IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

Application No. 5/2011

IN THE MATTER	of the Cook Islands Act 1915 Sections 390A and 416
AND	
IN THE MATTER	of the land known as **TEPUKA SECTION 106C, AVARUA**
BETWEEN	**ELLENA TAVIONI** on behalf of the successors of Makea Takau Applicant
AND	**COOK ISLANDS CHRISTIAN CHURCH CORPORATION LIMITED** of Avarua, Rarotonga Respondent

Dated: 31 December 2016 (NZT)
Counsel/Agent: Mrs Carr for Ms Tavioni
Mrs Browne for Respondent

JUDGMENT AS TO COSTS

Introduction

[1] The former Chief Justice (Weston CJ) issued a series of Judgments in relation to an application brought by the applicant, Ms Tavioni, under the exclusive jurisdiction given to the Chief Justice by S390A of the Cook Islands Act 1915 (NZ). Ultimately, the application was dismissed.

[2] All material decisions in the application were made by Weston CJ. Costs submissions were then filed but, for reasons of administrative oversight, were

not sent to him prior to his declining to renew his warrant expiring on 31 October 2016.

[3] Consequently, because of the exclusive jurisdiction provision, the costs submissions have been referred to the present Chief Justice for decision. The former Chief Justice has been consulted during preparation of this costs Judgment.

History of the application

[4] On 5 October 2011, the applicant filed this s390A application concerning various orders made in 1904, 1905 and 1908. The detail of the application has already been set out in Judgments by the former Chief Justice and dealt with in detail in a subsequent Judgment issued by Isaac J on 24 November 2016. Detail of that which is not necessary for present purposes is not repeated but the Judgment has been read.

[5] The application was first called before Weston CJ in March 2012 and on 28 March 2012 he dismissed the application.

[6] On 3 July 2012 an application was made to recall the Judgment on the basis that relevant authority had not been cited to the Judge. Moreover, not only was the authority said to be relevant but it had recently been the subject of argument in the Privy Council following which Judgment was, and on 3 July, remained, reserved.

[7] On 29 August 2012 the Chief Justice heard the recall application and issued a Minute in which the recall application was adjourned pending delivery of the Privy Council's decision. The parties were directed to bring the recall application on for hearing following receipt of the decision.

[8] The Privy Council delivered its decision on 22 October 2012. Notwithstanding the Chief Justice's earlier Minute, the parties to this application took no further steps to bring the matter on for hearing before him.

[9] On 5 March 2013 Mrs Browne sought costs in relation to the earlier dismissal of the application. That costs application is dealt with below.

[10] On 23 April 2013 the then Chief Justice issued a further Minute. He acknowledged that Mrs Browne had sought costs but said he was not

prepared to deal with costs pending an update as to the overall state of the application.

[11] The matter then was called before Weston CJ in the sitting of the Court held in September 2013. On 17 September 2013 he issued an oral decision. At [19] he noted that, prima facie, it appeared that the recall application must succeed. He said that, if the earlier decision of the Court of Appeal known as the *Tumu* case (CA 3/8; 10 July 2009) had been referred to him, and he had been told that, as at that date, it was shortly to be decided by the Privy Council, then he would not have proceeded with hearing the application at that time. At [21] he noted that counsel for the applicant had now applied to adjourn the s390A application on the basis that the applicant would issue proceedings under s416 of the Cook Islands Act. Accordingly, counsel sought to adjourn the s390A application pending resolution of the foreshadowed application. The former Chief Justice made orders accordingly.

[12] In 2014 Ms Tavioni brought a fresh application concerning the subject land (No 196/14). The following year a further proceeding was brought concerning the subject land. (No.441/15). The applicant, in the 2015 proceeding, was Caroline Tepuka Browne for whom Mr Holmes was acting. Ms Tavioni was cited as second respondent. Both applications sought declarations that the subject land was held as customary land.

[13] This s390A application was further called before Weston CJ in September 2015. On 24 September 2015 he issued a further Judgment in which he dismissed the s390A application reserving leave on the question of costs.

