IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION) **APPLICATION NO. 1/15**

IN THE MATTER of Section 390A of the Cook Islands Act 1915

AND
IN THE MATTER of the land known as **HOUSESITE SECTION 135, AVARUA**

AND
IN THE MATTER of an application to rehear Succession Orders made on 19 November 1926 and 17 February 1958 (MB 24/3) to the interest of Te Po

BETWEEN **STANLEY HUNT** of Rarotonga
Applicant

AND the descendants of **PUA POKOROA, NGEREMETUA POKOROA, TAIO POKOROA, IANGI POKOROA and NOOROA POKOROA**
1st Respondent

AND the descendants of **ANA @ ANA A PARIMA**
2nd Respondent

Date: 13 September 2017

Counsel: Mrs T Browne for Applicant
Mr T Moore for Respondents (no longer acting)
Ms M Henry for 1st Respondent
Mrs T Carr for 2nd Respondent

DECISION OF HUGH WILLIAMS, CJ

[WILL0327.dss]

[1] A minute in this matter dated 24 February 2017 (NZDST) summarised the procedural history of this application and noted that Weston CJ, in a minute of 20 September 2016, indicated an intention to refer the application to the Land Division for a report following completion of a number of matters.

[2] The application was heard in the Land Division of the Court on 24 May 2017 and, as recorded in the transcript and noted by Isaac J on the Land Decision Sheet, the Judge directed that all three succession orders raised in the matter were to be cancelled.

[3] Those succession orders were, as listed in the amended application in this matter dated 9 September 2016, those made on 19 November 1926 to the interests of Ngapini and Parima and that made on 17 February 1958 to the interests of Te Po. The application pleaded that the orders had been made in error in that they did not comply with the terms of an order on investigation of title made on 9 March 1908 in that the successors were not direct descendants of Ngapini, Parima and Te Po and the Court failed to enquire into whether the successors were direct descendants.

[4] In light of the findings of Isaac J, the three succession orders described in the last preceding paragraph are hereby formally cancelled pursuant to s 390A of the Cook Islands Act 1915.

[5] Submissions as to costs were made by Mrs Browne, counsel for the applicant, on 6 June 2017 and, in reply, on 26 July 2017 (both received by Hugh Williams CJ on 6 September 2017 (NZ time)) and from Mrs Carr, agent for the second respondent, dated 17 July 2017.

[6] In her initial submissions on costs, Mrs Browne referred to the leading New Zealand cases in that area namely *Morton v Douglas Homes Limited (No.2)*[1] and *Holden v Architectural Finishes Limited*[2] and, more pertinently, to the decisions in *Tini v CI Investment Corporation* and *Maina Traders Limited v Ngaoa Ranginui*[3]. In the latter, Isaac J noted that the two-thirds or 66 percent starting point was somewhat contentious and costs are more usually objectively assessed against the overall merits of the case, the conduct of each party and the several other factors listed in *Holden v Architectural Finishes Limited*.

[7] Mrs Browne's initial submissions noted the commencement of this proceeding on 5 December 2014, when only the 17 February 1958 succession order was challenged, and the application's gradual evolution as a result of submissions by others involved in the application, to the filing of the amended application, the details of which were earlier noted.

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1 [1984] 2 NZLR 260
2 [1997] 3 NZLR 143
3 1 February 2013

Mrs Browne noted that, even during the hearing before Isaac J, there were changes of stance on behalf of the respondents before it was conceded that all three succession orders should be cancelled. Mrs Browne submitted that "it was quite clear from the start that all three succession orders were made in error" and that the hearing and the filing of submissions could have been avoided if the agents opposing the application had arrived at their final positions much earlier in the history of the case. In light of that, Mrs Browne's submission was that either indemnity costs or at least 80% of her firm's total costs of $6,037.50 (including VAT) and $275 for disbursement, a total of $6,312.50, should be ordered.

[8] Mrs Carr, agent for the second respondents, also traversed the course of the proceedings but submitted that it was incorrect to say the applicant was wholly successful and the second respondent wholly unsuccessful as all were equally successful in convincing Isaac J that all three orders should be revoked. She particularly challenged Mrs Browne's submission that "it was quite clear from the start that all three succession orders were made in error" pointed to the more restricted basis of the original application. She also submitted that the application was procedurally incomplete at its outset and that some of Mrs Browne's costs appeared to relate to matters outside the litigation, namely correspondence concerning a lease and perusal of the same.

[9] Mrs Carr also pointed to what she suggested was a fundamental principal in land matters, namely that where parties remain as co-owners at the conclusion of a matter costs should lie where they fall lest the imposition of a costs order prejudice the desired result of the landowners moving forward together.

[10] Mrs Browne's response denied, by reference to facts not on the court file, Mrs Carr's submissions as to the lease. She submitted that the meeting of assembled owners called on 3 November 2014 was adjourned at the request of the then applicant but that otherwise it would have been supported by the majority and that, now, should the meeting be reconvened to consider the variation proposed by the lessee, the only persons entitled to attend would be the applicant's family who do not support the lessee's request.

[11] It appears that there was a lack of clarity in defining the thrust of this application until the original application, and the submissions of various respondents on it, resulted in the filing of the amended application on 9 September 2015, nine months after the original application was lodged. In light of the authorities, it would not be appropriate to order costs in favour of the applicant for that period.

[12] On the other hand, given the ultimate concession by all respondents that all three succession orders under challenge should be cancelled, it would appear that more rigorous analysis of the position earlier in the period between September 2015 and May 2017 would have enabled the matter to be resolved more quickly and at less cost, and, for that, the respondents should bear their share of responsibility.

[13] Against that, however, perusal of the file suggests there were procedural difficulties and additional difficulties concerning the standing of one Maryanne Pirake which no doubt attenuated resolution of the proceeding.

[14] In light of that and bearing in mind the claimed practice in the Land Division on which Mrs Carr relies, there will be a finding that the applicant is entitled to an order for costs in this proceeding of $4,000, approximately two-thirds of the amount charged by Mrs Browne's firm including VAT, but plus disbursements of $275.

[15] The submissions on costs did not seek apportionment in any order for costs as between the First Respondents and the Second Respondents so, for the present, the order for costs is to be joint and several as between the two classes of respondents but, should apportionment be sought, leave is reserved to apply in that regard.

Hugh Williams, CJ