IN THE HIGH COURT OF THE COOK ISLANDS
(LAND DIVISION)

APPLICATION NO. 319/18

UNDER	Sections 429 and 430 of the Cook Islands Act 1915 and Rule 348 of the Code of Civil Procedure 1981
IN THE MATTER	of the land known as **KAINGANUI 92G3, ARORANGI, RAROTONGA** and an application for costs
BETWEEN	**TEUPOO BATES** **Applicant**
AND	**TEREMOANA TAIO** **Second Applicant**
AND	**MERE JOHN MATEARA** **Respondent**

Hearing: On the papers

Appearances: Mr B Marshall for the applicant
Mrs T Browne for the second applicant
Mr T Moore for the respondent

Decision: 8 August 2019

DECISION OF JUSTICE C T COXHEAD AS TO COSTS

Introduction

[1] This is an application for costs by Mere John Mateara, the respondent. The costs application arises from my decision of 9 November 2018 dismissing the application to recall unsealed partition orders from 1996 and ordering the Registrar to seal those orders.

Submissions for costs by the respondent

[2] Agent for the respondent, Mr Moore, submits that the accepted procedure is that costs follow the event and are usually awarded to the successful party. This is codified in r 300 of the Cook Islands Code of Civil Procedure 1980-1981. The resulting test is (a) were the costs reasonably incurred? and (b) what contribution should the unsuccessful party make to the successful party's costs.

[3] The respondent has filed two invoices with their submissions. The first for $4105.00 including tax for land agent services payable to Ngaoa Ranginui; the second for $3620.00 including tax for land agent services payable to Travis Moore.

[4] Mr Moore cited *Binnie v Pacific Health Limited* for the principle that the conduct of the unsuccessful party will be relevant to the amount of costs awarded.[1] The respondent submits the first applicant's behaviour resulted in extra cost: in relation to procedure, for failing to recognise a point of law and for lack of merit to their application. As the second applicant effectively resiled from their position in submissions, the respondent submits that the bulk of costs should lie with the first applicant.

[5] On the matter of procedural conduct, Mr Moore submits that the first applicant produced near to 150 pages of material for the Court. Before filing the application, the first applicant had been in negotiations with the respondent for sealing of the 1996 orders over the course of a year. However, his true intent was to obtain a "swap" of the two titles created under those orders and he delayed agreement on sealing in order to obtain this swap. This behaviour has obstructed the ability of the respondent to bring separate applications for confirmation of agreement of assembled owners and to grant new leaseholds. That the unsealed orders were preventing owners entering into leases and obtaining occupation rights was also noted by counsel for the second applicant.

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[1] *Binnie v Pacific Health Limited* CA 65/02, 1 April 2003 at [21].

[6] Mr Moore further submits that the first applicant brought what was essentially a hopeless case. Despite the application being dismissed by Savage J, the first applicant coined the matter as the first application for recall of the orders. The first applicant also argued that a mistake or omission had occurred in the orders when that was clearly not the case.

[7] Overall, Mr Moore submits that the first applicant brought no fresh evidence and was unable to meet the test for recall.[2] Many opportunities were given to the first applicant to either amend or withdraw their case, but they persisted.

[8] It is submitted that the respondent sought to reach an agreement as to costs without coming to the Court, but their offer was rejected. This rejection has only drawn out an already long process that has caused significant cost to the respondent.

[9] Regarding quantum, the respondent submits that full indemnity costs are rare but points to the Māori Land Court of New Zealand for an example where 80% of costs were ordered.[3] He also notes that the Court of Appeal has indicated it may be willing to adopt the approach of the New Zealand Employment Court for full indemnity costs.[4] That decision suggested that such costs would only be granted where the losing party's case was wholly lacking in merit and their actions in pursuing it could be described as "reprehensible".[5] The Court of Appeal also noted that these considerations should not be considered mandatory, and the actions of the losing party overall should be the main consideration.[6] The result was that the Court ordered 100% indemnity costs to the winning parties to be split evenly between the losing party and their counsel.

[10] Mr Moore submits that the actions of the first applicant through the course of this case has met the test for full indemnity costs and could certainly be described as reprehensible and they are therefore seeking 100%. In the alternative, the respondent requests an award of costs at 80%, being the top of the range described by Grice J in *Tini v Cook Islands Investment Corporation*.[7]

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[2] *Horowhenua County v Nash (No. 2)* (1968) NZLR 632.
[3] *Housing New Zealand v Tawhai* (2001) 13 Takitimu Appellate Court MB 184 (13 ACTK 184).
[4] *George v Teau* [2013] CKCA 1; CA 2 of 2012 (20 February 2013).
[5] *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack* [2000] 1 ERNZ 518 (EmpC).
[6] Above n 4 at [21].
[7] *Tini v Cook Islands Investment Corporation* [2010] CKHC 90; OA 6.2010 (4 May 2010).

