

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 148

IN THE MATTER OF

an appeal under s 58 of the Heritage
New Zealand Pouhere Taonga Act 2014

BETWEEN

POUTAMA KAITIAKI
CHARITABLE TRUST

(ENV-2022-AKL-000010)

Appellant

AND

HERITAGE NEW ZEALAND
POUHERE TAONGA

Respondent

AND

FIRST GAS LIMITED

Applicant / Section 274 party

Court: Environment Judge M J L Dickey
Māori Land Judge M Doogan
Environment Commissioner R Bartlett

Last case event: 20 April 2023

Submissions: V Morrison-Shaw for Heritage New Zealand Pouhere Taonga
B J Matheson for First Gas Limited

Date of Decision: 6 July 2023

Date of Issue: 6 July 2023

DECISION OF THE ENVIRONMENT COURT

A: Under s 285 of the RMA, Poutama Kaitiaki Charitable Trust is ordered to pay costs to Heritage New Zealand Pouhere Taonga in the sum of \$19,792.10, and costs to First Gas Limited in the sum of \$15,573.90.

Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga



B: Under s 286 of the RMA, this order is enforceable in the District Court at New Plymouth.

REASONS

Introduction

[1] This proceeding relates to an appeal by Poutama Kaitiaki Charitable Trust (**Poutama**) against a grant of an archaeological authority (**the Authority**) to First Gas Limited (**First Gas**) by Heritage New Zealand Pouhere Taonga (**Heritage NZ**).

[2] The Authority (no. 2022/279) covers a section of the Maui gas pipeline. First Gas sought the Authority to repair a buckle in the Maui pipeline and remove an emergency pipeline bypass either side of the Waikorora Stream in North Taranaki. Works will also be undertaken to create strain relief for the pipeline and install additional drainage. The work will take place in the vicinity of the recorded archaeological site Q18/79.

[3] The appeal was struck out by the Court on 10 March 2023.¹

[4] Heritage NZ and First Gas have both made applications for costs.

Procedural history

Appeal filed

[5] The appeal was filed on 27 January 2022.

Mediation

[6] Court-assisted mediation took place on 16 March 2022. No resolution was reached.

Timetable to hearing and evidence exchange

[7] On 31 March 2022, counsel for Heritage NZ filed a post-mediation reporting memorandum outlining a list of outstanding issues and proposing an evidence

¹ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 38.

exchange timetable. The outstanding issues included the standing of Poutama to appeal given the restrictions on rights of appeal set out in s 58 of the Act, and res judicata / issues estoppel to the extent the appeal raises issues previously determined by this Court, as well as other issues.

[8] Poutama's response was received on 11 April 2022. In summary, Poutama did not agree to the timetable proposed by Heritage NZ and considered the proceeding should be stayed pending outcome of its appeal to the High Court.² Poutama also referred to a potential application for judicial review in relation to its first ground of appeal in this proceeding,³ which it considered should be determined prior to a hearing of this proceeding. Additionally, Poutama requested that service be directed upon the New Zealand Māori Council in accordance with s 18 of the Māori Community Development Act 1962.

[9] The Court accepted that the works proposed to be undertaken are urgent repair works. The Court did not consider it appropriate to delay progression of this appeal pending the outcome of the High Court's decision on the appeal against this Court's decision on another archaeological authority. Further, it was not appropriate to delay this appeal pending a possible application for judicial review in respect of one of the grounds raised in the appeal. As the New Zealand Māori Council is not party to the proceeding, the Court concluded there was no basis for it to be served. The Court directed a timetable for exchange of evidence.⁴

[10] The timetable directions required Poutama to file its evidence by 24 May 2022. Poutama emailed its first statement just after 9pm that evening followed by a second statement and a link to their evidence attachments on 26 May 2022. Poutama advised that two further statements were in preparation, and it expected to be able to file them by the end of the weekend (28 – 29 May 2022).

² Appeal on decision *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165. That decision related to an Authority to remove 270m of a redundant section of the Kapuni gas pipeline from land near the Coast at Tongaporutu, North Taranaki. The Authority was applied for on a precautionary basis, as a listed pit/terrace archaeological site (Q18/77) is recorded as being in the vicinity of the proposed works.

