

**IN THE COURT OF APPEAL
NIUE**

IN THE MATTER OF Article 5 of the Niue Constitution
BETWEEN **TOGIA SIONEHOLO**
Applicant
AND **BILLY TALAGI**
Respondent
AND **DALTON TAGELAGI**
Respondent

Coram: Chief Justice P Savage
Justice N Smith
Justice C T Coxhead

JUDGMENT AS TO COSTS

[1] Following the Court's decision of 17 May 2012 we reserved the issue of costs allowing 21 days from the date of that judgment for any costs application to be filed. We also allowed the appellant a further 21 days in which to respond.

Respondents' application

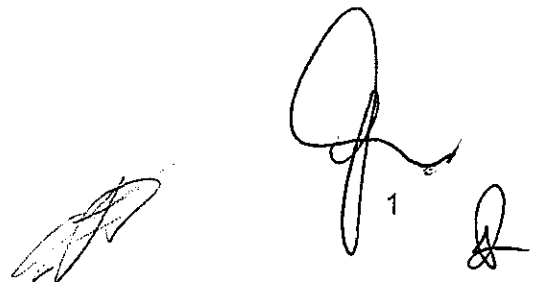
[2] The respondent's application for costs on appeal dated 11 June 2012 simply seeks the costs that have been incurred with regards to the appeal. The total amount sought for costs in relation to these proceedings is \$650.00. The amount sought includes the following:¹

Receipt and review of appeal documents and correspondence with Niue
Constitutional Lawyer Professor Anthony Angelo:

Professor Angelo:	5 hours at \$50 per hour =	\$250
Crown Law:	6 hours at \$25 per hour =	\$150

Preparation, review and filing of documents:

¹ Respondent's application for costs filed 11 June 2012 at point 4.



Crown Law: 10 hours at \$21 per hour = \$250
TOTAL = \$650

Appellant's response

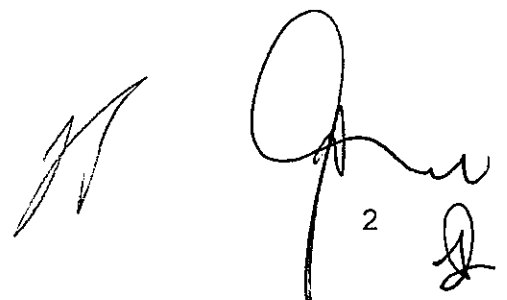
- [3] The appellant has responded to the costs application as follows:
- (a) The appellant disputes the number of hours (21 in total), claimed by the respondents on the basis that the submissions made comprised of only two and half pages;
 - (b) The respondents submission does not provide justification for the hours claimed. The matters touched on were strictly responding to the appellants submission and on that basis, at the most, the number of hours must be reduced by half with the total costs sought being reduced to \$325.00;
 - (c) The respondents were represented by public counsel – that is Government Legal office on a matter of public interest;
 - (d) Given the importance of the constitutional legal issue raised by the appellant it is submitted that the parties should bear their own costs.

The approach to costs

[4] In *Hekau v Tongahai* (2012) Land Appeal MB 2, 33-41, this Court set out the approach to costs.

[5] We follow the approach adopted in that case.

[6] The approach to determining costs is a two step basis. Firstly should costs be awarded? If the answer is yes, the second step is to determine the amount of costs that should be awarded.



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[7] The basic principles for determining whether costs should be awarded were set down in *Hekau v Tongahai* (2012) Land Appeal MB 2, 33-41, as follows:

- (a) This Court as with other Courts in the Pacific has an absolute discretion as to costs;
- (b) Costs normally follow the event;
- (c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
- (d) In the community such as Niue the High Court and the Court of Appeal has a role of facilitating amicable and ongoing relationships between parties and in particular with regards to land ownership and these concerns may sometimes mean an award of costs is inappropriate;
- (e) There is no basis for a departure from the ordinary principles of cost, where the proceedings were difficult and hard fought, and where a party succeeded in the face of serious and concerted opposition; and
- (f) Where proceedings involved counsel and where parties pursued and contested litigation within a relatively formal frame work an award of costs should be made.

[8] The second step to be considered relates to the level of cost. The applicable principles as set down by this Court are:

- (a) The Court in awarding an amount of cost has a broad discretion;
- (b) The Court should look at what is just in the circumstances and in doing so should have regard to the nature of the court proceedings; the importance of the issues; the conduct of the parties and whether the proceedings were formal or informal;
- (c) If a party has acted unreasonably - for example by pursuing a wholly unmeritorious and hopeless claim or defence - a more liberal award of costs may well be made in the discretion of the Court;



- (d) Where the unsuccessful party has not acted unreasonably it should not be penalised by having to bear the full cost of his/her adversary as well as their own solicitors and client costs.

