IN THE COURT OF APPEAL NIUE

Application No. 2024-00118

UNDER	Section 75 of the Niue Amendment (No 2) Act 1968 and rr 36, 38 and 48 of the Land Court Rules 1969
BETWEEN	FENOGATAO SUAMILI, VIHI SENITULI, MOKAMUA VALAMAKA, HEGEHEMOTU LOSELI and ANGELA SALT Appellants
AND	EUINI PARAMOA, TALE FOUFOUPULE PARAMOA, MILI PARAMOA, LAKUMATA PARAMOA, ARROL TOTUKI PARAMOA, MELEKE PARAMOA, and PARAMORE PARAMOA Respondents

Hearing:	22 April 2025 (via Zoom)
Coram:	Coxhead CJ Reeves J Armstrong J
Appearances:	R Toailoa for the Applicants S McAnally for the Respondents
Judgment:	9 February 2026

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] It is common for the Chief Justice of Niue to consider the issue of security for costs when an appeal application is filed. However, what is less common is for a party to apply for security for costs. This is the first application for security for costs to be considered by the Niue Court of Appeal. In fact, this is the first security for costs application to be considered by any Niue Court.

[2] The Paramoa family are respondents to an appeal against Isaac J's decision of 10 May 2024.[1] They have filed their application for security for costs pursuant to s 75 of the Niue Amendment Act (No 2) 1968 as well as rr 36, 38 and 48 of the Land Court Rules 1969 (the Rules).

[3] The appellants, Fenogatao Suamili, Vihi Senituli, Mokamua Valamaka, Hegehemotu Loseli and Angela Salt oppose the security for costs application.

Background

[4] The parties are cousins. Valamaka Meleke, from the appellants' family, was the biological child of Fatai and Meleke. Neke Paramoa, from the respondents' family, is also a child of Fatai and Meleke by way of customary adoption.

[5] Neke's customary adoption was formalised by order of the Land Court on 2 October 1962 (the Adoption Order) and has been recorded on his birth certificate.

[6] In 2015, proceedings were issued by another branch of the family regarding entitlements to lease proceeds from land being occupied by the Matavai Resort. The High Court issued its judgment on 17 April 2020 (*Asemaga v Suamili*), which held that parties to those proceedings – as well as to this proceeding, given the commonality of parties – were entitled to share in the lease proceeds.[2] *Asemaga v Suamili* recorded the Adoption Order.[3]

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1 *Suamili v Paramoa* [2024] NUHC 1.
2 *Asemaga v Suamili* [2020] NUHC 15.
3 At [78].

[7] The appellants did not appeal the High Court's ruling in *Asemaga v Suamili.* However, in March 2023 they issued proceedings seeking to set aside the Adoption Order. This matter was heard by the High Court on 22 March 2024.

[8] On 10 May 2024, the High Court issued *Suamili v Paramoa,* which dismissed the application to set aside the Adoption Order.[4] That is the decision that is now under appeal.

[9] On 3 July 2024, Coxhead CJ issued directions in relation to the appeal pursuant to r 38 of the Rules. The Chief Justice made the following directions:

> [2] I am satisfied that the grounds of appeal are sufficiently stated in the notice.
>
> [3] No orders as security for costs of the appeal are made at this time.
>
> [4] The matter will be set for hearing the next time the Niue Court Appeal sits.
>
> …
>
> [6] That the application [for stay of execution of judgment pending the appeal] will be referred to Justice Isaac given it is his judgment of 10 May 2024 that is being appealed.

[10] On 10 July 2024, the respondents filed an application seeking that:

(a) the appellants give security for their costs in the appeal proceedings of $15,000 or a sum as the Court deems sufficient;

(b) security be furnished by paying the sum within 30 days of the order;

(c) the appeal be stayed pending payment by the appellants of security for costs; and

(d) the respondents' costs incidental to this application be paid by the appellants.

[11] On 11 July 2024, the appellants filed a memorandum opposing the interlocutory application. The Court received further submissions from parties subsequently.

[12] The application for security for costs was heard by this Court on 22 April 2025.

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4 *Suamili v Paramoa*, above n 1.

[13] As the application for stay of proceedings has been referred to Isaac J for determination (per [10] above), this decision addresses only the application for orders for security for costs.