³ The first reason for the appeal is stated as: "The application and assessments are deficient, misleading, deceptive, and contain untruths and inconsistencies."

⁴ Minute of the Environment Court dated 13 April 2022.

[11] On 26 May 2022, counsel for Heritage NZ filed a memorandum seeking changes to the evidence timetable because Poutama had not filed its evidence by the date directed. Heritage NZ also asked that it be excused from printing a hard copy of the Poutama evidence attachments as they comprise some 4,153 pages (once all Poutama's evidence had been filed).

[12] A Minute dated 30 May 2022 records that the Poutama evidence had all been filed. The Court agreed to the electronic provision of the Poutama evidence attachments save that one hard copy would need to be provided to the Court. Heritage NZ was required to provide three hard copies of the combined common/evidence bundle, excluding the Poutama evidence attachments for which one copy needed to be provided for the Court's records.⁵

[13] There was some back and forth with the parties regarding hearing dates. The hearing was eventually scheduled for 13 and 14 December 2022.

Strike out application – November 2022

[14] On 10 November 2022, First Gas filed a strike out application. Heritage NZ supported the application.

[15] The application followed the decision of the High Court⁶ which dismissed an appeal against an earlier decision of this Court which addressed Poutama's claim to tangata whenua status and its ability to appeal a decision of Heritage NZ under s 58 of the Heritage Act.

[16] A judicial telephone conference was convened on 17 November 2022 to discuss the strike out application. An online hearing of the strike out application was tentatively scheduled for 6 December 2022 and a timetable for submissions directed.

[17] Poutama foreshadowed an application to adjourn the strike out application.

⁵ Minute dated 30 May 2022 at [4] and [6].

⁶ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZHC 2713.

First adjournment application – November 2022

[18] On 22 November 2022 Poutama filed an application for adjournment of both the substantive appeal and the application to strike out. The adjournment was sought in order to allow Poutama to engage and instruct legal counsel, among other reasons.

[19] First Gas and Heritage NZ accepted that it would be appropriate to adjourn the substantive hearing on the basis that the strike out application should be heard on 14 December 2022.

[20] The Court adjourned the substantive hearing and issued directions on 25 November 2022 setting the strike out application down for hearing on 14 December 2022. The Court made related directions for the filing of any further material in support of the strike out application, and for the filing of any submissions in opposition by Poutama.

Second adjournment application – December 2022

[21] On 9 December 2022, Poutama applied to adjourn the hearing of the strike out application on the basis that in the time available they had been unable to secure legal representation. Despite opposition from First Gas and Heritage NZ and following the filing of memoranda, the Court granted that adjournment.⁷

[22] The Court stated that this was the “final adjournment” to be granted to Poutama, and that no further adjournment applications from Poutama will be entertained.⁸

[23] In granting the adjournment, the Court made directions regarding filing of evidence and submissions in relation to the strike out application.

[24] It was intended that the strike out application be heard first, followed by the substantive hearing if required. Later timetable adjustments were made to allow the strike out application to be heard on 6 March 2023, followed by the substantive

⁷ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZEnvC 250 and *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZEnvC 251.

⁸ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZEnvC 250 at [3] and [8] and *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZEnvC 251 at [14].

hearing on 9 March 2023.⁹

[25] Poutama did not comply with any of these directions.

[26] On 1 March 2023, having received no submissions from Poutama, Heritage NZ and First Gas filed a joint memorandum recording their concern at the appellant's failure to comply with the Court's timetable orders.

Third adjournment application – 2 March 2023

[27] On 2 March 2022, Poutama filed an application for directions and an application for adjournment supported by submissions. No explanation was provided for missing the deadline set by the Court, or for the fact that counsel had not been instructed to act on their behalf. Poutama asked that both the strike out application and substantive proceedings be adjourned until the "Preliminary Issues" identified by the appellant were addressed.