[11] The respondent opposes the submission that parties represented by land agents are not entitled to costs. Mr Moore notes particularly that the Chief Justice has previously invited him to submit on the issue of costs in a previous case. Furthermore, he explains in *Pittman*, as referenced by the first applicant, the facts were that he as land agent had failed to register his client as a full party. Therefore, when the Chief Justice stated "...land agents are not entitled to costs", he meant Mr Moore himself was not entitled to costs. In the case of *Daniel v Hunter*, Chief Justice Weston awarded costs in favour of a party represented by land agent Ms Tere Carr.[8]

[12] Mr Moore submits that costs are awarded to parties and not to counsel representing them, and no legislation limits their award only to parties who have engaged lawyers. The purpose of the Land Agents Registration Act is to give a choice to parties seeking representation. It is submitted that failure to award costs where a party has abused process because of their representation, would invite abuse of process whenever land agents are engaged.

Grounds of opposition

[13] The first applicant opposes the costs sought by the respondent. They submit parties ought to bear their own costs, or in the alternative, that full indemnity costs are not justified.

[14] Mr Marshall submits that s 9 of the Law Practitioners Act 1994 entitles legal practitioners to sue for costs. As the Land Agents Registration Act 2009 does not contain a corresponding provision, it must have intentionally been omitted by Parliament. This is supported by a comment of Chief Justice Williams in the case of *Pittman v Landowners of Rangiatua 103C2B2* which states plainly: "Mr Moore's application for costs is dismissed on the basis that land agents are not entitled to costs".[9] Further support for this point can be found in *Little & Matysik PC v George* which discussed judicial oversight of lawyers' fees and the lack of corresponding oversight of land agents' fees.[10] The Court therefore concluded that, unlike solicitors, land agents who represent themselves are unable to recover costs. Mr Marshall submits that this demonstrates that the cost of retaining a land agents cannot be recovered by cost order.

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[8] *Daniel v Hunter – Aremango 7D1* 6/2012, Tom Weston CJ, 18 March 2016.
[9] *Pittman v Landowners of Rangiatua 103C2B2* 2/2017, Hugh Williams CJ, 27 March 2018.
10 *Little & Matysik PC v George* [2013] CKHC 22.

[15] Mr Marshall further submits that the more recent comments in *Pittman* should be preferred over those in *Daniel v Hunter*. He goes on to distinguish on the facts, pointing out that the costs in *Daniel v Hunter* followed a concession by opposing counsel and therefore was intended to give effect to party wishes. The decision in *Pittman* was based on legal merit alone.

[16] In the alternative, Mr Marshall submits that if the Court should find land agents are entitled to costs, costs should nonetheless lie where they fall. It is submitted that the actions of the second applicant and the respondent extended the proceedings. Agreement had been reached on the how to proceed to seal the orders, but the position of those parties changed, to the surprise of the first applicant. This is evident in the hearing transcript.

[17] Emails have also been submitted that contradict the assertion of the Respondent that she alone was trying to have the orders sealed. The parties have been trying for some time to have the orders sealed and although many meetings were held, Mr Marshall submits some of the delay can be attributed to the Registrar refusing to act. Agreement has been reached between the landowners, but it became clear that an application would have to be filed with the Court – this was done by the first applicant in good faith to reach a mutually beneficial conclusion.

[18] The first respondent denies having acted in a way to prolong proceedings. Mr Marshall notes that their submissions of fact and their application for recall were not lacking in merit, despite not being accepted by the Court. The substantive decision did not comment on *res judicata* and regardless, the first applicant was not seeking to relitigate what had already been heard before Savage J in 2010. That application sought to have the judgment set aside, whereas the current is for recall only.

[19] Finally, Mr Marshall submits it is not reasonable for the respondent to claim costs for retaining an agent prior to the application being filed as costs must relate to the matter before the Court. Therefore, the costs in the invoice labelled "A" and annexed to the application are not reasonably incurred. Furthermore, tax does not form a part of a costs award and the inclusion of tax in the respondent's invoices should be considered were any order to be made.

[20] With regard to quantum, Mr Marshall submits that a reasonable contribution would be 60% of the total of the second invoice submitted by the respondent, marked "B" for $3620.00. The total should be less 15% tax. As the second applicant resiled from their position part way through proceedings, it is submitted that a fair division of half the costs each should be shared between the first and second applicants.

Second Applicant

[21] The second applicant submits that each party should pay their own costs as land agents are not entitled to legal costs and there is no justification for an order as to costs against the second applicant.

