IN THE COURT OF APPEAL
NIUE (LAND DIVISION)

Application No: 11604

IN THE MATTER OF	Appeal No. 11604 Part Ulumago/Meimei, Liku District
BETWEEN	**ENELE KAIUHA, AHITAUTAMA MAKEA-CROSS AND NEWLAND POUMALE**
	Appellants
AND	**HOLO U TAFEA**
	Respondent

Hearing:	18 March 2024
Coram:	Isaac J Reeves J Armstrong J
Appearances:	Maui Solomon for Appellants Romero Toailoa for Respondent

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DECISION OF COURT OF APPEAL

Background

[1] This is an appeal filed by Enele Kaiuha, Ahitautama Makea Cross and Newland Poumale against orders of the Niue High Court dated 10 August 2017.

[2] The orders appealed from were made:

(a) Pursuant to s 34 of the Land Act 1969 Holo Tafea was granted a partition order of Section 1 Block 1 Part Meimei on Provisional Plan 11453; and

(b) Pursuant to s 14 of the Land Act 1969, Holo Tafea, Famakau Tafea and Vailita Holo Pihigia were appointed magafaoa of the partitioned land.[1]

[3] The appeal was heard in the Niue Court of Appeal on 18 March 2024. After hearing submissions from the appellant and the respondent we granted the appeal and stated that we would set out our reasons in writing for our decision. We also invited the respondent to file submissions as to costs within 30 days, with the appellant to reply within 30 days of that filing.

[4] Our reasons for granting the appeal and our decision on costs are set out below.

The partition

Appellants' submissions

[5] The appellants submit as follows:

(a) The partition application was submitted on the basis that Famakau descended from Tulagi Taupule Katikula (Tulagi), the common ancestor for the land. However it is clear from the genealogy submitted to the Court that she is not a direct descendant of Tulagi, but instead a

[1] For ease of reference after the parties to the appeal are initially mentioned they will be referred to by their first names throughout the decision.

descendent of Fatatoa Paitoga Katikula (Paitoga), Tulagi's brother. Therefore, the appellants say, the lower Court failed to identify the correct magafaoa of the land.

(b) It is common ground that Holo's adoptive father was given permission by the leveki magafaoa at that time to build a house on the land. Since then the Tafea family have occupied the house. The appellants submit that Holo's adoptive father receiving permission to build a house, and the Tafea family's continued occupation after he has passed, does not constitute a right of ownership. The gift was not permanent, the mana of the land and the genealogy has not changed and therefore Holo has no right to partition without the permission of the leveki magafaoa as someone who is not a descendant of the common ancestor for the land.

(c) The respondent did not have approval from the rightful leveki magafaoa to partition the house site, increase the area of land adjacent to the house, or to become leveki.

(d) The High Court erred in exercising its discretion to provide Holo and his family with a partition and leveki magafaoa rights to the land.

[6] At the core of the appeal is the appellants' opposition to the orders made granting the partition and appointing Holo as leveki magafaoa. The appellants have strongly opposed Holo's applications to partition the land and to become leveki magafaoa, having filed an injunction application in 2016 to stop Holo from extending the house on the land in question.

[7] The appellants seek that the partition orders made in favour of Holo are set aside and annulled.

[8] Notwithstanding, the appellants are in favour of a life interest permitting Holo and his wife, Famakau, to occupy the house, after which time the house and land will return to the magafaoa.

Respondent's submissions

[9] The respondent submits that there was no injustice caused by the exercise of the lower Court Judge's discretion to necessitate the intervention of the Niue Court of Appeal. They say that the land was given by a descendant of Tulagi, Pesai Taumalolo, who was the leveki magafaoa of the land at the time, to Holo's adopted father to build a home for him and his family. There was no time limit provided for the occupation of this home, and Tafea's family has continued their occupation in the home and do not wish to vacate.

[10] The partition granted in the High Court was sought to rationalise the respondent's occupation, however despite the partition Holo sought to preserve the underlying ownership as resting with the common ancestor Tulagi. Should the respondent no longer wish to occupy the land in the future, they submit that the land will be returned to the Tulagi magafaoa.