[28] Heritage NZ and First Gas filed a joint memorandum opposing the applications. First Gas and Heritage NZ argued that the additional adjournment should not be granted, especially given Poutama had already been granted two adjournments. Regarding Poutama's concerns about the High Court decision, First Gas and Heritage NZ pointed out that the appropriate avenue would have been an appeal to the Court of Appeal.

[29] By Minute dated 2 March 2023, the Court declined the further application for adjournment, stating:

[5] The application for adjournment is refused based as it is on a misconception of the proper procedure by which a decision of the High Court may be overturned or set aside. Further, Poutama has had considerable time to instruct legal counsel and to prepare for the strike out hearing. Detailed reasons for declining the adjournment and related application will be included in our decision on the strike out application.

[6] The strike out application will be heard on **6 March 2023** and if necessary, the substantive appeal will be heard on **9 March 2023**.

⁹ Minute dated 15 December 2022.

[30] The reason for the adjournment request was to enable determination of Poutama’s proposal that s 287 be invoked by the Court to state questions of law to the High Court – relating to the findings of the High Court in the previous Poutama appeal. However, those questions amount to a challenge to, or re-litigation of, the High Court’s findings. The appropriate avenue for such challenge is for Poutama to have sought leave to appeal the High Court’s decision. The Court’s understanding was that no application had been made.

[31] It was for that reason, and because Poutama had had ample time to seek and obtain legal advice on the application for strike out, that the Court refused the adjournment application.

Fourth adjournment application – 3 March 2022

[32] On 3 March 2023, solicitor Mark Utting filed a further application for adjournment stating that “counsel is in the process of being instructed by Poutama Kaitiaki Charitable Trust”. Mr Utting indicated that barrister Miriama Houra was being instructed and further time was sought to enable her to receive instructions and to meet with Poutama representatives. On this basis, the application to adjourn the strike out application set down for hearing on 6 March 2023 was made.

[33] By email dated 3 March 2023, the Court advised its decision that this further application for adjournment was also declined.

Fifth adjournment application – 6 March 2023

[34] On the day of the hearing a further application for adjournment was made by Ms Houra on the basis that she needed more time to take instructions and review the papers. Counsel for First Gas and Heritage NZ opposed this application.

[35] Having regard to the history of this proceeding, the Court concluded that a further adjournment was not warranted. Poutama Trust had offered no explanation as to why they did not instruct legal counsel in a timely way. It appeared Poutama only took steps to do so following the Courts refusal of their third application to adjourn on 2 March 2023.

Strike out decision

[36] On 10 March 2023, the Court issued a decision¹⁰ striking out the appeal. The Court concluded that Poutama’s ability to be heard under the appeal provisions had been decided in a matter with largely identical facts and concerning the same land by the High Court.¹¹ The High Court upheld a decision of the Environment Court that the Poutama Trust does not have tangata whenua status, nor do they fall under any of the other categories which would make them “directly affected”, so as to have standing to appeal under s 58 of the Heritage Act. This Court concluded it had no jurisdiction to consider or determine this appeal as there was no right to appeal.

[37] Costs were reserved with directions for any application for costs to be filed within 10 working days of the date of the decision, and any replies to be filed within a further 10 working days.¹²

Costs in the Environment Court

[38] As the Heritage New Zealand Pouhere Taonga Act 2014 does not contain any provisions relating to an award of costs, any costs applications are to be determined by s 285 of the Resource Management Act 1991 (**RMA**).

[39] Under s 285 of the RMA, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. The Environment Court Practice Note 2023 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or practice.¹³

[40] There is no general rule in the Environment Court that costs follow the event.¹⁴ The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it

¹⁰ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2023] NZEnvC 38.

¹¹ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZHC 2713.

¹² *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2023] NZEnvC 38 at [63].

¹³ *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].

¹⁴ *Culpan v Vose* A064/93.

would be fairer to depart from that rule.¹⁵ The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.¹⁶

[41] When considering an application for costs the Court will make two assessments: first, whether it is just in the circumstances to make an award of costs and second, having determined that an award is appropriate, deciding the quantum of costs to be awarded.¹⁷

[42] There is no scale of costs under the RMA. In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. The range of cases that come before this Court is so great and the circumstances of proceedings are so diverse that devising a fair scale would be at least very difficult and likely to have so many exceptions that it could not truly be used as a scale.

