Decision No. A 95/2002

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under section 120 of the Act

BETWEEN **TE KUPENGA O NGATI HAKO INCORPORATED**

(RMA 1775/98 and RMA 237/00)

Appellant

AND **HAURAKI DISTRICT COUNCIL and WAIKATO REGIONAL COUNCIL**

Respondents

AND **H G LEACH & CO LTD.**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R J Bollard (presiding)
Environment Commissioners A H Hackett and I G McIntyre

DECISION AS TO COSTS

[1] As an aftermath of the protracted and strenuously contested appeals brought by Te Kupenga O Ngati Hake Inc (Te Kupenga) in relation to the Tirohia landfill and quarry extension proposal of H G Leach & Co Ltd (the Company), costs are sought on two fronts. The Company seeks a substantial award against Te Kupenga towards the Company's gross costs, calculated as having totalled $326,240.72. The Waikato Regional Council (Environment Waikato) also applies for a costs contribution towards its total outlay of $51,318.08.

[2] It will be convenient to deal first with the latter application. The appeals were determined as a result of two hearing phases in 1999 and 2000 (Decision Nos. A105/99 (interim) and A010/2001 (final)). In the interim decision Te Kupenga's

contentions concerning the consents granted by Environment Waikato were not upheld. It was apparent that Te Kupenga's real contest lay with the land use aspect which the Hauraki District Council (HDC) as the relevant consent authority had adjudicated upon at first instance. On examining the land use consent application and HDC's decision, it was found that the application was incomplete and that an additional application was needed in conjunction with the first. While the Company lodged an appeal with the High Court, it chose as well to make the further application to HDC in order to cover its position. That application was heard and determined in the Company's favour and Te Kupenga's second appeal followed challenging HDC's decision.

[3] At the second hearing phase in this Court, Te Kupenga contended that the Company lacked all the consents required for the proposed landfill and further quarrying. Counsel again appeared for Environment Waikato and after hearing Te Kupenga's case and the submissions of counsel for Environment Waikato in response, it was found that the grounds of appeal against Environment Waikato's position were not made out. Rather, the gravamen of Te Kupenga's concerns were again found to relate to the land use aspect that lay within HDC's jurisdiction at first instance.

[4] In contrast to Environment Waikato, HDC has elected not to seek an award of costs on either appeal. However, Environment Waikato's, stance is understandable, given its success after the first hearing, and the need for it to be represented again and have additional arguments presented in answer to the contentions advanced for Te Kupenga at the second hearing. Given the findings reached in the interim decision, one might have supposed that the second hearing need not have involved Environment Waikato. As matters turned out, Environment Waikato's position was vindicated after presentation of contested argument at each hearing.

[5] In all the circumstances, an award of costs is justified, a reasonable contribution in our view being $12,500. In arriving at that sum we have considered the various contentions in the memoranda of counsel for and against costs, including the point raised for TeKupenga that the Regional Council did not need to have further evidence adduced at the second hearing phase, in that it was able to have its position suitably promoted simply through argument presented via its counsel - which we might add was capably conceived and presented.

[6] In our judgment, the amount awarded represents a reasonable degree of recompense to Environment Waikato in relation to its participation at the two hearings (particularly the second hearing), against the background of the Court's findings in both the interim and final decisions. Te Kupenga O Ngati Hako Inc is therefore ordered to pay the said amount of $12,500 by way of costs to The Waikato Regional Council, which sum is certified recoverable, if need be, in the District Court at Thames.

[7] We turn now to the Company's costs claim. Here it is said that the findings in the decision following the second hearing phase, viewed in conjunction with the background associated with Te Kupenga's pursuit of its appeals, warrant a significant costs award in the Company's favour. It is said that Te Kupenga's stance lacked substance and that the uncompromising approach adopted throughout meant that the Company was forced into incurring heavy expenditure to promote its case successfully.

[8] For Te Kupenga it is said that those opposed to the Company's proposal were genuine in their belief that the proposal should not proceed; furthermore, that the findings in the final decision, though not acceptive of various critical aspects of Te Kupenga's case, did not go to the point of specifically determining against Te Kupenga on the "core belief' element. Again, it is said that the Company was itself the cause of an appreciable part of the costs incurred because of its decision to proceed initially on a legally unsound basis as found by the interim decision - thus effectively giving rise to the need for two hearing phases of greater overall length, as opposed to a single combined phase concerning the total intended operation.

[9] Having reflected on the submissions and counter submissions before us, fully presented by counsel on each side, our judgment is that costs should be allowed to rest where they fall. We bear in mind that costs awards are not made as some form of penalty, but by way of recompense to a party or parties in circumstances considered fair and just for making an award. Again, costs in this Court are not determined on a basis of presumption in favour of a successful party, rebuttable only where special circumstances are identified as to render the presumption's application inappropriate.

[10] We have reflected upon the submissions of counsel for the Company based on the well-known case of Shelby [1991] 1 NZLR 587 and other cases cited, but are not persuaded that Te Kupenga's case in opposition, though fixedly maintained with

an eye to a given end, was mounted in such a manner that costs should follow at the end of the day. Each party was successful in the course of the proceedings, with the interim decision going in Te Kupenga's favour, and the final decision in favour of the Company.

[11] Te Kupenga in fact mounted a serious challenge to the total proposal, not only relying on lay evidence but on evidence adduced from qualified experts - including a planner, a landscape architect, and two witnesses (Professor Ritchie and Mr Alexander) with expertise in Maori affairs and cultural issues.

[12] We acknowledge that from the Company's perspective the total process was expensive and doubtless frustrating in its duration by virtue of the zeal displayed by Te Kupenga in its unwavering resistance to what the Company was seeking to undertake. Even so, the proposal was significant in resource management terms, and Te Kupenga was entitled to have its claims fully heard and considered *de novo* at appeal level. Although ultimately unsuccessful, the appeals were not without some ultimate purpose and benefit, inasmuch as the conditions of consent as finally framed and endorsed more aptly served to promote the purpose of the Resource Management Act, with particular reference to the supporting provisions of Part II bearing on Maori values.

[13] Weighing all arguments for and against, we adjudge that there be no order as to costs. We also express the hope that continuing feelings of resentment and antagonism that may exist in one quarter or another will abate, with all issues concerning this contentious litigation now being formally resolved by delivery of this decision.

DATED at **AUCKLAND** this 2nd day of May, 2002.

For the Court:

R J Bollard
Environment Judge