Submissions

Submissions for the respondents

[14] The application for security for costs was filed pursuant to s 75 of the Niue Amendment Act (No 2) 1968, however it also refers to r 38 of the Rules. At hearing, counsel for the respondents submitted that the application is made under rr 36, 38 and 48 of the Rules.

[15] The respondents' submissions also draw on the general approach for security for costs in New Zealand, noting that Niue's law is based on New Zealand law.

[16] Referring to the Rules, the respondents submit that:

(a) Coxhead CJ's directions of 3 July 2024 were made pursuant to r 38, which enables the Chief Justice to consider security for costs upon receipt of the appeal and expressly notes that the decision as to security for costs is at the Court's discretion.

(b) Notwithstanding the Chief Justice's directions, the Court can receive and determine a subsequent application for security for costs pursuant to r 36. The respondents submit that r 38 enables the Chief Justice to carry out an initial assessment in terms of security for costs, but this does not preclude the Court from making orders for security for costs once additional information can be put before a fully constituted Court.

(c) The ability of a fully constituted Court to vary, make, or discharge further orders for security for costs was implied in the Chief Justice's directions, where he stated that no orders for security would be made "at this time".

(d) Rule 48 provides that the Court can govern its own processes "to promote the ends of justice". The respondents submit that the appellants' request for the Court not to allow the respondents to be heard on security does not promote the ends of justice, as required.

[17] The respondents also submit that in *Talagi v Pihigia*, the then-Chief Justice Savage did not make orders for security for costs but signalled that the Court of Appeal could make such orders at a future point, if it was deemed appropriate.[5]

[18] The respondents submit that while the Court should not prevent a genuine claim by an appellant of limited means, it must also protect respondents from being drawn into unjustified litigation. The respondents submit that the Court should exercise its discretion by considering all the circumstances of the case and arriving at a conclusion that would do justice between parties.

[19] In terms of the present application, the respondents submit that security should be ordered as:

(a) The appeal has little merit and was raised for an ulterior purpose – to prevent the Paramoa family from benefitting from land in which their father and Valamaka Meleke were entitled to share.

(b) There is no evidence that the appellants can meet any costs awarded against them. The respondents note it was not until after the respondents made submissions as to costs in the High Court proceedings that the appeal was filed and served. Further, while the appellants claim that they are entitled to money arising from lease proceeds being held by Justice Department, the respondents submit that the extent to which these funds would be available to the appellants should the appeal fail is unclear.

(c) It is unreasonable and contrary to the interests of justice for the respondents to be put to the expense of defending further litigation without adequate security. If security for costs is not directed, the respondents will be required to incur further costs with no means of redress.

[20] As to quantum, the respondents note that the appeal raises 31 points, which may take considerable time to address. Having considered the calculations stipulated in New Zealand's

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5 *Talagi v Pihigia* [2015] NUCA 4.

Court of Appeal (Civil) Rules 2005,[6] the respondents seek security for costs in the sum of $15,000.

Submissions for the appellants

[21] The appellants note that the application is brought as an original application and not an appeal. Accordingly, they submit that the Court of Appeal has no jurisdiction to consider this matter under s 75 of the Niue Amendment Act (No 2) 1968, as relied upon by the respondents.

[22] The appellants submit that while r 36 of the Rules appears to provide a general jurisdiction to the Court to consider security for costs at any stage of the proceedings, this rule should not apply to appeals because r 38 specifically governs the determination of security for costs in relation to appeals. This, the appellants say, is consistent with the principle of statutory interpretation that a general provision cannot override a specific provision.

[23] The appellants submit that r 38 does not provide the Court of Appeal with jurisdiction or power to make orders for security for costs. In their submission, r 38 provides a mandatory function for the Chief Justice to consider whether an appellant must pay security for costs, and that this decision is at the Chief Justice's sole discretion. Rule 38 also provides the Chief Justice the power to dismiss any appeal should an appellant not comply with any order as to surety of costs.

[24] The appellants argue that the Chief Justice has, in his 3 July 2024 directions, already carried out his statutory functions and made the necessary orders per r 38 and is therefore functus officio. The appellants submit there are no statutory powers under the Rules or substantive law empowering the Chief Justice to reconsider any of the orders or directions already made by him pursuant to r 38.