[43] Experience has shown that many of the Court's awards have tended to fall within four bands, as follows:

- (a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;
- (b) standard costs, which generally fall between 25 – 33% of the costs actually and reasonably incurred by a successful party (sometimes referred to as the “comfort zone”);
- (c) higher than standard costs, where certain aggravating factors are present as discussed below; and
- (d) indemnity costs, which are awarded rarely and in exceptional circumstances.

¹⁵ *Culpan v Vose* A064/93.

¹⁶ *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

¹⁷ *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

[44] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessments of whether to award costs and what the quantum should be if they are present in a case:¹⁸

- (a) where arguments are advanced without substance;
- (b) where the process of the Court is abused;
- (c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;
- (d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;
- (e) where a party takes a technical or unmeritorious point and fails; and
- (f) whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

Heritage NZ application for costs

[45] Heritage NZ submitted it is appropriate for a costs award to be made in its favour for the following reasons:

- (a) the appeal included unmeritorious claims regarding tangata whenua status which had previously been considered in other Environment Court and High Court proceedings;¹⁹
- (b) following the issue of the High Court decision, Poutama's continuation of the appeal amounted to an abuse of process;²⁰

¹⁸ *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

¹⁹ *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [168]; *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [467]; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629; and *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165.

²⁰ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 38 at [53], referring to *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2022] NZHC 2713 at [43].

(c) Poutama's case was poorly pleaded and presented:

- (i) Poutama's evidence and in particular the attachments to their evidence included a significant amount of material which was irrelevant to the issues before the Court or went beyond the scope of their appeals such as claims regarding the representative status of and payments to Te Rūnanga o Ngāti Tama;²¹
- (ii) Poutama failed to comply with timetabling directions of the Court for both the substantive appeal (evidence was filed late)²² and strike out proceeding (no substantive evidence or submissions were filed despite Poutama specifically requesting and receiving time for this to occur);²³
- (iii) Poutama failed to instruct legal counsel until a week before the strike out hearing – despite requesting and being granted two previous adjournments to allow time for that to occur;²⁴
- (iv) Poutama applied for five adjournments of the strike out hearing – with the last three applications being filed very late (two working days before the hearing and on the hearing date itself) and without any reasonable grounds being provided to support an adjournment;²⁵ and
- (v) Poutama took a technical and unmeritorious point in the strike out application in seeking to have the Environment Court refer an issue under s 287 to the High Court when that issue arose out of comments made by the High Court in separate proceedings;

²¹ For example, see Statement of Evidence of Marie Gibbs, 26 May 2022, at [47] – [73].

²² Poutama evidence was filed between one and six days late as noted in Heritage NZ's May 2022 Memorandum, and the Court's Minute dated 30 May 2022 at [2].

²³ As referred to in *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZEnvC 251 at [4] and [13].

²⁴ Refer Minute dated 25 November 2022, *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZEnvC 251 at [9], and *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 38 at [26].

²⁵ As summarised in *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 38 at [19] – [26].

- (d) Heritage NZ incurred significant costs it would not have otherwise incurred as a result of the appeal. These costs included:
 - (i) reviewing and responding to the significant amount of material filed by Poutama in support of its appeal (comprising 132 attachments and some 4,174 pages); and
 - (ii) compiling an electronic and hard copy version of the common bundle (spanning eight volumes and comprising some 4,685 pages in total);
- (e) Poutama failed to respond to two settlement proposals from Heritage NZ both of which involved Heritage NZ agreeing to forego costs in the separate High Court proceedings (and in this proceeding) if the appeal was withdrawn;
- (f) Poutama's appeal engaged no matters of general or public importance: instead the appeal was brought in relation to claimed private interests of Poutama and was fact specific;
- (g) Poutama put Heritage NZ to the expense of having to formally argue the strike out application; and
- (h) if an order for costs is not made the public purse will bear the full costs since Heritage NZ is a Crown entity.

