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

APPLICATION NO: 495/10

IN THE MATTER	of the land known as **Marae Section 45M Takitimu**
AND	
IN THE MATTER:	of an application for costs in relation to succession orders to Iro
BETWEEN	**MICHAEL RENNIE,** builder of Titikaveka
	Applicant
AND	**TEAVA IRO,** retired policeman of Titikaveka
	Respondent

Appearances Ms M Henry, for the applicant
Mr R Tylor, for the respondent

Judgment: 16 February 2017

JUDGMENT AS TO COSTS
SAVAGE J

Introduction

[1] The respondent seeks costs in the sum of $8,650.00 having been successful on the rehearing of succession orders to Iro granted on 5 October 2015.

[2] On 19 August 2016 I issued an interim decision reserving the costs application pending the resolution of an application to recall the 5 October 2015 judgment.

[3] The application for recall was subsequently withdrawn by the applicant on the day it was scheduled to be heard.

[4] Counsel for the respondent now seeks full indemnity costs, for both the rehearing and the recall proceedings, in the sum of $8,650.00. The applicant opposes the costs sought.

Background

[5] This costs decision relates to proceedings initiated by Michael Rennie in 2010 in relation to a succession order made on 3 July 1968 relating to Iro, said to be a male adult, as his name appears on the land register for Marae section 45M Takitimu in 1908.

[6] Mr Rennie's application was successful and on 20 October 2010 pursuant to s 45 of the Cook Islands Act 1915 I set aside the 1968 order and set the succession matter down to be reheard de novo.

[7] An interlocutory hearing was held on 10 October 2011. At the conclusion of the hearing I adjourned the matter for hearing in October 2012.

[8] In the mean time an issue of recusal arose and on 29 May 2012, Mr Tylor, for the respondent, filed an application to strike out the rehearing proceedings on the basis that the applicant had failed to comply with the directions of the Court.

[9] The matter next came before me on 2 October 2012. The substantive application and the strike out application were traversed. At the conclusion of the hearing I made orders for the timetabling of submissions.

[10] On 20 November 2012 the applicant filed a notice to withdraw the proceedings. I considered that in the circumstances, justice would best be served if I heard the matter and as such I convened a hearing in August 2015.

[11] On 5 October 2015 I issued a decision granting the orders as were made in 1968 and restoring the position which pertained prior to the orders being revoked. I reserved costs.

[12] As stated, on 19 August 2016 I issued an interim decision in relation to costs. I noted the recall application had been filed and considered that the costs decision should be reserved pending the resolution of the application to recall the matter. I also indicated that if the applicant wished to seek costs in relation to the original matter they would need to file the appropriate application.

[13] The application for recall was subsequently withdrawn by the applicant on the day of the scheduled hearing.

[14] The respondent now seeks full indemnity costs in respect of both the substantive matter and the recall application totalling $8,650.00.

Respondent's Submissions

[15] The respondent seeks full indemnity costs in relation to the rehearing application being $4,800.00 and full indemnity costs for the recall application being $3,850.00.

[16] The respondent submits that at no time did the applicant seek to discuss their application to revoke the 1968 succession order with him. No family meeting was called and no correspondence was received from the applicant advising of the proceedings. The respondent submits that he was not given an opportunity to explain the 1968 succession orders prior to the revocation application being filed by the applicants.

[17] In addition the respondent says that in 2002 they gave up their shares in the land to assist the applicant's whānau in obtaining an occupation grant only to have the applicant seek to revoke the succession order to Iro.

[18] The respondent submits that he has been put to considerable expense in defending proceedings where the applicants knew of the relationship between the

landowners and to Iro. The respondent says that in related proceedings the applicant has used evidence of the relationship to support succession applications and now seeks to reject that evidence.

[19] Full indemnity costs are sought on the basis that there has been a continued failure by counsel for the applicant to comply with court orders and repeated obstruction of the hearing of the matter which eventually required the respondent to file an application for strike out. The respondent also points out that the applicants also unsuccessfully applied for my recusal from the matter.

[20] In relation to the recall application, the respondent submits that the basis of the application was without foundation. The claim by counsel for the applicant that they were not advised of the withdrawal of the originating application is subject to challenge. In any event the recall application was withdrawn on the day it was set down to be heard and the respondent was still required to prepare for the hearing.

