IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

Application No. 286/04

IN THE MATTER of section 409(f) of the Cook Islands Act 1915
AND
IN THE MATTER of the **PA ARIKI TITLE**
AND
IN THE MATTER of an application by **PA ELIZABETH-TE RITO O TE RANGI ARIKI** to hear and determine her right to hold the title of **PA ARIKI**

Mr George for Pa Elizabeth
Mrs Browne for Pa Marie
Dates of hearing: 13 May 2005
Date of decision: 26 May 2005

DECISION OF GREIG CJ ON COSTS

[1] On 2 July 2004 I gave judgment on this matter against the Applicant. Costs were reserved. The successful Respondent now seeks an order for costs against the Applicant.

[2] Under the Judicature Act 1980-81 section 92 gives the Court the widest discretion to make such order as it thinks just for the payment of costs. This wide discretion is repeated in Rule 300 of the Code of Civil Procedure but with the proviso that in default of any special direction costs shall abide the event of

the proceedings. That in any event is the general rule. To exercise the judicial discretion otherwise requires some reason to make it just that some other order ought to be made.

[3] This claim was an application made by Pa Elizabeth Terito O Te Rangi Ariki to determine her right to hold the title against her sister who had held the title since 1990.

[4] In 1996, Pa Elizabeth brought proceedings to challenge her sister's succession to Ariki land of Pa.; land which the Court after a lengthy hearing and in a lengthy and detailed judgment held to be Ariki land. Pa Elizabeth then appealed against that judgment. The appeal was dismissed on the grounds that it was out of time. But the Court of Appeal observed and stated that it was not persuaded that there were any merits to the appeal which would have outweighed the delay.

[5] In 2002 Pa Elizabeth applied to the Ui Rangatira to remove Pa Marie. That application was rejected. Then in May 2004 Pa Elizabeth with the support of her family and some Mataiapo purported to remove Pa Marie and to invest herself with the title. Thereafter this application was made.

[6] In the course of my judgment I expressed my own regret and repeated that expressed by McHugh J in the earlier proceeding that the family had been unable to resolve their differences without recourse to the Court. At the end of my judgment I said "I have already repeated and endorsed the hope for conciliation and peace in this family. It needs a gesture, a conciliatory approach to be made. Some magnanimity, some swallowing of pride and humbling of the parties to try to get together and while a number of the family are here, this might be an opportunity in spite of this case to make that approach. Unfortunately there has not been such conciliation since this application seeks

costs on a solicitor and client basis in the sum of $25723.13 whereas the application is opposed totally. It seems that no earlier approach was made to settle or resolve the question or quantum of the costs.

[7] It was also my view that at the heart of the dispute about the title was the right of the Ariki to the ownership of land including the valuable land on which the Vaimangu hotel is projected for development.

[8] In my judgment this is not a case for departure from the principle that the costs follow the event; that the winning party is entitled to costs. Here the losing party has brought more than one proceeding to challenge her sister's rights and has maintained her claims in spite of decisions against her. The claim in respect of the title was an important one which required a defence which was successful. The hearing went for more than three days with witnesses and argument on both sides. It cannot be said that the claim by Pa Elizabeth was frivolous or without foundation. It was not however simply a matter of a tribal title but was at foot a claim to substantial property rights. Pa Marie was brought to Court to defend her title and won. She must be entitled to the recompense of costs.

[9] I turn then to the quantum and the question whether this is a case for solicitor client costs. That was not in terms pursued in the application but rather a reasonable proportion, though unspecified, of the actual costs incurred. It is not then in my view an appropriate case for full indemnity. It is a case for party and party costs. It is not a case with the special characteristics which require the losing party to bear a greater proportion than what is reasonable between parties.

[10] The question is then what is reasonable which is of more difficulty in respect to a successful defendant than to a successful plaintiff when the judgment in money or other value can be of relevance in fixing the amount. Of

course here Pa Marie retained her title and the right to the Ariki lands which are of substantial value intrinsically and potentially. There is no maximum amount or basis for fixing party and party costs up to the actual amount incurred. It is generally accepted that 66% of the actual costs is a helpful starting point though that may be subject to increase or decrease. Conduct of the case by winner and loser may be relevant in assessing whether there has been anything which unduly adds to the costs or which ought to be taken into account for or against either party. I note that Mrs Browne has not presented any calculation based on the scale in the Code or included any of the usual disbursements and expenses such as witness fees and expenses.

[11] In the end this was a case of importance involving material and cultural aspects which required a full defence. It was successful. There were no special features which increased the costs or were of a quality to require any particular criticism of the original applicant which ought to be taken into account against her. Nor were there any features in the conduct of the case on the part of the respondent to be brought into account against her. Substantial costs were incurred properly. I have no cause to question the reasonableness of the actual costs rendered and there was no challenge of that in this hearing. In the end it is a matter of impression rather than of precise calculation. Pa Marie was put to the expence of the total amount because the proceedings were brought. She is entitled to a reasonable amount which I fix at $17,000.00 for Solicitor's costs and $270.00 for disbursements.

Laurie Greig CJ