[25] Further, the appellants argue that, given the procedures for determining security for costs are clear, r 48 – which applies in situations where no procedures are provided under the Rules – does not apply in the present case.

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6 Court of Appeal (Civil) Rules 2005 (NZ), r 35(5).

[26] The appellants suggest that, rather than applying for an order for security for costs, the respondents should have appealed the Chief Justice's decision not to issue such an order. Further, they suggest that there are legal procedures available to the respondents to enforce any order of costs in their favour should the appeal not succeed.

[27] In response to the arguments laid out at [19] above, the appellants submit:

(a) The merits of the appeal cannot be a ground for considering whether security for costs should be awarded or not, as this is a matter for the Court of Appeal hearing the substantive appeal to determine.

(b) The onus is on the respondents – as applicants to this interlocutory proceeding – to provide evidence that the appellants are unable to meet any costs awarded against them. However, this evidence has not been produced. In any event, the appellants submit that a significant amount of money is being held in the Justice Department, to which the appellants will be entitled.

(c) It is contrary to the interests of justice and the public interest for the appellants to be "suppressed at the initial stages of the appeal process by requiring the payment of exorbitant sums".

[28] The appellants submit that the substantive appeal raises important issues and emphasise the need for the appeal to proceed.

[29] Should the Court determine that security for costs should be awarded, the appellants submit that the amount sought by the respondents is excessive. The appellants submit that a third of the amount sought – around $3,000–$5,000 – would be sufficient.

Security for costs in the Court of Appeal

[30] Rule 38 provides that the Chief Justice can order security for costs upon receipt of an appeal. It states:

38 Powers and duties of Chief Justice in relation to notices of appeal

> (1)(a) The Registrar, on receiving a notice of appeal, shall forthwith transmit it, or a true copy thereof duly certified by the Registrar as being such a copy, to the Chief Justice.
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> …
>
> (2)(a) On the receipt of a notice of appeal or a true copy thereof, the Chief Justice shall, in his discretion and without hearing parties, decide whether security for the costs of the appeal shall be given by the appellant.
>
> (b) If he decides that such security shall be given, he shall fix the amount thereof and the time within which the security shall be given, that time to be computed from and including the day on which notice of the requirement of security is given to the appellant.
>
> (c) The Registrar shall forthwith give notice in writing of the requirement to the appellant accordingly.
>
> (3)(a) Security for costs of an appeal shall in all cases be given by depositing the amount in money with the Registrar, or any other person specified by the Chief Justice.
>
> …

[31] As we read the rule, the Chief Justice has full discretion, when an appeal is filed, without the need to hear from the parties, to either:

(a) grant security for costs; or

(b) decline to grant security for costs.

When the Chief Justice orders security for costs

[32] The process for when security for costs is granted by the Chief Justice in the first instance, pursuant to r 38, is dealt with at r 38(2)(b)–(c) and 38(3)(a).

When the Chief Justice declines to grant security for costs

[33] However, when the Chief Justice declines to grant security for costs in the first instance, the process to be followed by a respondent who then wishes to apply for security for costs is unclear.

[34] We are of the view that rr 38 and 36 must be read in a way to allow the Rules to operate together and not to create unworkable situations or to be contradictory.

[35] It could be argued, as Mr Toailoa says, that when a Chief Justice declines to grant security for costs pursuant to r 38, then the respondents' avenue to seek security for costs is by appealing the Chief Justice's decision. That would make the Rules unworkable. The Chief Justice has full discretion. The Rules provide that the Chief Justice is not required to hear from the parties. If a party was to appeal the decision of the Chief Justice, what would be the grounds for appeal be, given the Chief Justice is not required to hear from the parties and has absolute discretion?

[36] The Court's specific powers to determine security for costs are stipulated by the r 36, which states:

> **36 Security for costs**
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> (1) In any proceedings and at any stage the Court may require any party to deposit with the Registrar or the Clerk of the Court or any other person specified by the Court any sum of money as security for costs, and, in default of that deposit being made, the Court may stay the proceedings, either wholly or in respect of the party so in default.
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> (2) When any sum has been so deposited as security for costs, it shall be disposed of in such manner as the Court directs.
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> (3) Notwithstanding any provision of these Rules, neither the Crown, nor the Minister, nor Cabinet, nor the Registrar shall in any case be liable to give security for costs in respect of any application to or proceedings in the Court.