Applicant's Submissions

[21] Ms Henry for the applicant submits that the applicant was successful in the application for revocation and is entitled to reasonable costs in respect of the revocation application. An amount of $1233,33 is sought being two thirds of the costs incurred.

[22] Ms Henry opposes the respondent's application for costs and argues that costs should lie where they fall or if the Court is minded to make an award, the award should be towards the lower end of the scale.

[23] In addition Ms Henry argues that full indemnity costs are not warranted in this case and queries the actual amount sought by the respondent as Mrs Browne's invoice 03425 appears to include non related matters.

[24] In relation to the rehearing proceedings, Ms Henry submits that the applicant was genuine about the proceedings as evidenced by his payment of $4,000 as security for costs. He did not intend to waste the Courts time.

[25] Further, if the respondent was concerned that the applicant was misleading the Court, Ms Henry argues that, it ought to have been raised at the rehearing and cannot now be advanced by way of an application for costs.

[26] Ms Henry further states that the hearing held on 10 October 2011 was intended to deal with preliminary matters and instead the respondent sought to have evidence taken. Counsel for applicant had no prior notice of the witness statement and cross examined the witness merely because she was in court. Further the 10 October 2011 was not advertised.

[27] As regards the recall application, Ms Henry submits that the application for recall was made in good faith and upon general principles of natural justice. The application was premised on the basis that the applicant had not instructed Mr Manarangi to withdraw the proceeding.

[28] Ms Henry argues that the decision to withdraw the application was made on 13 October 2016 following a discussion with counsel for the respondent two days before the hearing. It was accepted that as a matter of law the applicant could not responsibly proceed with the recall application. This saved the Court time, the calling of four witnesses and submissions on legal arguments.

Law

[29] It is a well established legal principle that costs usually follow the event. A general starting point when assessing costs is a contribution towards two thirds or 66 per cent of the costs incurred by the successful party.[1]

[30] The Court may also find it useful to objectively assess the overall merits of the case. Such an assessment will directly influence the extent to which costs will be granted. An award of costs must be reasonable and it must also reflect costs which were reasonably incurred.[2]

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1 *Tuake v Ngate – Akoa 65, Arorangi* (2014) at [29] citing *Glaister v Amlagamated Dairies Ltd* CA99/03, 1 March 2004 at [9] and [14].

2 Ibid at [30].

[31] In *Tini v Cook Island Investment Corporation*, Grice J favoured the cross check approach where costs are deemed to be an amount which falls within the range of 20 – 80 percent of a reasonable fee following consideration of a number of influencing factors.[3]

[32] Those factors are set out in *Holden v Architectual Finishes Ltd* and include but are not limited to:[4]

(i) The length of the hearing [the longer the hearing, the more it is worth; but waste of time should be penalised].

(ii) The amount of money involved [the greater the amount, the greater the responsibility, and the fee warranted].

(iii) The importance of the issues, in a monetary or a non-monetary sense, to either the parties or generally [the greater the importance, the greater the demand for skill and care, and a commensurate fee].

(iv) The legal and factual complexity [the more intricate and difficult the case, the greater the fee].

(v) The amount of time required for effective preparation.

(vi) Whether argument(s) lacking substance (but not necessarily frivolous or vexatious) was/were advanced.

(vii) Abuse of the process of the Court.

(viii) Any failure to comply with the rules, or an order or direction of the Court [to the extent such non-compliance has impeded progress].

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3 *Tuake v Ngate – Akoa 65, Arorangi* (2014) at [31] citing *Tini v Cook Island Investment Corporation.*

4 *Holden v Architectual Finishes Ltd* [1997] 3 NZLR 143

(ix) Unreasonable or obdurate refusal to settle, so far as known to the Court.

(x) Unrealistic attitudes, or inadequate payments into Court.

(xi) Technical or unmeritorious points.

(xii) The degree of success achieved by the parties [a party may succeed on only one of a number of causes of action, or succeed but for significantly reduced relief. Success only in part frequently is recognised by significant reduction in costs awarded].

(xiii) Whether the hearing was lengthened or shortened by the conduct of either party.

Discussion

Rehearing application

[33] The respondent seeks full indemnity costs in relation to the rehearing application being $4,800.00. Mr Tylor seeks $4089.50 and Mrs Browne $712.58. Mrs Browne costs relate to the revocation proceedings prior to 6 December 2010 and are considered separately below in relation to those proceedings.

[34] Both parties accept that the general starting point is two thirds of the costs reasonably incurred. I therefore start with a figure of $2726.33 (being two thirds of Mr Tylor's costs).