[11] The respondent disagrees with the submission that the gifting of the land did not extend to Holo and his family. The Court was clear that the gift and subsequent partition does not call for a change in the common ancestor upon partition, thus accepting that the gift was properly executed and that it does not affect the underlying ownership of the land.

[12] It is submitted by the respondent that the Court did not take into account an irrelevant consideration, and that he gave sufficient weight to the indication of support for the appointment of Holo, Famakau and Vailita as leveki magafaoa, which is shown by the minutes of a meeting held on 21 October 2016.

[13] The respondent submits that the appeal should be dismissed and the orders of the lower Court be affirmed.

The appointment of leveki

Appellants' submissions

[14] The main issue for the appellants is that the Court identified Famakau as a descendant of the common ancestor of the land, Tulagi, when she is not. In doing so the lower court incorrectly granted ownership to the wrong magafaoa.

[15] The whakapapa submitted to the Court states that Famakau descends from Tulagi's brother, Paitoga. It is submitted that this does not entitle Famakau to claim descent from Tulagi and she should not have been recognised as a member of the magafaoa.

[16] The appellants submit that following the definitions of "Mangafaoa" provided by the Land Act 1969 and historian Ron Crocombe, the mangafaoa is the family or group descended from a common ancestor. It is accepted that the mangafaoa comprises of several generations of descendants both biological and adopted of **one man** (or occasionally one woman). Famakau does not qualify as mangafaoa under these definitions, the only way she could qualify would be if the common ancestor was Tulagi's father, but this is not the case.

[17] The appellants considered the purpose and intention of the legislation and submitted that allowing those who descend from the siblings of the named common ancestor to override the ownership rights of direct descendants of the common ancestor could not have been the intention of the legislator. The appellants brought to the Court's attention that Famakau has her own entitlement to claim ownership to land through her descent line from Paitoga.

[18] Overall the appellants submit that the Court failed to acknowledge a previous order of the Court, and appointed the appellants as leveki magafaoa for Section 1 of the land. This adds to the appellants submissions that the Court failed to identify the correct magafaoa of the land, and followed the wrong common ancestor as a result. The appellants were appointed as the leveki magafaoa before the respondent filed the partition application and the appellants made it clear to Holo that they opposed the partition and him becoming leveki magafaoa.

[19] The appellants submit that the meeting held on 21 October 2016, where it was determined that those present supported Holo becoming the leveki magafaoa of the land, was invalid as the attendees were related to Holo and Famakau but were not descendants of Tulagi. Therefore the proper process was not followed in appointing a leveki magafaoa.

[20] The appellants seek the following orders:

(a) To set aside and annull the order appointing Holo Tafea, Famakau Tafea and Vailita Holo Pihigia as leveki magafaoa of the partitioned lands;

(b) That the Court affirm that Tulagi is the common ancestor of the lands in question; and

(c) Affirm the previous order of the Court dated 9 November 2016 that the appellants, Enele Kaiuha, Ahitautama Makea-Cross and Newland Poumale, are the appointed leveki magafaoa of the lands in question.

Respondent's submissions

[21] The respondent submits that the Court did not determine that Famakau was a direct descendant of Tulagi but that there was a genealogical connection between the Tulagi and Famakau. Further, the respondent submits that this is enough to appoint the respondent as the leveki magafaoa. Therefore they say that the Court did not err in its findings, but that the appellants misunderstood the Court's reasoning.

[22] The respondent submitted that the Court did not make its decision in isolation when appointing the respondent as the leveki magafaoa, but considered multiple factors. One factor was that the land was gifted to Holo's father, and consent and support was given to the Tafea family to continue to reside in and make improvements to the house they have lived in for the last 50 years.

[23] The respondent submits that the Court did not err in appointing Holo as leveki magafaoa, as he was only appointed as the leveki magafaoa for the partitioned land block of 1402m^2 and Enele remained the leveki magafaoa for the rest of the land to which she was appointed. Further, the respondent says that Enele had not bought her official appointment as the leveki magafaoa to the Court's knowledge at the time.