[9] We would also add to that the Court's discretion as to the level of contribution is a broad one but a reasonable contribution will seldom be as little as 10% and a contribution as large as 80% or 90% will seldom be reasonable on an objective analysis.

Public Interest

[10] Where appropriate, Courts have declined to award costs, or awarded only reduced costs, against a party unsuccessful with a genuine and legitimate public law challenge, for example one raising public law issues of general importance, having merit and not brought for personal gain.²

[11] In New Zealand, *Helmbright v Environment Court*³ Justice Baragwanath summarised the leading case-law in relation to whether costs should be awarded where proceedings are brought on the basis of public interest as follows:

[9] Where there is a sufficient public interest the Court will depart from the skeleton of the rules to give it due weight, although bearing constantly in mind their presumptive application. An example is *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 525-6; [1994] 1 AC 466 at 485F where Lord Woolf said:

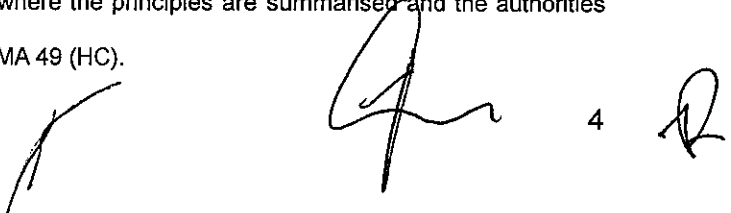
There remains the question of costs. Although the appeal is to be dismissed, the appellants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different 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.

[10] The decision was cited in *R (Smeaton) v The Secretary of State for Health* [2002] EWHC 886 concerned the costs payable on the failed application by the Society for the Protection of the Unborn Child for review of the decision of the Secretary of State for Health to authorise a morning after pill marketed by the added party Schering. Munby J said

14. I derive from Lord Woolf's words two points of significance for present purposes: first, that in considering what order for costs to

² McGechan on Procedure HRPT 14.17 Public Interest Challenges. *Gibbs v New Plymouth DC (No 2)* HC New Plymouth CIV-2004-443-115, 5 October 2006 (where the principles are summarised and the authorities collected).

³ *Helmbright v Environment Court (No 2)* [2005] NZRMA 49 (HC).

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make it is important to have regard to the fact, if fact it be, that the proceedings were not brought out of any motive of personal gain and, secondly, that it is in the same way important to have regard to any wider public interest which may be involved.

[12] In *Titahi Bay v Porirua City Council*⁴ the High Court of New Zealand considered that:

[14]... one must be wary about providing too great a disincentive to scrutiny on public interest matters. Likewise, a Council must accept that well meaning, but perhaps misguided, challenges will occur.

Should cost be awarded?

[13] The respondents were successful. Costs normally follow the event for the successful party.

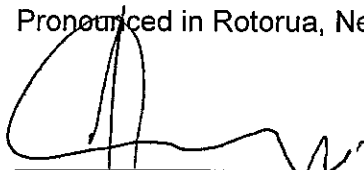
[14] We do note that the two individual respondents were represented by the Crown and individually incurred no costs.

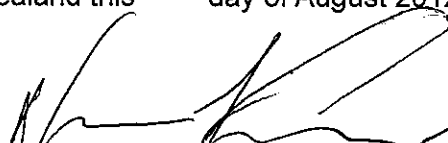
[15] This was a matter of public interest and was taken not for the appellant's own benefit but for the public benefit. The fear of having to pay costs should not be such that it deters people from taking proceedings on important public interest issues.


[16] At appeal level the appellant was not successful. The appellant was to a certain degree held correct in pursuing this case, when after the High Court hearing, but before judgment, legislative amendments were made to change what formed the basis of the appellant's complaint.

[17] That this was a matter of public interest involving the Crown does not in our view automatically deprive the Crown of being eligible for costs. However, in these circumstances costs should lie where they fall. There is no order as to costs.

Pronounced in Rotorua, New Zealand this day of August 2012


Chief Justice P Savage
(Presiding)


Justice N F Smith


Justice C T Coxhead

⁴ HC Wellington CIV 2007-485-1933, 18 October 2007.