IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION) **APPLICATION NO. 10/2016**

IN THE MATTER	of Section 390A of the Cook Islands Act 1915 (NZ)
AND IN THE MATTER	of the lands known as **KAINGAVAI 49C2, TAKITUMU; TE VAIMAPIA 19, TAKITUMU; KURUTOKI 10H2, NGATANGIIA; NURIKI 11B, NGATANGIIA**
AND IN THE MATTER	of an application relating to the Succession Orders to MANUANGA of 23 October 1933 and of 26 November 1984 and to rehear the Succession Orders to TEKURA made on 11 September 1954
BETWEEN	**LYNNSAY RONGOKEA FRANCIS** of Rarotonga, self employed Applicant
AND	**SIMON SNOWBALL, TAERO TEOE CRUMMER, TEIRONUI TEOE CRUMMER, PERIRA TEOE CRUMMER, TEOE JUNIOR TEOE CRUMMER, NGAPOKO TEOE CRUMMER, MARIA TEOE CRUMMER; URAIATA TEOE CRUMMER, TEREMOANA TEOE CRUMMER; TEREAPII TEOE CRUMMER & EMILY TEOE CRUMMER** Respondents

Date of Application:	13 October 2016
Appearances:	Mrs T Browne for Applicant Mr T Moore as agent for Respondents Simon Snowball & Teremoana Teoe Crummer @ Theresa Samuels Mrs T Carr for Respondents Maria Teoe Crummer and Tereapii Teoe Crummer and Objector E Short No appearance for remaining respondents
Date of Land Division Report:	30 October 2020 (NZT)
Date of Substantive Judgment:	19 April 2021

Date of Costs Judgment: 25 August 2021

JUDGMENT OF HUGH WILLIAMS, CJ

(re Costs)

[0155.dss]

Introduction

[1] The substantive judgment delivered on 19 April 2021, dismissing the application brought by Ms Francis under s 390A of the Cook Islands Act 1915 (NZ), said[1] that if costs were sought memoranda may be filed and set a timetable for that aspect of the matter.

[2] Mr Moore, acting for two respondents as shown in the intituling, filed full submissions on costs on 3 June 2021 on behalf of himself and Mrs Carr. She acted for two other respondents as shown in the intituling and an objector and materially assisted Mr Moore in the conduct of the ultimately successful defence. Indeed, it appears from the transcript and the other documents filed in the case that she bore the main brunt of the defence[2]. Recovery at indemnity rates was sought[3] for part of the costs with, in the alternative, recovery at 66% of Mr Moore's sole invoice for $3,601, and Mrs Carr's first invoice of $3,250, with recovery sought at 80% of Mrs Carr's second invoice for $5,850 and 100% of her third of $4,750[4].

[3] Mrs Browne, counsel for the applicant, in submissions filed on 11 August 2021, took the position that costs should lie where they fall and, in the alternative, that the total of the costs sought were excessive and no part of the conduct of these proceedings justified an order for indemnity costs.

[4] This judgment deals with those issues.

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1 At [63].

2 Mrs Carr has "superior knowledge and skills when it comes to papa'anga": Moore submissions, at 10.

3 Moore submissions, at 46 & 58.

4 All those sums are exclusive of VAT – indeed Mrs Carr's invoices omitted VAT – but Court's costs awards are VAT or GST neutral: *New Zealand Venue & Event Management v Worldwide NZ LLC* [2016] NZCA 282.

Principles

[5] Section 92 of the Judicature Act 1980-81 gives the Court discretion to make such orders for costs as it considers just, a broad discretion which is confirmed by R 300 of the Code of Civil Procedure 1981. Naturally, many factors affect both whether costs should be awarded and, if so, in what amount, but it is generally recognised that an award of party and party costs is to impose on an unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party, having regard to the nature and course of the proceeding and the amounts actually charged[5]. Though the percentages cited are unhelpfully broad, in land cases in the Cook Islands the approach is as set out in *Maina Traders Limited v. Ngaoa Ranginui*[6] where the following appears:

> [16] It is widely accepted that costs usually follow the event.[2] While it is often stated that the general starting point when assessing costs is a contribution towards two-thirds or 66% of the costs incurred by the successful party, this is somewhat contentious. It is more useful to objectively assess the overall merits of the case, such as the conduct of each party, as this will directly influence the extent to which costs will be granted, as an award of costs must be reasonable, and it must also reflect costs which were reasonably incurred.[3]
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> [17] In the recent Cook Islands decision of *Tini v. Cook Islands Investment Corporation*, Grice J favoured the cross-check approach, where costs are deemed to be an amount that falls within the range of 20-80% of a reasonable fee following consideration of a number of influencing factors[4].
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> [18] These factors were set out in *Holden v. Architectural Finishes Ltd*, and include, but are not limited to[5]:
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> (i) Length of hearing (the longer the hearing, the more it is worth; but waste of time should be penalised);
> (ii) Amount involved (the greater the amount, the greater the responsibility and the fee warranted);
> (iii) Importance of the issues to the parties or generally (the greater the importance, the greater the demand for skill and care, and a commensurate fee);
> (iv) Legal and factual complexity (the more intricate and difficult the case, the greater the fee);

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5 *Morton v. Douglas Homes Limited* (No.2), [1984] 2 NZLR 620.

6 *Maina Traders Limited v. Ngaoa Ranginui*, 1 February 2013, Isaac J, following *Tini v. Cook Islands Investment Corporation*, Grice J.

(v) Time required for effective preparation (this item assumes a reasonable level of experience and competence and is not to be allowed to cover hours extended through its absence);
(vi) Arguments advanced which lacked substance;
(vii) Abuse of process, including collateral purpose and attrition (care is needed. Angry allegations do not suffice: proof rests on the party so asserting);
(viii) Unreasonable or obdurate refusal to settle, so far as known to the Court;
(ix) Unrealistic attitudes, or inadequate payments into Court;
(x) Technical or unmeritorious points;
(xi) Degree of success achieved by the parties;
(xii) Lengthening or shortening of hearing by conduct of a party (particularly applicable where the successful party's conduct has contributed to the dispute and ultimate litigation. Provocation should not be rewarded)."

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2 *Glaister v Amalgamated Dairies Ltd* NZCA 1/3/2004 CA 99/03 (McGrath J, Hammon J & W Young), at [9].
3 *Glaister v Amalgamated Dairies Ltd*, at [14].
4 *Tini v Cook Islands Investment Corporation*, at [16].
5 *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143.

[6] In land cases, to those principles may be added the observations of the Privy Council as to the "special character and importance of ancestral property to the indigenous peoples of the Cook Islands which transcends any commercial significance" and that "the relationship between the indigenous people and their ancestral land through Tikaanga (right, authority) is an essential component of their identity"[7].

[7] The principles relating to indemnity costs are usefully summarised in R 14.64 of the New Zealand High Court Rules and include parties acting vexatiously, frivolously, improperly or unnecessarily commencing, continuing or defending a proceeding, plus other criteria not currently relevant, but including an omnibus provision that "some other reason exists which justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious".

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7 *Baudinet v. Tavioni* [2012] UKPC 35, at [61]. See also *Descendants of Utanga, Arerangi Tumu v. Descendants of Iopu Tumu* [2012] UKPC 35, at [2]; and *Browne v. Munokoa* [2018] UKPC 18, at [5].

Course of proceedings

[8] An outline of the course taken by these proceedings appears in the introduction to this judgment and in the substantive judgment itself[8]. To that narrative should be added a note that the hearing of this matter in the Land Division took place on 16 and 18 July 2019 and that, following receipt of Coxhead J's Report on 5 November 2020, copies of the Report were referred to the parties with advice that the Chief Justice was minded to accept the recommendation for dismissal of the application. An opportunity was given to the parties for further submissions.