[24] Further, the respondent submits that the Court was correct to make the appointment of a leveki magafaoa following partition as this is provided for in s 36(c) of the Land Act 1969, irrespective of the earlier appointments of Enele and others. It is submitted that the Court did not exercise its discretion upon a wrong principle.

[25] The respondent submits that the appeal should be dismissed and the orders of the lower Court should be affirmed retaining Holo, Famakau and Vailita as the leveki magafaoa.

The Law

Partition

[26] Part 3 of the Land Act 1969 sets out the provisions in relation to the partition of Niuean land and the Court's discretion to do so. Sections 34 and 36 provide:

> **34 Jurisdiction to partition Niuean land**
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> (1) The Court shall have exclusive jurisdiction to partition Niuean land.
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> (2) The jurisdiction **to partition shall be discretionary** and the Court may refuse to exercise it in any case in which it is of the opinion **that partition would be inexpedient in the public interest or in the interests of the Mangafaoa or other persons interested in the land.**
>
> …
>
> **36 Discretionary powers of Court**
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> In partitioning any land the Court may exercise the following discretionary powers -
>
> (a) It may where the Leveki Mangafaoa wishes to allocate a portion of the land to a member of the Mangafaoa or the Mangafaoa has become unduly large or in cases of irreconcilable family disputes, partition the land among groups of members of the Mangafaoa on what appears to the Court to be the general desire of the persons concerned to be just and equitable;
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> (b) It shall avoid, as far as practicable, the subdivision of any land into areas which because of their smallness or their configuration or for any other reason, are unsuitable for separate ownership or occupation; It may appoint new Leveki Mangafaoa in respect of the pieces of land affected by any partition orders.

[27] The above-mentioned sections of the Land Act 1969 give the Niuean Land Court exclusive jurisdiction in relation to partitions.[2] Also the general tenor on the law concerning partitions of Niuean land is that where land is partitioned into two or more land blocks, the underlying ownership of the land continues to reside with the magafaoa, and the Court should consider and give weight to the interests of the magafaoa in exercising its discretion as to whether it should grant a partition.[3]

[28] Section 36(c) of the Lands Act 1969 allows the Court to appoint new leveki magafaoa in respect of the pieces of land affected by any partition order. This also indicates that a new title is contemplated under the partition regime.

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2 *Tongahai v Tafatu – Section 3, Block III, Alofi District* (Part Tapeu) [2015] NUCA 3; App No. 1189 at [39]-[41].

3 *Tongahai v Tafatu – Section 3, Block III, Alofi District* (Part Tapeu) [2015] NUCA 3; App No. 1189 at [41].

[29] In the Niuean context a partition is a subdivision of the physical land and also the legal title, but not a division of the underlying magafaoa ownership. When the Court orders a partition in Niue the resulting legal effect of that order will necessarily see:[4]

> (a) a division of the physical land into two or more blocks - completed with a survey;
>
> (b) the appointment of a leveki (it maybe the same person or a different person) for the newly partitioned block;
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> (c) the issuing of a new title for the partition block that is independent of the parent title; and
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> (d) the recording of the common ancestor on the new title.

Leveki magafaoa

[30] Section 14 of the Land Act 1969 provides the legal principles to be applied where leveki magafaoa are involved:

> …
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> (2) If the application is signed by members who in the Court's opinion constitute a majority of the members of the Mangafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the Leveki Mangafaoa of that land.
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> (3) If no such an application is received within a reasonable time, or applications are each signed by the members who, though having attained the age of 21 Years, constitute less than a majority of the Mangafaoa who have attained such age the Court may appoint a suitable person to be Leveki Mangafaoa of that land.
>
> (4) The appointment of a Leveki Mangafaoa shall not be questioned on the grounds that any member of the Mangafaoa was absent from Niue, but the Court may consider any representation made in writing by any member so absent.
>
> (5) Any person who is domiciled in Niue, and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of Mangafaoa land, may be appointed as a Leveki Mangafaoa of any land, but if he is not a member of the Mangafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.
>
> (6) In appointing any Leveki Mangafaoa the Court may expressly limit his powers in such manner as it sees fit.

