We note that Whata J ordered that costs be paid to the respondents in the High Court, and it would appear that those costs have been paid. This is an indication that there is some access to funds. Standing behind Ngāti Te Ata is the Te Ara Rangatu o Te Iwi o Ngāti Te Ata Waiohua Inc (19200008) (the entity which executed the undertaking as to damages in support of the original interim orders that were sought in this proceeding).[14] It could be expected that this body does have assets, the extent of which are unknown given the lack of any affidavit.

[12] Thus we are left unsatisfied that Ngāti Te Ata cannot pay or will suffer severe hardship if payment is required. This ground is not made out.

[13] Accordingly we conclude that no case for a complete waiver of costs has been made out. We do however order a waiver in part. In our view only one amount of security for costs of $6,600 should be paid, rather than the two lots ordered by the Registrar. This is because it is not clear to us that it will be necessary for more than one party to carry the burden of responding to the appeal. Ngāti Tamaoho did not enter an appearance at the hearing on this costs issue. It was stated:

> Ngati Tamaoho do not have the resources to continue to fight this litigation indefinitely and they oppose the application for a dispensation from providing security for costs in this matter. They wish to rely on any submissions the Crown may make in this regard.

[14] The extent of the role that will be taken by Ngāti Tamaoho is uncertain. It seems likely that the Crown will take the major role in presenting submissions for the respondents.

[15] In those circumstances we are not satisfied at this stage that it is necessary or fair to direct the payment of two amounts of security for costs. We propose ordering that only one amount be paid. A further application can be made for more security for

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13 See *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations*, above n 1, at [5] .
14 At [5].

costs should the parties think it appropriate to take the matter up again at some later point.

[16] The first, second and third respondents' application for strike-out is adjourned pending the appellant's payment of security for costs.

Result

[17] The application for waiver of security for costs is granted in part.

[18] The appellant is to pay one set of security for costs of $6,600, to be paid into Court within 15 working days of delivery of this judgment.

[19] The first, second and third respondents' application for strike-out is adjourned.

[20] There is no order for costs on these applications.

Solicitors:
Corban Revell, Auckland for Appellant
Crown Law Office, Wellington for First and Second Respondents
Tuia Legal, Wellington for Third Respondent