[9] It should also be noted that the respondents, in opposing the application, consistently took the stance which was ultimately successful: namely that the applicant was in error in bringing the application and would be unable to prove to the required standard the core issue in her application, essentially that two persons named Manuaanga were one and the same person. The evidence led Coxhead J to conclude:

> [68] It is always difficult to assess historical matters in a contemporary context. Here we are being asked to assess what happened in 1933, 1958 and 1984 from a 2020 perspective. Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is normally deemed to have been correct. The principle of omnia praseumuntur rite esse acta (everything is presumed to have been lawfully unless there is evidence to the contrary) must apply in these circumstances. Therefore, in the absence of a patent defect in an order, there is a presumption that the order made was correct. The burden of proof is on the applicant to rebut that proposition with clear evidence.
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> [69] In the present case, I am not persuaded on the balance of probabilities that there has been a mistake, error or omission with regard to the three succession [sic] the applicant seeks to overturn. It is not clear that Manuaanga in those orders is the same person who adopted Tepaeru A Tau. In fact, the weight of the evidence presented to the Court suggests that these are two different Manuaanga from different genealogies, although they may have some connection through Vai. *[In this matter, the evidence given by Tepaeru A Tau herself almost 100 years ago is to be preferred.]*[49]

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49 Italicisation in original.

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8 At [1]-[6].

Submissions

[10] Mr Moore's submissions began by explaining how Mrs Carr and he had jointly participated in the defence of the application, including in the hearing before Coxhead J. He submitted that the respondents' costs were reasonably incurred, particularly in Mrs Carr's line-by-line refutation of Mrs Browne's challenge to the conclusions in Coxhead J's Report after the same was distributed to the parties for comment. Mr Moore submitted that Ms Francis' conduct put the respondents to additional costs and expense to the extent of their becoming entitled to recover indemnity or increased costs on the grounds of lack of merit of the applicant's case from the outset, she having failed to recognise the weakness of her application.

[11] Mr Moore carefully chronicled the respondents' consistent stance in relation to the application, including reference to a number of memoranda filed on the respondents' behalf. He particularly pointed to Mrs Carr's incisive cross-examination of Ms Francis at the hearing before Coxhead J as recounted in the Judge's Report and submitted that the applicant's submissions following distribution of the report amounted to an attempt to re-litigate the case, something not open to her.

[12] Mr Moore referred to a number of decisions concerning awards of costs in the Cook Islands, especially in land cases, and to the award of indemnity costs in *George v. Teau*[9]. That led Mr Moore to submit that the "applicant in this s 390A matter has acted in a way that is reprehensible and that indemnity costs or increased costs about 66% are appropriate"[10].

[13] Mrs Browne submitted that costs should lie where they fall so as not to deter applicants from bringing cases in the likelihood of costs being awarded against them for failure; that the applicant believed she had an arguable case but was unable to satisfy the onus and burden of proof; that the application was dismissed without any finding that it lacked merit; and that, as the substantive judgment said, "this application is almost a case study of the difficulties applicants face in s 390A matters".

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9 *George v. Teau* [2013] CKCA 1, 20 February 2013. However, the facts in that case were exceptional and so unlikely to be repeated that the case provides little precedent.

10 Moore submissions, at 46.

Discussion and Decision

Should an order for costs be made against the applicant?

[14] Despite Mrs Browne's submissions that costs should lie where they fall, there is nothing in this case to displace the ordinary rule that losing parties should be ordered to make a reasonable contribution to the costs of the successful parties. Though requiring painstaking investigation, preparation and presentation by the parties, it was, at bottom, a matter where the applicant's case ultimately foundered on an inability to produce enough probative evidence of events many years in the past which was sufficient to satisfy the onus and standard of proof.

[15] True, those respondents who chose to oppose the application consistently took the view that the applicant would be unable to prove her case, and pleaded that on a number of occasions, but there is nothing unusual in parties defending litigation taking the standpoint that parties initiating the litigation will fail.

[16] There is therefore justification for an award of costs being made in favour of those respondents who chose to oppose the application and the question become the level of the award and who should benefit.

What amount of costs should be awarded?

[17] The narrative in Mr Moore's invoice dated 3 June 2021 to his clients for $3,601 plus VAT and disbursements ($60) shows that the invoice covers the whole period of his involvement in the application with his costs being calculated at $130 per hour.

[18] Mrs Carr's invoices are, however, unhelpful in being undated and sparing in their narrative. The first invoice, for $3250 being 25 hours at $130, expressly relates to the period prior to referral to the Land Division, and the second, for $5,850 at the same hourly rate, is said to relate to "all matters relating to the 390A challenge by Ms Francis" and also covers the preparation and conduct of the hearing before Coxhead J. The third, dated

January/February 2021 for $4,750[11] relates to the period following distribution of the Report and covers the opportunity for submissions.