[31] The Court is required to determine title to Niuean land in accordance with Niuean custom and usage.[5] Ownership is determined by ascertaining and declaring the magafaoa of

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4 *Tongahai v Tafatu – Section 3, Block III, Alofi District* (Part Tapeu) [2015] NUCA 3; App No. 1189 at [61].
5 Land Act 1969, s 10.

that land by reference to the common ancestor.[6] Relative interests of the magafaoa in the land can be determined by the Court, but only for the purposes of allocating money and not for ownership purposes.[7] A leveki magafaoa is then appointed, who must be supported by the magafaoa, and that person has the power to control the occupation and use of the land.[8] The exercise of the leveki magafaoa's powers must be done in accordance with Niuean custom and in consultation with the magafaoa.

General jurisdiction of the Niue Appellate Court

[32] Section 41 of the Niue Land Court Rules 1969 states that all appeals of the Niue Court of Appeal are by way of rehearing. The Court of Appeal may do the following:

(a) Affirm the order appealed from;

(b) Annul that order, with or without the substitution of any other order therefore;

(c) Vary that order;

(d) Direct the Land Court to make such other or additional orders as the Court of Appeal thinks fit;

(e) Direct a new trial or rehearing by the Land Court;

(f) Make any order which the Land Court might have made in the proceedings; and

(g) Dismiss any appeal.

[33] The Court of Appeal has the ability to allow an appeal on grounds not set out in the notice of appeal as long as it would not cause an injustice to the other parties.

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6 Land Act 1969, s 12.
7 Section 13.
8 Sections 14 and 15.

[34] The Court of Appeal has a wide discretion. The powers of the Niue Court of Appeal are similar to the powers of the Māori Appellate Court and the New Zealand Court of Appeal. Such powers are widely stated, and this is done intentionally to enable this Court to be proactive in determining a resolution for both the legal and underlying issues.[9]

[35] The wide discretion of the Court was further mentioned in *Asekona v Misikea* as follows:[10]

> [32] It is clear that an appellate court has wide powers and is empowered to do that which the High Court ought to have done and has an overriding objective to do what is in the interests of justice. However those powers do not appear to extend to remitting a matter back to the High Court that was not the subject of appeal.

[36] The law provides that in the exercise of this discretion it is not the role of the appellate court to consider the case afresh and arrive at its own decision. The appellate court intervenes where it is satisfied that:[11]

(a) The lower court acted on an error of law or a wrong principle;
(b) The lower court failed to take into account a relevant consideration;
(c) The lower court took into account an irrelevant consideration; or
(d) The lower court was plainly wrong.

Discussion

Partition

[37] As set out above, a partition of Niuean land is done in the interests of the magafaoa of the land.

[38] The lower Court partitioned the land in favour of Famakau on the basis that she was a descendant of the common ancestor Tulagi.

[39] The appellants have clearly demonstrated that Famakau is not a descendant of the common ancestor of the land, Tulagi, but is instead a descendant of Tulagi's brother Paitoga. Accordingly, as the lower court incorrectly identified Famakau as a descendent of Tulagi in

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9 *Asekona v Misikea* [2017] NUCA 1; App No. 10130/5, at [28]; See also *Karena – Karaka Huarua A and B* (2005) 6 Taitokerau Appellate Court MB 260 (6 APWH 260) at [32].
10 *Asekona v Misikea* [2017] NUCA 1; App No. 10130/5.
11 *Tahega v Kapaga – Part Limu Sec 1 Block II* [2020] NUCA (majority), at [8].

the decision to grant the partition, it was both plainly wrong and did not take into account a relevant matter. That is that Famakau was not descended from the common ancestor of the land. On that basis, the partition order must be set aside as it was not made in the interests of the magafaoa of the land in question.

Leveki magafaoa

[40] The law is clear that the support for a leveki must come from the magafaoa of the common ancestor for the land in question. The applicant must show he has the majority support from the magafaoa by way of members of the magafaoa consenting to the application for the appointment of the leveki magafaoa. No such support was provided by the magafaoa of the land.

[41] The support for the respondent's appointment came from the magafaoa of Paitoga, Tulagi's brother, and the respondent's families who are not the magafaoa of the land.

[42] The Court should not have based its decision on support which did not come from the magafaoa of the land.

