

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA**

**Application No. 8/01  
CA No. 3/08  
PC No. 2/10**

**IN THE MATTER** of the Cook Islands Act 1915,  
Sections 390A, 391 & 409(e)

**AND**

**IN THE MATTER** of the lands known as Mangaiti  
Kairoa 30 + 54 No. 1, Auautangata  
56, Vaitakaia 59, Nauparatoa 60,  
Te Matepa 61, Vairoa 64  
(Ruatonga), Taurupau 69,  
Rarokava 70, Te Piri 73  
(Takuvaine), Koterou 88, Taratiu 93  
(Ruatonga), Anga Kopua 125  
(Takuvaine), Rimatara 127N  
(Araitetonga), Nokii 182 (Ngatipa),  
Aretura & Taiakoka 188E N,  
Vaiokura 191B, Rangimaru 191G  
(Upper Tupapa) - "the Tumu lands"

**BETWEEN** the descendants of **UTANGA** and  
**ARERANGI TUMU**

Applicants

**AND** the descendants of **IOPU TUMU**

Respondents

**JUDGMENT OF DAVID WILLIAMS CJ AS TO COSTS  
(IN THE HIGH COURT)**

**Costs**

1. I have carefully considered the following submissions:
  - (i) Submissions of Applicants as to Costs dated 9 March 2010;
  - (ii) Submissions of Respondents as to Costs dated 3 May 2010; and,
  - (iii) Submissions of Applicants in Response to Submissions of Respondents as to Costs dated 14 June 2010.

2. In their submissions, the Applicants make the point that the Applicants' succeeded in establishing their primary cause of action. They lost because Section 416 "saved the day" for Respondents. Therefore, they contend that no costs order should be made against them.
3. However, as pointed out in the Respondents' submissions, Section 416 was pleaded against the Applicants at an early stage and it was always likely to be a most difficult hurdle to overcome.
4. In my view it would be unfair and inappropriate to depart completely from the general rule that the successful party is entitled to costs and to accede to the Applicants' submission that the parties should bear their own costs.
5. As to quantum, it is agreed that Section 92 of the Judicature Act 1980-81 governs:

"Subject to this Act and to the provisions of the Crimes Act 1969, the High Court shall have the power to make such order as it thinks just for the payment of the cost of any proceedings by or to any party thereto. Such costs shall be in the discretion of the Court, and may, if the Court thinks fit, be ordered to be charged upon or paid out of any fund or estate before the Court."
6. Contrary to Mr Mitchell's submission, the leading New Zealand case of *Morton v Douglas Holmes Ltd (No. 2)* [1984] 2 NZLR 620 has often been referred to in the Cook Islands jurisprudence and is relevant to the exercise of the Court's discretion. I proceed accordingly.
7. The amount of costs has been documented and I find it proved and reasonable in the sum of \$13,500.00.
8. In my view, taking into account the nature and course of these proceedings, I consider it appropriate to order the Applicants to make a reasonable contribution towards the costs reasonably and properly incurred by the Respondents, together with disbursements. I put that figure at 50% of the Respondents' costs.
9. I therefore order the Applicants to pay the Respondents:

- (i) \$6,750.00 by way of reasonable contribution to the legal costs of the Respondents; and,
- (ii) \$221.50 for disbursements.

**Leave to Appeal to Privy Council**

- 10. I have noted that Applicants have lodged an Application for Leave to Appeal to Her Majesty the Queen in Council dated 24 July 2009 ("Application").
- 11. In their letter to the Registrar of 24 July 2009, the Applicants informed the Registrar that they wished to take advice on the prospects of any appeal from a Queen's Counsel based in Auckland. Almost one year has since passed. There has been more than ample opportunity to obtain advice. It is not generally permissible for intending appellants to delay decision whether or not to proceed and, indeed, delay may be a ground for refusing leave or cancelling conditional leave: see *Carter Holt Harvey Ltd v Commerce Commission* (2003) 16 PRNZ 835.
- 12. The Applicants should decide promptly if they wish to pursue their Application.
- 13. Accordingly, I direct the Registrar to list the Application for the Court of Appeal sittings in November 2010.



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David Williams CJ

15 June 2010