[19] In the acknowledged two-step process to the calculation of costs awards, the first question is whether the costs sought were reasonably incurred.

[20] Looking first at the matter globally before factoring in any question of totality or overall fairness, in this case there must inevitably have been significant duplication of effort between Mrs Carr as claimed in her invoices totalling $13,850 and Mr Moore's invoice for $3,601. Indeed, perusing the narratives of the accounts, such as they are, and the submissions, that appears almost to be conceded.

[21] It is considered that, having regard to the complexities of this matter, an hourly charge out rate of $130 is not unreasonable for agents of Mr Moore's and Mrs Carr's experience, but if one-third of Mr Moore's invoice, say $1,200, is assumed to relate to the period prior to referral, as is the case with the whole of Mrs Carr's first invoice for $3,250, an award of 50% of the total of $4,450 would seem to be reasonable, namely $2,825.

[22] For the period from referral to conclusion of the hearing before Coxhead J, again there must be significant duplication between Mr Moore's invoice and Mrs Carr's invoice for this period of $5,850, but if $600 of Mr Moore's invoice is assumed to relate to this period and the respondents are awarded 66% of both invoices, the costs award for that aspect of the matter amounts to $4,300.

[23] An award to Mrs Carr of that percentage recognises the skilful and detailed cross-examination of the applicant which she conducted at the hearing before Coxhead, which, as the transcript demonstrates, did much to result in the Judge's recommendation for dismissal.

[24] The nature of Mrs Browne's response to the opportunity for submissions following distribution of the Report could arguably be characterised as an attempt to re-litigate the issues decided by Coxhead J, but any conclusion in that regard must be tempered by the

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[11] The hourly rate is not stated.

approach to costs awards in land cases earlier noted. Even though she was ultimately unsuccessful, having regard to the attitude of Cook Islanders to their interests in land it could not be said that Ms Francis acted vexatiously, frivolously, improperly or unnecessarily in commencing and continuing the claim, albeit in the face of the respondents' resolute opposition.

[25] The application for indemnity costs for the period following distribution of the Report is therefore declined.

[26] For this period, again there will have been major duplication with Mr Moore's costs – a memorandum of 10 February 2021 merely said his clients adopted Mrs Carr's submissions – and it is unhelpful that Mrs Carr has not included an hourly rate in her account, but given that her submissions largely repeat the submissions she made to Coxhead J, it is considered that the appropriate allowance for this period would be nil for Mr Moore's participation and half, $2,375, of the invoice for $4,750 for Mrs Carr's work during this period.

[27] Those tentative amounts sum to $9,500. However, costs awards need to be fair, their fairness being judged on the overall bearings of the case, and, in this case, as in many others in the Land Division, there were numerous respondents, and all of them, represented and unrepresented, maintained a common approach to opposing the application. This was not a case where, as sometimes occurs, various respondents or groups of them, take differing attitudes to the claim. It would not be fair or just for respondents who choose to instruct separate counsel or agents to further their common cause, all to be awarded costs at the usual level of their separate but common representation from the other side if that representation is successful. That is particularly the case where, as here, near-uniformity of action results. To put that point another way, multiple parties to an application, all of whom adopt a common position, should not be able to exert costs pressure on their opponents and possibly dissuade them from continuing with their litigation, merely by each retaining separate representation.

[28] The amounts so far tentatively awarded have recognised, to a lesser degree, the duplication of effort. The more potent aspect so far resulting in the reductions from the costs charged has been the normal percentages of recovery shown by the authorities.

However, in this case, it is considered that a further reduction from the tentative figures is justified to allow for the duplication point and for fairness.

In light of that, the global award of costs to the respondents against the applicant will be set at $8,500. As between Mr Moore and Mrs Carr, their accounts are roughly in the ratio of 20% charged by Mr Moore and 80% by Mrs Carr. The award of costs will therefore be of $1,700 to Mr Moore and $6,800 to Mrs Carr.

Hugh Williams, CJ