[43] We therefore find the decision of the lower Court was incorrect and the order made appointing Holo Tafea, Famakau Tafea and Vailita Holo Pihigia as leveki magafaoa should be annulled.

[44] Further, we confirm the prior order of the Court dated 9 November 2016 appointing Enele Kaiuha, Ahitautama Makea Cross and Newland Poumale as leveki magafaoa for this land.

Conclusion

[45] This Court therefore makes the following orders:

(a) Cancelling the orders made by the Niue High Court on 10 August 2017 pursuant to section 34 of the Land Act 1969 and annulling Holo Tafea's partition order on Section 1 Block 1 Part Meimei on Provisional Plan 11453;

(b) Cancelling the orders made pursuant to section 14 of the Land Act 1969, appointing Holo Tafea, Famakau Tafea and Vailita Holo Pihigia as magafaoa of the partitioned land; and

(c) Confirming the order of 9 November 2016 appointing Enele Kaiuha, Ahitautama Makea Cross and Newland Poumale as leveki magafaoa of this land.

Costs

Appellants' submissions

[46] The appellants submit that costs should be awarded in this matter on the basis that costs normally follow the event, that the appeal proceedings were formal and strenuously contested by the respondent, and that the appellants have been successful "in the face of serious and concerted opposition".

[47] The appellants submit that the respondent has acted unreasonably by filing the partition and not following the proper process of consulting with the leveki magafaoa, which lead to the appellant having to challenge the High Court decision. The appellants also submit that the Court should take into account what they say has been 'aggravating conduct' by the respondent towards Enele since the filing of the application.

[48] As the Court has a broad discretion in deciding the level of costs, the appellants submit that the respondent's contribution should be at the highest level of 80% of the appellants' legal fees amounting to $20,400. As well as 80% of the fees and expenses from additional work undertaken by one of the appellants, Enele Kaiuha (totalling $3,280), and a full award of disbursements (totalling $4,565.80).

Respondent's submissions

[49] The respondent opposes the costs sought by the appellants and submits that each party should bear its own costs.

[50] If this Court is of the mind to award costs the respondent submits as follows in reply to the appellants' submissions:

(a) Counsel for the appellants no longer holds a practising certificate and appeared as an unregistered legal 'agent'. Therefore his charge-out rate should be $112.50 an hour;

(b) The 68 hours claimed by the appellants' counsel is excessive considering that the issues on appeal were not complex, the submissions of counsel were not extensive and the hours do not match what is reasonably required for consultation, research and correspondence with clients and the Court. The reasonable professional costs claimed by counsel should be 55 hours at $112.50 an hour, totalling $6,187.50; and

(c) In terms of the 'appellants costs', counsel submits that the figure quoted by the appellants' counsel includes costs personally incurred by the appellants in both the High Court and Court of Appeal proceedings. They submit those costs should not be awarded as the general rule is that litigants will not be paid for their work on a case unless there are exceptional circumstances, and no such circumstances exist here; and this Court only granted leave to hear parties on costs incurred from the appeal, not the High Court proceedings.

[51] The respondent submits that the allegations concerning alleged aggravating conduct by the respondent are of no substance and have no bearing on the costs application.

[52] Counsel submits that Holo took reasonable steps to preserve his occupation of the land, in which he honestly believed he had a good case for a number of reasons, including the length of time he had been in occupation of the land, consent from descendants of Tulagi to his occupation, and the genealogical connection between his wife and Tulagi.

[53] During the Appellate Court hearings Holo had to seek professional assistance. The respondent's legal costs and disbursements were $17,516.00, consequently counsel submitted that he does not have the financial means to pay the appellants' costs as well.

[54] The respondent submits that as the Court plays a role in facilitating amicable and ongoing relationships between parties in regard to land ownership, a costs award should not be considered appropriate in the present case and costs should lie where they fall. However, if the Court is minded to award costs, then only 10% of the reasonable professional fees of $6,187.50, plus 10% of the disbursements, should be awarded.

Law

[55] The law as it relates to costs provides the Court with a wide discretion to grant costs "as it sees fit" as follows:[12]

> **35 Costs**
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> In any proceedings the Court may make such order as it thinks fit for the payment of the costs thereof, or of any matters incidental or preliminary thereto, by or to any person who is party to the proceedings, whether the parties by and to whom all costs are so made payable are particles in the same or different interests.