[37] The workable approach is as follows: where the Chief Justice declines to grant security for costs in the first instance pursuant to r 38, it is still open to a respondent to apply for security for costs pursuant to r 36. Put another way, when the Chief Justice declines to order security for costs pursuant to r 38, that does not remove a party's ability to apply to the Court for security for costs pursuant to r 36 at a later stage.

[38] "Court" is defined in r 2 of the Rules as the "High Court or the Court of Appeal as the case may require".

[39] Rule 36 clearly applies to either the High Court or Court of Appeal. It goes on to state that Court may require security for costs "in any proceedings". We read this as referring to any proceedings in the High Court or Court of Appeal. Rule 36 also states that the Court may require security "at any stage", which allows an application for security for costs before or during proceedings.

[40] In the only decision that has been issued on security for costs – by the then Chief Justice Savage in *Talagi v Pihigia*, in February 2015 – the former Chief Justice held:[7]

> [1] I have received an application for security for costs from the Respondent. The Respondent lives in Niue and has no counsel currently acting for her. It is therefore hard to see that she will be expending any monies defending this appeal and therefore, it is not appropriate that I award security for costs.
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> [2] This is not to say that the application may not be renewed should circumstances change or the Court of Appeal may think it appropriate to award for costs.

[41] The former Chief Justice clearly indicated that while he had declined to make an order for costs for the appeal matter, an application for security for costs could still be made. We agree with that approach.

When the Chief Justice defers decision to make orders on security for costs

[42] A situation may arise where the Chief Justice, upon initial receipt of an appeal, chooses to defer the decision to make orders as to security for costs. This was the case with Coxhead CJ's directions of 3 July 2024, which state that "no orders as security for costs of the appeal are made *at this time*" (emphasis added).

[43] In our view, such a deferral practically amounts to declining security at that preliminary stage, given that there remains an opportunity for further consideration of security for costs should an application be made pursuant to r 36 (as discussed at [37] above).

[44] The wording of r 38 supports this position. Rule 38(2)(a) says that "the Chief Justice *shall*, in his discretion and without hearing from parties, *decide* whether security for the costs of the appeal shall be given by the appellant". This wording stipulates that the Chief Justice

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7 *Talagi v Pihigia,* above n 5.

must decide security for costs – that is, must grant or decline security – upon initial receipt of an appeal.

[45] The purpose of r 38(2)(a) is to determine upon initial receipt of an appeal whether security should be ordered. This is preliminary only. If declined at this stage, r 36 enables an applicant to file an application for security to be considered further.

[46] Therefore, when a Chief Justice defers a decision on security upon initial receipt of an appeal, the Chief Justice has in fact declined security at that preliminary stage and left open the possibility for security at a later stage, should an application be filed pursuant to r 36. This is in line with the only case on the matter, *Talagi v Pihigia* quoted at [40] above, where the Chief Justice declined security in the first instance but noted that "the application may…be renewed should circumstances change or the Court of Appeal may think it appropriate to award for costs".

Security for costs in the High Court

[47] For completeness, we note that in High Court proceedings, clearly a respondent can apply for security for costs pursuant to r 36.

[48] As noted above, r 36 clearly states that the "Court" which includes the High Court or Court of Appeal, may require "in any proceedings" "at any stage" any sum of money as security for costs to be deposited with the Registrar.

The law with regard to security for costs

[49] The law and processes relating to orders for security for costs are yet to be fully explored by the Niuean courts. Only one decision has been issued on this matter – by the then-Chief Justice Savage in *Talagi v Pihigia*, in February 2015, which we have noted above at paragraph [19].[8]

[50] Given the minimal Niuean case law on this question, we now turn to the law in New Zealand in relation to security for costs to provide some guidance.

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8 *Talagi v Pihigia,* above n 5.

The law in New Zealand

[51] In granting leave to appeal, the Court of Appeal and Supreme Court of New Zealand are empowered to do so subject to certain conditions – including conditions relating to security for costs.[9] However, where the Court has not fixed security for costs at this initial stage, appellants are required to provide security for costs unless the circumstances warrant that security be dispensed with.[10]

[52] That security for costs in appeals is provided as a matter of course is distinct to the legal framework in Niue, where orders for security for costs are determined at the discretion of the Court in all circumstances.[11]

[53] Further, quantum for security in appeals to the New Zealand High Court and Court of Appeal is stipulated by legislation unless otherwise directed,[12] which is again distinct from the Niuean legal framework.