First Gas application for costs

[46] First Gas submitted it is just in the circumstances for costs to be awarded for the following reasons:

- (a) the archaeological authority that was the subject of the appeal was sought by, and granted to, First Gas and it was necessary to authorise the completion of earthworks on nationally significant infrastructure for which First Gas is responsible. It was therefore entirely appropriate for First Gas to join the proceedings under s 274 RMA;

- (b) Poutama has no legal interest in the land on which the proposed works subject to the authority under appeal are to occur;
- (c) there was no public interest component in the appeal. The interests being pursued were private interests of the appellant and/or its individual members;
- (d) Poutama chose to file the appeal and the grounds of the appeal filed were wide reaching. The evidence filed was voluminous, including 132 separate attachments. First Gas was required to provide both primary and rebuttal evidence responding to the matters raised in the appeal; and
- (e) after the receipt of the High Court decision, Poutama should have been aware that the appeal had no prospects of success and Poutama should have promptly withdrawn the appeal at that time.

No reply submissions from Poutama

[47] No response has been received from Poutama.

[48] A timeline of events is as follows:

- (a) on 10 March 2023 the Court issued the decision on the strike out application. That decision set a timetable for costs applications and replies;²⁶
- (b) on 20 March 2023, Heritage NZ filed an application for costs;
- (c) on 21 March 2023, Heritage NZ filed a replacement costs application;
- (d) on 21 March 2023, an email from the Court Registry to all parties advised that any replies in response to Heritage NZ's costs application must be filed within a further ten working days (by 4 April 2023);
- (e) on 21 March 2023, First Gas advised it would be filing a costs application by 24 March 2023. By email dated 21 March 2023 from Court Registry staff all parties were advised First Gas' application would have a further reply date

²⁶ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand* [2023] NZEnvC 38 at [63].

of 7 April 2023. By further email this was corrected to 11 April 2023, due to the Easter holiday;

- (f) on 22 March 2023, First Gas filed an application for costs;²⁷
- (g) on 23 March 2023, a Court Registry staff member advised counsel for First Gas that the reply date was to be left as 11 April 2023 to avoid any confusion;
- (h) the Court received no reply submissions by 11 April 2023 (or to date);
- (i) on 17 April 2023, counsel for First Gas emailed the Court Registry asking for confirmation that no response had been filed by Poutama. Mireama Houra apologised for the delayed response and advised they were still awaiting instructions from the instructing solicitor Mark Utting; and
- (j) on 20 April 2023, all parties were advised the Court would proceed to consider the costs applications.

[49] The Court has proceeded to determine the costs applications as it considers adequate time and notice has been given to Poutama and it has failed to comply with the timetable set. No extension was requested.

Should costs be awarded?

[50] Having reviewed the applications for costs and the relevant submissions, we find that an award of costs for both Heritage NZ and First Gas is warranted.

[51] We accept the grounds advanced by Heritage NZ and First Gas in support of their claims.

[52] The courts have concluded in a number of decisions that Poutama does not have tangata whenua status.²⁸ This was another attempt by Poutama to relitigate a

²⁷ Note the email with First Gas' costs application was received by the Court on 21 March 2023 at 7:08pm. As the Court's working day ends at 5pm, this application is being treated as having been received on 22 March 2023.

²⁸ Kapuni gas pipeline archaeological authority: *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165; *Poutama Kaitiaki Charitable Trust v Heritage New*

matter that has already been determined by the courts. In particular, the Environment Court had previously dismissed Poutama's appeal on another archaeological authority (regarding the Kapuni gas pipeline) by decision dated 22 October 2021.²⁹ This should have put Poutama on notice regarding the requirements for such an appeal.

[53] The High Court then issued a decision on 19 October 2022 dismissing Poutama's appeal regarding the archaeological authority for the Kapuni gas pipeline.³⁰ We agree that continuing the proceedings after that High Court decision was misguided as it should have indicated to Poutama that its appeal had no chance of success. We agree that continuing the appeal after the High Court decision was issued amounts to an abuse of process. Heritage NZ and First Gas were put to the cost of having to apply for and formally argue the strike out application. Heritage NZ and First Gas incurred costs that could otherwise have been avoided.