[56] There is a two-step approach to determining costs. The first step is to determine whether costs should be awarded and the second is to determine the appropriate amount of costs.[13]

[57] The Court of Appeal has also found the following principles to be relevant when considering whether costs should be awarded:[14]

(a) Costs usually follow the event;

(b) Costs are a discretionary measure available to the Court;

(c) In a community such as Niue, the Court plays a role in facilitating amicable and ongoing relationships between parties, particularly in

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12 Niue Land Court Rules 1969, s 35.
13 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012.
14 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012 at [13].

regard to land ownership. As such, costs may not be considered appropriate in some circumstances;

(d) A successful party should be awarded a reasonable contribution to the costs that were actually reasonably incurred;

(e) Where proceedings involved counsel, and where parties pursued and contested litigation within a relatively formal framework, an award of costs should be made; and

(f) There is no basis for a departure from the ordinary principles of costs, where the proceedings were difficult and hard fought, and where a party succeeded in the face of serious and concerted opposition.

[58] Where it is clear that costs should be awarded, *Hekau v Tongahai* provides how the Court should determine the level of costs to be awarded using the following principles:[15]

(a) The Court has broad discretion when deciding the level of costs;

(b) The Court should have regard to the nature of the court proceedings; whether the proceedings were formal or informal; the importance of the issues; and the conduct of the parties;

(c) If a party has acted unreasonably, for example by pursuing a wholly unmeritorious and hopeless claim or defence, it is within the Court's discretion to award a higher level of costs against them; and

(d) Where the unsuccessful party has acted reasonably, it should not be penalised by having to bear the full costs of their adversary as well as their own solicitor/client costs.

[59] Costs are assessed objectively with regard to the above principles. A reasonable contribution as to the fees will fall within the range of 10 per cent to 80 per cent.

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15 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012.

Discussion

[60] This appeal was strongly contested by both parties who both considered they had rights on their side. Both parties were also legally represented and their counsel argued each case strenuously for their respective clients.

[61] Bearing this in mind, we consider that costs should be awarded and we do not consider we should deviate from the principle that costs normally follow the event. With this in mind we will make an order for costs in favour of the appellant.

[62] The question however is the quantum of the award of costs.

[63] The appellant seeks 80% of their legal fees amounting to $20,400, 80% of fees and expenses from additional work undertaken by Enele Kaiuha (totalling $3,280), and a full award of disbursements (totalling $4,565.80).

[64] The respondent considers that if the Court is minded to award costs, the reasonable professional fees incurred by the appellant should be $6,187.50, and it is appropriate for the Court to award 10% of that plus 10% of the disbursements.

[65] We are mindful that the respondents have lived on this land for 50 years and that the appellants want the Court to grant the respondents a life interest on the land. Therefore the costs should not be punitive but ensure family unity is preserved.

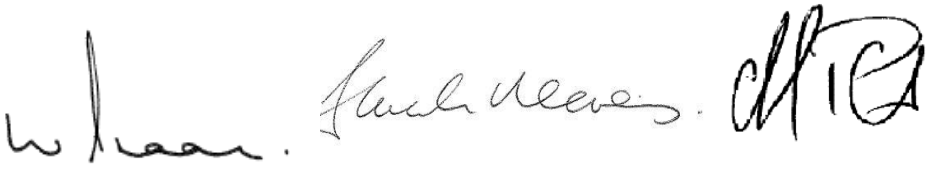
Decision

[66] Based on the above factors we consider that the costs should be set out at the rate of $150.00 per hour for say 50 hours, totalling $7500.00. We also consider disbursements should be paid at $4565.80

[67] Finally, we do not think it appropriate to award party costs to the appellants.

[68] Therefore the costs and disbursements payable by the respondent to the appellants amount to $12065.80.

Pronounced at 11.30am (NZT) in Gisborne on the 8th day of August 2024



W W Isaac	S F Reeves	M P Armstrong
JUSTICE	**JUSTICE**	**JUSTICE**