[54] For matters heard in the first instance, the Court's power to make orders for security for costs is governed by identical tests found in r 5.48 of the District Court Rules 2014 and r 5.45 of the High Court Rules 2016. This test is three-staged:[13]

(a) Has the plaintiff met the threshold test (stipulated in r 5.48(1) of the District Court Rules 2014 or r 5.45(1) of the High Court Rules 2016)?

(b) If yes, should the Court exercise its discretion to make an order for security for costs?

(c) If yes, how much security should be provided?

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9 Court of Appeal (Civil) Rules (NZ), r 27(2) and Supreme Court Rules 2004 (NZ), r 26(2).

10 High Court Rules 2016 (NZ), r 20.13; Court of Appeal (Civil) Rules (NZ), r 35; Supreme Court Rules (NZ), r 31.2.

11 Niue Land Court Rules 1969, r 36.

12 High Court Rules (NZ), r 20.13(3); Court of Appeal (Civil) Rules 2005 (NZ), r 35(5). The Supreme Court Rules (NZ) do not stipulate a set amount for security.

13 District Court Rules 2014 (NZ), r 5.48(1)–(3)(a) and High Court Rules (NZ), r 5.48(1)–(3)(a)

[55] If an order for security is made, the Court will also consider whether to stay the proceedings until security is provided.[14]

[56] A defendant who applies for orders for security in New Zealand Courts must first establish that:[15]

(a) the relevant plaintiff is either a resident, corporation, or subsidiary of a corporation incorporated outside of New Zealand; or

(b) there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[57] Once this threshold is met, the Court at its discretion must determine whether security for costs should be provided by the plaintiff. The District Court may order security for costs "if it thinks fit in all circumstances",[16] and the High Court may make such order "if the Judge thinks it is just in all the circumstances".[17]

[58] In *A S McLachlan Ltd v MEL Network Ltd*, the Court held that the decisions whether to order security and the quantum of security are highly discretionary. Indeed, the Court warned that this discretion "is not to be fettered by constructing 'principles' from the facts of previous cases". Orders for security for costs should ultimately be based on a careful evaluation of the facts and circumstances of a particular case.[18]

[59] Nevertheless, authorities may assist to identify relevant factors in assessing whether ordering security for costs is appropriate in the present circumstances. New Zealand authorities have suggested that possible considerations include, but are not limited to:[19]

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14 District Court Rules (NZ), r 5.48(3)(b) and High Court Rules (NZ), r 5.45(3)(b).
15 District Court Rules (NZ), r 5.48(1) and High Court Rules (NZ), r 5.45(1).
16 District Court Rules (NZ), r 5.48(2).
17 High Court Rules (NZ), r 5.45(2).
18 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]–[14].
19 For a comprehensive commentary and summary of relevant case law, see *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.45] and *Civil Procedure: District Courts and Tribunals* (online ed, Thomson Reuters) at [DCR 5.48].

(a) The merits and prospects of success of a case, bearing in mind the early stage of the proceedings.[20] The absence of a statement of defence may make the Court unable to assess the merits of a case.[21]

(b) Delay in applying for security for costs. Considerations as to delay include whether the delay has prejudiced the plaintiff and whether such delay could be justified.[22]

(c) Whether the litigation has public interest overtones.[23] However, plaintiffs in litigation with a public interest element are not immune from security for costs.[24]

(d) Access to justice.[25] The Courts will be slow to make an order for security that would stifle a claim.[26]

(e) Whether the plaintiff's impecuniosity has been caused by the defendant's acts on which the action has been brought.[27]

(f) The conduct of parties.[28] However, the plaintiff's conduct may be of limited relevance where an order will prevent the plaintiff from pursuing a claim that is not characterised as having little chance of success, unmeritorious, or unjustified.[29]

(g) Whether the defendant is using the application for tactical reasons without genuine concern for protection against the costs of litigation.[30]

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20 *Meates v Taylor* (1992) 5 PRNZ 524 (CA) at 528; *Lee v Lee* [2019] NZCA 345 at [73]; and *McNaughton v Miller* [2022] NZCA 273 at [19].

