

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

APPLICATION: 943/2023

UNDER Section 409(c) of the Cook Islands Act
1915 and Rule 355 of the Code of
Civil Procedure of the High Court
1981

IN THE MATTER of the land known as AKAOA
SECTION 10, ARORANGI

AND

IN THE MATTER of an application for orders for an
accounting and for mesne profits

BETWEEN NAEA ROBATI of Rarotonga,
Landowner
Applicant

AND DORREN BOGGS AND STEVEN
LEONARD BOGGS of Rarotonga
Respondents

Hearing dates: Decision made on the papers

Decision: 5 June 2024 (NZT)

JUDGMENT OF JUSTICE C T COXHEAD
AS TO COSTS

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Introduction

[1] This decision for costs follows a decision I made on 14 July 2023 where I dismissed the application and then invited submissions as to costs.

[2] Counsel for the respondent, Mrs Tina Browne, filed submissions with the Court on 3 August 2023.

[3] Despite a number of attempts by Court staff to ask Mr Moore whether he would be filing submissions on behalf of his client, no submissions were received.

Respondents' application for costs

[4] Counsel for the respondent has filed an invoice for actual costs reasonably and properly incurred.

[5] Counsel for the respondent submits that on receipt of the application filed by Mr Moore's client, they immediately wrote to Mr Moore advising him that the application was misconceived and should be withdrawn before any further legal costs were incurred.

[6] There was no response received from Mr Moore.

[7] When the application was called on 10 July 2023, Mr Moore asked for it to be adjourned to 12 July. On 12 July, Mr Moore asked for the application to be adjourned to 14 July. On 14 July 2023, Mr Moore asked that the application be adjourned to the next Court. The respondent and her mother attended Court on each occasion.

[8] At the Court sitting on 14 July, counsel for the applicant sought dismissal.

[9] After some discussion about the matter being adjourned or withdrawn, with no issue as to costs, or dismissed, Mr Moore accepted that the matter would be best dismissed and that he would have to deal with costs with Mrs Browne.

[10] As I saw it, the matter should have been dismissed as there were clear issues with:



- (a) whether the Court had jurisdiction under s 409(c) of the Cook Islands Act 1915 to make the orders that were being sought; and
- (b) that the case law did not support a claim for possession and mesne profits between owners.

[11] The application was dismissed, and costs reserved.

[12] The respondent submits that costs could have been avoided had the application been withdrawn at the outset.

[13] Given the circumstances, the respondents contend that they are entitled to a contribution of 80 per cent of their legal cost.

The legal principles

[14] The Court can award costs under s 384 of the Cook Islands Act 1915, which provides:

In any proceeding [the Land Court] may make such order as it thinks fit as to the payment of the costs thereof, or of any proceedings or matters incidental or preliminary thereto, by or to any person who is a party to that proceeding, whether the persons by and to whom the costs are made payable are parties in the same or different interests.

[15] As per s 92 of the Judicature Act 1980-81, costs are at the jurisdiction of the Court:

Subject to this Act and to the provisions of the Crimes Act 1969, the High Court shall have the power to make such order as it thinks just for the payment of the costs of any proceedings by or to any party thereto. Such costs shall be in the discretion of the Court, and may, if the Court thinks fit, be ordered to be charged upon or paid out of any fund or estate before the Court.

[16] The Code of Civil Procedure of the High Court 1981 provides:

300. Costs –

- (1) Subject to the provisions of these rules, the costs of any proceedings shall be paid by or apportioned between the parties in such manner as the Court thinks fit; and in default of any special direction such costs shall abide the event of the proceedings.

- (2) The amount of costs awarded shall be ascertained and stated in the judgment or order.
- (3) The costs on any judgement or order carrying costs shall include any moneys paid or payable for Court fees under the High Court Fees Costs and Allowances Regulations 1981, for allowances to witnesses under the High Court Fees Costs and Allowances Regulations 1981, or for other necessary payments or disbursements, together with solicitors' costs on the appropriate scale prescribed in the High Court Fees Costs And Allowances Regulations 1981.
- (4) The Court may in its discretion disallow the whole or any part of any costs.
- (5) Nothing in these rules shall be construed to deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would otherwise be entitled under any Act or rule of law.

[17] Costs usually follow the event, with a general starting point being a two-thirds contribution towards the costs incurred by the successful party.¹

[18] In *Maina Traders Ltd v Ranginui* the Court set out factors which may influence an award of costs:²

- a) The length of the hearing (the longer the hearing, the more it is worth, but waste of time should be penalised);
- b) The amount of money involved (the greater the amount, the greater the responsibility, and the fee warranted);
- c) 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);
- d) The legal and factual complexity (the more intricate and difficult the case, the greater the fee);
- e) The amount of time required for effective preparation;
- f) Whether argument(s) lacking substance (but not necessarily frivolous or vexatious) was/were advanced;
- g) Abuse of the process of the Court.
- h) Any failure to comply with the rules, or an order or direction of the Court (to the extent such non-compliance has impeded progress);

¹ *Tuake v Ngate – Akaoa 65, Arorangi* [2014] CKLC; App 213/2013 (4 March 2014), at [30] citing *Glaister v Amalgamated Diaries Ltd* [2004] NZCA 99/03.

² *Maina Traders Ltd v Ranginui – Areau 35, Arutanga, Aitutaki* [2013] CKLC; App 225/2011 (9 February 2013) as cited in *Tavioni v Cook Islands Christian Church Inc* [2018] CKLC 2; App 196/2014 (26 September 2018). at [19].

- i) Unreasonable or obdurate refusal to settle, so far as known to the Court;
- j) Unrealistic attitudes, or inadequate payments into Court;
- k) Technical or unmeritorious points;
- l) 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);
- m) Whether the hearing was lengthened or shortened by the conduct of either party.

Decision

[19] The purpose of an award of costs is to make a reasonable contribution towards the legal cost of the successful party.

[20] I am of the view that costs should be awarded to the respondent. They were successful in that the application was dismissed.

[21] Counsel for the respondent took early steps to seek the withdrawal of the application. Counsel for the respondent was unsuccessful in pointing out to the applicant the futility of their application.

[22] In this situation, the respondent has been put to the inconvenience and cost of needing to engage legal counsel with regards to an application that had little chance of success. The application was in essence withdrawn and then dismissed, after a number of hearings, albeit very brief hearings.

[23] I am of the view that the respondent is entitled to a contribution of 80% of her costs being \$1,564.00. I therefore award costs of \$1,564.00 in favour of the respondent.

Dated at Rotorua, Aotearoa/New Zealand this 5th day of June 2024.



C T COXHEAD
JUSTICE