[54] We agree Poutama's case was poorly pleaded and presented, including because:

- (a) the evidence filed by Poutama was lengthy and unfocused. This put Heritage NZ to particular cost as they were directed to provide the common/evidence bundle;
- (b) Poutama did not comply with directions;
- (c) Poutama did not take the opportunities provided to file evidence and/or instruct counsel in a timely manner despite requests for further time to do so;
- (d) Poutama failed to provide reasonable grounds to support three of the adjournment applications; and
- (e) seeking to have the Environment Court refer an issue to the High Court under s 287 RMA was an unmeritorious/technical argument.

Zealand Pouhere Taonga [2022] NZHC 2713; *State Highway 3/Mt Messenger: Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 87.

²⁹ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165.

³⁰ *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZHC 2713.

[55] We acknowledge that Heritage NZ and First Gas had to prepare for a case on the merits as well as the strike out application. This would have added to the costs they incurred.

[56] Overall, there were numerous procedural steps, all initiated by or resulting from Poutama's action or inactions, which lengthened proceedings, and which put Heritage NZ and First Gas to unnecessary expense. We find that it is appropriate to award costs to both Heritage NZ and First Gas.

Quantum

[57] Having considered that an award of costs is warranted, we now address quantum.

Heritage NZ submissions

[58] The costs incurred by Heritage NZ include the following:

- (a) prior to the strike out application being filed (i.e., between December 2021 and October 2022):
 - (i) legal fees (excluding GST) of \$15,637.50;
 - (ii) legal travel disbursements of \$370.92;
 - (iii) litigation support services for the preparation of the common bundle of \$2,354.60.
- (b) after the High Court issued its decision and the strike out application was filed (i.e., between October 2022 and March 2023), legal fees (excluding GST) of \$12,600.

[59] Heritage NZ seeks costs of \$19,792.10. This is comprised of:

- (a) \$4,837.50 – being its legal fees incurred prior to the strike out application less an amount of \$1,125 to account for time spent in March, June and July 2022 on issues not directly related to appeal issues;

- (b) \$2,354.60 being the full amount of the litigation support services charge for the common bundle; and
- (c) \$12,600 being 100% of its legal fees incurred (excluding GST) following the issue of the High Court decision and the filing of the strike out application.

[60] Heritage NZ submits that the quantum of costs it seeks is both appropriate and reasonable given the factors noted above, and because:

- (a) it is seeking only 33% of its costs associated with the appeal prior to the strike out application being filed:
 - (i) such an amount, while at the upper end, is within the Court's usual comfort zone for costs; and
 - (ii) is cognisant of the substantial amount of evidence filed and procedural steps taken prior to the strike to application being filed;
- (b) Heritage NZ is not seeking to recover the legal travel disbursement;
- (c) the costs Heritage NZ incurred for the common bundle were a result of the number and size of the Poutama evidence attachments (which comprised some 88% of the bundle on their own);
- (d) Heritage NZ is seeking full indemnity costs only from the point that Poutama was on notice that its appeal was an abuse of process – i.e., after the High Court issued its decision on 19 October 2022 and Poutama elected not to withdraw its appeal;
- (e) the costs Heritage NZ incurred following the strike out application being filed were reflective of the number of procedural and substantive steps required to respond to that application, including:
 - (i) filing a memorandum setting out its position on the strike out application;

- (ii) responding to Poutama’s five requests for adjournment and s 287 application;
 - (iii) attendance at a judicial conference;
 - (iv) preparation of legal submissions on the strike out application; and
 - (v) preparation for and attendance at the strike out hearing;
- (f) Heritage NZ was required to prepare for the substantive hearing since:
- (i) the appeal was set down to be heard only two working days after the strike out hearing;³¹ and
 - (ii) the Court had directed all parties to be “ready to proceed with both matters”;³²
 - (iii) Heritage NZ sought to minimise these costs by preparing only its draft legal submissions and by seeking an obtaining leave to substitute its archaeological witness. Other normal hearing preparation steps such as the finalisation of its submissions, the preparation of cross examination and a bundle of authorities, were left to be completed after the strike out application had been determined.