21 *Ren v Pan* [2025] NZHC 184 at [23].

22 *Nikau Holdings Ltd v Bank of New Zealand* (1992) 5 PRNZ 430 (HC) at 441; *Jo v Johnston* [2013] NZHC 552 at [18]; *Oxygen Air Ltd v LG Electronics Australia* [2018] NZHC 945 at [26]; *Hey v Hey* [2021] NZHC 591 at [25]; and *Eurekly Ltd v Crimson Consulting Ltd* [2022] NZHC 24 at [78]–[80].

23 *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746 (CA).

24 *Jindal v Liquidation Management Ltd* [2023] NZHC 183 at [30]–[32].

25 *Lee v Lee*, above n 20, at [20] and *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [23](b).

26 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [3].

27 *Bell-Booth Group Ltd v Attorney-General & BCNZ* (1986) 1 PRNZ 457 (HC).

28 See for example *Sharda Holdings Ltd v Gasoline Alley Services Ltd* HC Auckland CIV-2008-004-539, 13 November 2009 at [7].

29 *Wright v Attorney-General* [2019] NZHC 3046 at [53].

30 *Stills v McCormack* [2023] NZHC 702 at [45].

[60] Balancing the competing interests of the plaintiff and the defendant is the overriding consideration in this discretionary exercise.[31] The Court must balance the plaintiff's right of access to justice against the defendant's interests in being protected from a barren costs order.[32]

[61] Subject to the circumstances of a case, the amount of security should represent a reasonable contribution toward costs.[33]

[62] The Court has inherent jurisdiction to review, set aside, or vary an order for security for costs, even if made by consent, where there has been a significant change in material circumstances or as required in the interests of justice.[34] The need for a significant change in material circumstances is particularly relevant where the application is effectively to review the existing order rather than for further security.[35]

The law in Niue

[63] Clearly the Niue Courts have extensive discretion to grant security for costs. The Niue law does not provide a threshold test like in Aotearoa New Zealand, although clearly whether an appellant is able to pay costs is a major consideration.

[64] Having considered the Aotearoa New Zealand authorities we are of the view that, like in Aotearoa New Zealand, when considering the matter of security for costs, balancing the competing interests of the plaintiff and the defendant is the overriding consideration in this discretionary exercise.

[65] In Niue, like in Aotearoa New Zealand, orders for security for costs should ultimately be based on a careful evaluation of the facts and circumstances of a particular case.

[66] Factors to be considered by the Courts in the Niue context would include:

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31 *Highgate on Broadway Ltd v Devine*, above n 20, at [24](c).

32 *Clear White Investments Ltd v Otis Trustee Ltd* [2016] NZHC 2837 at [4].

33 *Wishart v Smallbone* [2020] NZCA 434 at [52].

34 *Cargill NZ Ltd v Palmerston Wool Co Ltd* (1997) 11 PRNZ 52 (HC); *Stead v The Ship "Ocean Quest of Arne"* [1995] 3 NZLR 415 (HC); *O'Malley v Garden City Helicopters* (1994) 8 PRNZ 182 (HC); *Driver v Radio New Zealand Ltd* [2020] NZHC 2903 at [8]; and *Monnery v Parsons* [2023] NZHC 1595 at [14].

35 *Lawrence v Glynbrook 2001 Ltd* HC Dunedin CIV-2009-412-713, 21 June 2011 at [10].

(a) Whether the plaintiff (appellant) will be unable to pay the costs of the defendant (respondent) if the plaintiff (appellant) is unsuccessful in the plaintiff's (appellant's) proceeding.

(b) The merits and prospects of success of a case, bearing in mind the stage of the proceedings. It may be more difficult to determine the merits and prospects of success of a case at a very early part of proceedings.

(c) Delay in applying for security for costs.

(d) Whether the litigation has public interest overtones.

(e) Access to justice. The Courts will be slow to make an order for security that would stifle a claim.

(f) Whether the plaintiff's (appellant's) impecuniosity has been caused by the defendant's (respondent's) acts on which the action has been brought.

(g) The conduct of parties.

(h) Whether the defendant (respondent) is using the application for tactical reasons without genuine concern for protection against the costs of litigation.