[14] The following year, in July 2016, Isaac J heard the two applications filed in 2014 and 2015 concerning the subject land. He dismissed the applications. Detailed reasons were subsequently given by him in a written Judgment dated 24 November 2015. His Judgment, of course, concerned the two applications before him and the question of costs in those applications will, in due course, need to be dealt with by him also. This Costs Judgment is not intended to resolve any costs outstanding in relation to those two applications.

Costs memoranda

[15] In the first costs memorandum filed by Mrs Browne on 5 March 2013 she sought costs in the sum of $6,366.69 representing 70% of costs incurred by her client.

[16] Mrs Browne filed a second costs memorandum on 29 July 2016. In that memorandum she detailed the further costs incurred by her client since filing the first memorandum. They totalled $13,774.25. She sought an award of costs at 70% of that total.

[17] Mrs Carr, in reply, filed a holding memorandum on 22 September 2016 with her final position set out in a memorandum dated 30 September 2016. Mrs Carr started by identifying the five bills of costs relied upon by the Church in seeking costs. Of the five, she noted that the fourth (dated 5 May 2014) apparently related to No.196/14. On the face of it, that appears to be correct.. There has been no subsequent memorandum filed by Mrs Browne denying the position. Therefore, those costs are ignored. On that basis, Mrs Browne has billed for 68.7 hours at a total charge of $17,775 in relation to the s390A application.

[18] In her memorandum Mrs Carr expressed doubt as to whether the former Chief Justice was correct in his interpretation of paragraph [59] of the *Tumu* decision. While, of course, Mrs Carr is entitled to hold such a view, the fact is that the former Chief Justice's decision on that was not appealed and, for present purposes, must be taken as correctly stating the law.

[19] Mrs Carr, like Mrs Browne, referred to the decision of Grice J in *Tini v Cook Islands Investment Corporation*. Mrs Carr criticised the 70% level of costs sought by Mrs Browne. She said that the 70% claim has no proper basis in law.

Discussion

[20] Mrs Carr is correct in her statement that the costs sought by Mrs Browne in her first memorandum of March 2013 are overstated because they seek recovery in relation to defending the application culminating in the hearing of March 2012. That hearing effectively miscarried because of the failure by both parties to notify the former Chief Justice that a highly relevant case was being decided by the Privy Council. As the Chief Justice subsequently said, he would not have proceeded with the hearing had he known that.

[21] Nevertheless, Mrs Browne is entitled to some recovery in relation to those attendances. While some costs might be said to have been wasted, at least a portion were not. The initial steps in defending the proceeding would have

required attendances in any event. Assessing the matter as best as can be Mrs Browne's client is allowed $1,000 in relation to that initial period.

[22] Turning to the subsequent period, Mrs Browne seeks costs of $9,641.98 representing 70% of actual costs.

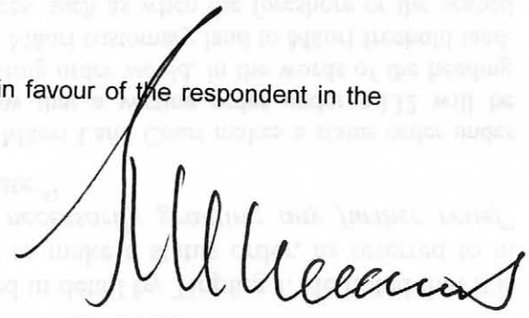
[23] It is understandable that Mrs Browne seeks costs at a high level for this period. Her client faced wide-ranging challenges in relation to a substantial land asset held by it. Her client's defence of the application was ultimately successful. Nothing in the subsequent applications determined by Isaac J undermines such a conclusion.

[24] Nevertheless, it would be disproportionate if the Court were to award costs in relation to this part of the claim at such a sum. The applicant's challenge raised issues of considerable significance and importance. The land was said to be held as customary land and, in that sense, the application had a public interest dimension. The area of land under challenge was substantial. In all of these circumstances, there is justification to discount a costs claim which might otherwise be sustainable to recognise the public interest dimension. While, ultimately, it can only be a matter of judgment, the Court's view is that costs in the sum of $5,000 would fairly represent the respondent's entitlement to costs for this subsequent period.

[25] The total costs awarded are therefore $6,000.

Decision

[26] Costs are awarded against the applicant in favour of the respondent in the sum of $6,000.



Hugh Williams CJ