First Gas submissions

[61] First Gas seek a total of \$15,573.90. First Gas seek between 25-33% of the costs of the appeal up until the date of the High Court decision, being \$2,517, together with a disbursement cost of \$86.90. First Gas seek indemnity costs for the costs incurred after the High Court decision, being \$12,970.³³

[62] The costs incurred by First Gas are:

- (a) up until the release of the High Court decision: legal costs, comprising legal

³¹ Minute dated 15 December 2022.

³² *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2022] NZEnvC 251 at [12].

³³ First Gas have applied a slight adjustment (a two hour reduction) to reflect the application for adjournment that was opposed by First Gas but granted by the Court.

fees of \$8,390 and disbursements of \$86.90³⁴ (all figures GST exclusive); and

(b) after the High Court decision: legal costs, comprising legal fees of \$14,070.

[63] First Gas submit the costs claimed are appropriate:

(a) in terms of the contribution of costs before the High Court decision, an award of 30% is at the mid-point of the Court's general comfort level.

Further:

(i) the grounds of appeal were very broad, including "That the application and assessments are deficient, misleading, deceptive, and contain untruths and inconsistencies";

(ii) the evidence filed was extensive and in almost all respects was related to broader matters unconnected to the archaeological authority at issue in the proceeding; and

(iii) ultimately the appeal was struck out and accordingly Poutama can be said to have failed on all of its grounds of appeal.

(b) in terms of the indemnity costs sought, First Gas submitted that:

(i) a responsible litigant would have sought urgent legal advice immediately following the receipt of the High Court decision in October 2022;

(ii) First Gas provided an opportunity for Poutama to withdraw its appeal after the receipt of the High Court decision, and if it had done so, First Gas had offered not to make any claim for costs up to that date. Poutama did not respond to that offer. First Gas was therefore put to the costs of preparing, filing and arguing the application to strike out the appeal.

³⁴ Filing fee for s 274 notice.

Evaluation on quantum

[64] In terms of the contribution of costs sought before the High Court decision, both Heritage NZ and First Gas have sought amounts which fall within the standard or “comfort zone” band. We conclude that an award of costs within the “comfort zone” for those costs incurred before the High Court decision would be appropriate.

[65] For costs incurred after the High Court decision, we agree that indemnity costs are appropriate. Continuing the proceedings after the High Court decision amounted to an abuse of process. As stated above, there were numerous procedural steps, all initiated by or resulting from Poutama’s action or inactions, which lengthened proceedings and which would have required Heritage NZ and First Gas to incur costs.

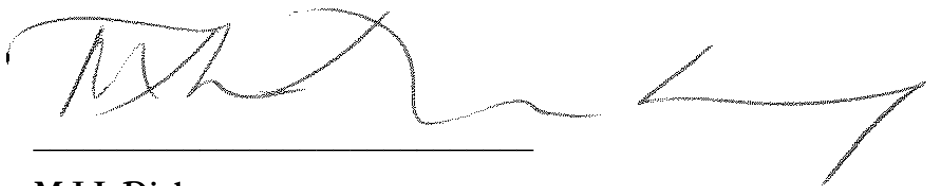
[66] In light of the above, we conclude that the costs sought by Heritage NZ and First Gas would reflect a reasonable contribution towards their costs. Heritage NZ is therefore to receive \$19,792.10 in costs, and First Gas is to receive \$15,573.90.

Outcome

[67] Accordingly, under s 285 of the RMA, Poutama Kaitiaki Charitable Trust is ordered to pay costs to Heritage New Zealand Pouhere Taonga in the sum of \$19,792.10, and costs to First Gas Limited in the sum of \$15,573.90.

[68] Under s 286 of the RMA, this order is enforceable in the District Court at New Plymouth.

For the Court:



M J L Dickey
Environment Judge