Decision

[67] In light of the discussion at [42]–[46] above, we consider that Coxhead CJ has, per his 3 July 2024 directions, declined to order security for costs at that preliminary stage, but left open the possibility for further consideration of security at a later stage. Given that the respondents have subsequently sought security pursuant to r 36, we now turn to decide whether that application should be granted.

[68] As outlined at [63]–[66] above, the test as to whether security should be ordered is ultimately discretionary and does not require the respondents to establish the appellants' impecuniosity. That said, impecuniosity is nevertheless a relevant factor, and the respondents have not provided any evidence to suggest that the appellants are unable to meet any costs

awarded against them. In fact, the respondents have noted the appellants' claim that they are entitled to money arising from lease proceeds being held by Justice Department.

[69] The respondents say it is unclear to what extent the funds held by the Justice Department would be available to the appellants should the appeal fail. The appellants say they are entitled to funds being held by the Justice Department. We note that in Justice Reeves' judgment of 2020 concerning the parties' entitlement to the lease proceeds (outlined at [6] above), she gave directions that the lease money could only be paid when parties have identified the members of the magafaoa entitled to share the relative interests, and they have demonstrated how the funds would reach magafaoa members through a trust or some such being established.[36] Those conditions have not yet been met. At this point in time, the lease monies are being held by the Justice Department and are not available to the appellant. And if the conditions of Justice Reeves 2020 judgment decision are not met those funds will never be available to the appellants.

[70] Currently, the appellants are not entitled to any of the funds being held by the Justice Department. Therefore, there is no evidence before the Court that the appellants are entitled to funds or have funds available to pay costs if they fail at appeal.

[71] We are cautious in making comments regarding the merits of the appeal although we do note that the appeal does seem wide-ranging, raising some 31 points. This can either indicate that the judgment of the High Court was not well-reasoned and has many points to appeal, or that the appellants have taken a scattergun approach in seeking to appeal anything and everything in the hope that one of those points will be successful.

[72] The appellants' conduct is interesting in that it was not until after the respondents made submissions as to costs in the High Court proceedings that the appeal was filed and served, and that the appellants applied to stay (to stop) Judge Isaac from making a decision as to costs. This could be seen to indicate actions being taken by the appellants so that costs are not paid or are unable to be paid.

[73] The protracted nature of these proceedings is of concern, especially given that the respondents seem to have been successful at all stages. We agree that it is unreasonable and

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36 *Asemaga v Suamili,* above n 2.

contrary to the interests of justice for the respondents to be put to the expense of defending further litigation without adequate security.

[74] We are of the view that security for costs should be granted.

[75] As to quantum, the respondents have noted that the appeal raises 31 points, which may take considerable time to address. The respondents have considered the calculations stipulated in New Zealand's Court of Appeal (Civil) Rules 2005,[37] and seek security for costs in the sum of $15,000.

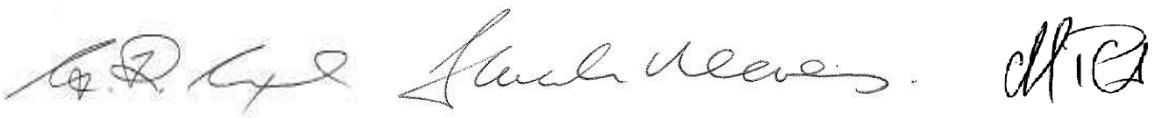
[76] However, in this situation, we are of the view that the context of this case must be taken into consideration. While the appellants have noted that they are entitled to money arising from lease proceeds being held by Justice Department, when these funds would be available to the appellants and the amount of the funds that the appellants are entitled to is still very unclear.

[77] Balancing the above considerations, we agree with appellants' submission that an amount around $3,000–$5,000 would be sufficient. We order therefore that $5,000.00 is to be paid by the appellants as security for costs, within ninety (90) days by depositing the amount in with the Registrar of the Niue Court.

[78] The appeal is stayed pending payment by the appellants of security for costs.

[79] Failure to deposit the amount with the Registrar may result in the appeal being dismissed.

Pronounced at 10.00am in Aotearoa New Zealand on the 9th day of February 2026.



CT Coxhead	SF Reeves	MP Armstrong
CHIEF JUSTICE	**JUSTICE**	**JUSTICE**

[37] Court of Appeal (Civil) Rules 2005 (NZ), r 35(5).