

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(ELECTORAL COURT)**

Misc No. 112/2010

In the Matter	of Section 92 of the Electoral Act 2004
and	
In the Matter	of an election of Members of Parliament of the Cook Islands held on Wednesday 17 November 2010
BETWEEN	KETE IOANE Petitioner
AND	MONA IOANE KAKE First Respondent
AND	TAGGY TANGIMETUA Second Respondent
AND	MARK TEREI SHORT Third Respondent

JUDGMENT OF THE COURT (AS TO COSTS)

- [1] Following the hearing of the Petition over two days on Aitutaki I dismissed the petition (although upholding two qualifications challenges). The cross-Petition was then withdrawn.
- [2] The first respondent, who successfully opposed the Petition, now seeks costs. Mr Lynch's position is set out very briefly in his submissions dated 4 March 2011. He says that costs of \$19,385 were incurred and those costs are particularised in an attachment to the memorandum. In short, Mr Lynch spent 91.9 hours on the matter which he charged at \$200 per hour. In addition, there are some disbursements including \$200 for photocopying etc and \$469 being Mr Lynch's return airfare to Aitutaki.
- [3] Mr Lynch's memorandum does not set out the amount of the costs which he says should be ordered in his client's favour.
- [4] Mrs Browne's response is dated 7 March 2011. She says costs should be limited to the sum of \$6,000 representing the amount of security for costs fixed by the Court.

- [5] In her submissions she refers to two decisions. First, *Puna v Piho* (unreported, Misc 85/06, Nicholson J, 29 March 2007). She also refers to an earlier decision of mine *Matipo v Wigmore* (unreported, Misc 88/06, 27 April 2007).
- [6] Mrs Browne refers to the five factors identified by Nicholson J in his Judgment at paragraph [55]:
- [a] the amount of security for costs fixed by the Court;
 - [b] the amount and composition of all costs of all parties to the petition of and incidental to the presentation of the petition and the proceedings consequent thereon;
 - [c] the success of each party;
 - [d] any costs which, in the opinion of the Court, have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part of either the petitioner or of the respondent, and any needless expenses incurred or caused on the part of the petitioner or respondent;
 - [e] the conduct of each party and the events after security for costs was fixed.
- [7] Nicholson J fixed costs of \$6,000 based on the particular facts before him.
- [8] Mr Lynch filed submissions in response on 8 March 2011. He states that the other two Petitions heard by me (Tamarua and Rakahanga) have been resolved as between counsel. He also submits that limiting costs to \$6,000 would not be appropriate.
- [9] I now address the five favours identified by Nicholson J.
- [10] First, the amount of security for costs was fixed at \$6,000 recognising that the bribery allegations required a higher level of security over the standard costs of \$5,000. Security for costs is an estimate set, in advance of any hearing, and while it is an important marker in fixing costs subsequently, it is not ultimately determinative. Nevertheless, I bear in mind what Nicholson J said at paragraph [51] of his Judgment: counsel proceed at their peril (as to costs) if they conduct their case on a more expensive basis than has been fixed by way of security.

[11] The second factor is to assess the costs of all parties. Mr Lynch's costs have already been mentioned. Mrs Browne's costs for all three Petitions totalled \$15,000 plus VAT and disbursements. These costs have not been apportioned as between the three Petitions which are the subject of the relevant fee note. Nevertheless, I would anticipate that the Aitutaki Petition absorbed a greater amount of costs than the other two. Even if I were to assume that Mrs Browne's costs in relation to the Aitutaki Petition were \$7,000, there is still a very significant discrepancy between her costs and those of Mr Lynch. I think it is also fair to say that Mr Lynch's costs would be far higher than can be found in the general run of Petitions. Certainly, my experience in previous Petitions would suggest that costs in the region of \$7,000 would be more readily expected than costs in the sum of \$18,000.

[12] I make some general observations about Mr Lynch's costs:

[a] I think these costs are higher than would be regarded as the norm for this type of litigation;

[b] it became clear during the course of the hearing that Mr Lynch had undertaken a large amount of preparation and this, perhaps was reflected in the outcome of the Petition;

[c] the first respondent was entitled to conduct his defence on a no-expenses-spared basis but he is not necessarily entitled to have costs fixed against the petitioner at such a level;

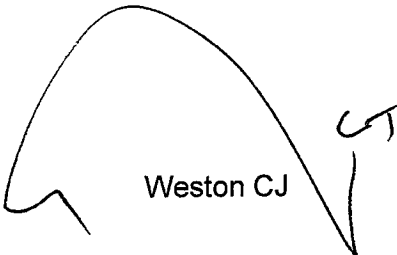
[d] while I have no way of knowing, I would have thought that some of the attendances shown in Mr Lynch's schedule of attendance would have been spread across all Petitions undertaken by him and not just the Aitutaki Petition.

[13] The third factor in the Nicholson J decision is the relative success of each party. This, in my opinion, overlaps with the fourth factor which is to examine the conduct of the parties and the nature of the allegations made. In my opinion, the qualification objections run by the Petitioner were reasonable and, indeed, two were successful. The bribery allegations (as to the water tank) should not, in my opinion should have been brought. The evidence as it was given before me was weak. I appreciate that it is often difficult to assess a witness before a hearing and it may have been the case that the bribery allegations, prior to the hearing, appeared stronger than they turned

out to be. However, in my opinion, the bribery allegations (as to the water tank) were border line at best.

- [14] The bribery allegations in relation to the sunglasses were withdrawn at the last minute. The evidence in support, which I have read, appeared particularly weak and I can understand why a decision was made to withdraw. The petitioner can have no credit for this late withdrawal. The first respondent would have incurred costs in preparation. In coming to that conclusion I have taken account of my earlier decision concerning the Matavera Petition in *Turepuv v Egelton & Others* (27 October 2006).
- [15] Overall, and in assessing the third and fourth factors, I believe that there should be an uplift in costs to reflect the two bribery allegations, one of which was found to be unsuccessful and the other of which was withdrawn.
- [16] The final factor is the conduct of each party. In my opinion nothing arises here which has not been addressed above.
- [17] Taking all these factors into account, I fix costs in the sum of \$7,500 plus disbursements of \$669.00. The \$6,000 security for costs is to be released by the Court and paid to Mr Lynch on account of these costs. The petitioner is then to pay the balance of \$2,169.00 to Mr Lynch's offices.

Dated 23 March 2011 (NZT)


Weston CJ