[35] In assessing the overall merits of the case I consider that the matter was of significance to both parties. I believe that the applicant had a genuine belief that the succession order was incorrect however the respondent also held a strong belief that there had been no error. The matter was complicated by the paucity of clear evidence to demonstrate the identity of the Iro listed in the ownership order.

[36] Nonetheless as I noted in my decision of 5 October 2015 the matter came before me on a number of occasions and had tortuous progress. The issue of recusal was explored at length as were a number of other interlocutory issues. The rehearing proceedings comprised of two hearings. A preliminary hearing was held on 10 October 2011 and evidence received from the respondent. A further hearing was held on 2 October 2012 at the conclusion of which directions for the filing of submissions were issued.

[37] Rather than file submissions, counsel for the applicant filed a notice to withdraw the application. The respondent nonetheless filed submissions on the succession matter and a hearing was convened on August 2015. The respondent's evidence was uncontested and orders were made in terms of the 1968 order on 5 October 2015.

[38] The degree of complexity in this case stems from the fact that the respondent was required to provide evidence to determine a succession order in relation to a papaanga more than a century old. I consider that this would have taken some time for the respondent to prepare.

[39] Given that the applicant was successful in the revocation application then sought to withdraw from the rehearing application following two hearings the costs incurred by the respondent are not unreasonable. Further I take into account the fact that the respondent has been put to the effort of defending these proceedings by filing a strike out application and responding to the recusal matters and appearing and presenting arguments at the hearings. In the circumstances a higher award of costs is warranted.

[40] The respondent is entitled to costs in the sum of $3,476.07 being 85 per cent of the costs incurred.

Recall application

[41] The respondent seeks full indemnity costs for the recall application being $3,850.00. That sum includes $2,125 incurred by Mrs Browne for 8.5 hours preparation and $1725.00 incurred by Mr Tylor for 11.5 hours preparation.

[42] The recall hearing did not eventuate as the application was withdrawn by the applicant on the day of the hearing.

[43] Counsel for the applicant argued that the recall application was made in good faith on the basis that the applicant had not instructed Mr Manarangi to withdraw from the rehearing proceedings.

[44] Counsel for the respondent submits that the basis of the application was without foundation and withdrawn at the last moment requiring counsel to still prepare for the hearing on the matter.

[45] I consider that the application for recall was ill founded and the application to withdraw came too late in the piece. Both counsel for the respondent parties were required to prepare for the hearing. While the withdrawal of the application may have saved the court time it is reasonable that counsel for the respondents incurred costs in preparing for the hearing.

[46] The respondent is entitled to costs in the sum of $2,887.50 being 75 per cent of the costs incurred.

Revocation application

[47] The applicant was successful in applying to revoke the 1968 succession order. In my interim judgment I indicated to counsel for the applicant that if counsel wished to seek costs in relation to the original matter she would need to file the appropriate application.

[48] Ms Henry has now filed submissions seeking an amount of $1,233.33 in costs in relation to the revocation proceedings. This sum is two thirds of the costs incurred by the applicant.

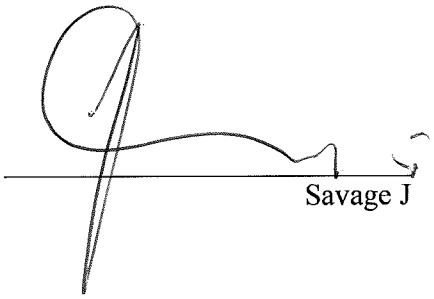
[49] Counsel for the respondent seeks costs on behalf of Mrs Browne in the sum of $712.58. Mrs Browne appeared on three other related applications involving contested succession orders. Her invoice dated 6 December 2010 includes a total sum for all four proceedings. The costs sought represent ¼ of the costs incurred by Mrs Browne up to 6 November 2010.

[50] As I noted in my decision of 5 October 2015 the revocation hearing was a close run thing. I set aside the 1968 judgment for two reasons. The first related to the paucity or brevity of the recording of the evidence given at the 1968 hearing and the second being that Iro was noted in the register for the block as being a male adult when in fact Iro was an infant at that date.

[51] In the circumstances I consider that the costs incurred for the revocation hearing should lie where they fall.

Decision

[52] There is an order for costs payable by the applicant to the respondent in the sum of $6,363.57.



Savage J