[22] Further, the second applicant submits that indemnity costs are not justified and should the Court make an order that the applicants make a reasonable contribution to the costs of the respondents then that should be paid by the first applicant and not shared between the applicants.

[23] The second applicant should not be made to pay any cost whether it is indemnity or contribution to the reasonable cost of the respondents as the delay in having the order sealed was no fault of the second applicant. The issue for the second applicant was simply the area marked on the plan. It is accepted that the parties did attempt to negotiate a swap to achieve what the parties believed was the initial intention unfortunately however no agreement was achieved.

The issues

[24] As I see them, the issues in this proceeding are as follows:

(a) Can Court award costs to a party who is represented by a land agent?

(b) Should costs be awarded?

(c) If costs are to be awarded what is the quantum?

The law

[25] The award of costs has been described across several pieces of legislation. The Cook Islands Act 1915 states as follows:

> **384. Costs** - 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 so made payable are parties in the same or different interests.

[26] The Code of Civil Procedure 1980-1981 states:

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.

[27] The Judicature Act 1980-1981 also has a section on costs:

92. Costs - Subject to this Act and to the provisions of the Crimes Act 1969, the High Court shall have 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.

Discussion

Can costs be awarded to a party who was represented by a land agent?

[28] The fundamental rule is that all questions relating to costs fall within the discretion of the Court. The fixing of costs is quintessentially the exercise of a judicial discretion. The underlying rationale for costs is that a party should be able to recover a reasonable contribution towards their legal expenses. Except in rare cases, a successful party can only expect to receive a contribution towards the actual legal expenses reasonably incurred.

[29] The aim of costs is not to fix solicitor or counsel remuneration but to impose on the unsuccessful party an obligation to make good the burden of brining or defending the matter carried by the successful party.

[30] The context of land proceedings within the Cook Islands anticipates solicitors and land agents appearing as representatives. This context needs to be taken into consideration. The Land Agents Registration Act 2009 provides that a land agent who holds a current annual

practising certificate may appear in the Land Division of the High Court as an advocate for or representative of any person.

[31] If our starting point is that an award of costs is to reimburse a successful party for having to appear in Court then whether they were represented by an agent or a solicitor should make no difference. It is about the burden on the successful party in bringing or defending a matter, and not the qualifications of their authorised representative.

[32] The Court has been provided with two cases from two different Chief Justices. The Chief Justice Williams case of *Pittman v Landowners of Rangiatua 103C2B2* and Chief Justice Weston, as he then was, case of *Daniel v Hunter*. While both cases have a different result with regards to costs to a land agent, neither case provides reasoning as to whether the Court can, or cannot, grant costs to a client represented by a land agent.

[33] I note that costs have been awarded against a land agent on a solicitor basis. In the case of *Tupangaia v Taakoka Island Villas Limited*, costs were awarded against an agent on a solicitor basis.[11] The then Justice Weston dealt with the issue of whether a land agent should pay cost as a consequence of a judgment where the proceedings were declared to be a nullity and struck out. He stated:[12]

> [23] It is common ground that, in appropriate circumstances, a solicitor representing a party might personally be subject to an order for costs. I see no conceptual difficulty with extending that to a person purporting to act as agent. If it was to be otherwise, the procedures of the Court would easily be subject to abuse. An agent would purport to issue proceedings in the name of a bankrupt knowing that a costs order against the bankrupt would be fruitless and the agent subject to an immunity. That could not be right. As I said in my previous Judgment, the right to issue proceedings is an important one and it must be protected. Equally, though, defendants must be protected from the improper issue of proceedings. There is a balance to be struck.

[34] To be able to award punitive costs against an agent in the same manner as a solicitor implies an equality in their treatment within the Cook Islands context. To refuse to award costs to a party represented, in the Land Division of the High Court, by a land agent would then create an unreasonable injustice. The Land Agents Registration Act 2009 appears to be about improving access to justice by providing people with the option of engaging a land agent when

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[11] *Tupangaia v Taakoka Island Villas Ltd (Costs Judgment)* [2009] CKHC 3.
[12] Above n 11 at [23].

bringing a matter to the Land Division of the High Court. I find a refusal to award costs to a party because they chose to employ a land agent would risk nullifying that benefit.

[35] The underlying basis of an award of cost is to provide a reasonable contribution towards the legal cost of a successful party. I see no difficulty with extending that to cover the cost of a land agent authorised by legislation to represent a person in the Land Division of the High Court.

Should costs be awarded?

[36] In this case all parties, first and second applicants and the respondents have been involved in negotiations to reach an agreement. During the long course of these proceedings and negotiations, parties' positions appear to have changed on a number of occasions. To a greater or lesser extent, all parties have, in my view, contributed to the proceedings being protracted.

[37] As Mr Marshall submits agreement had been reached between the landowners, but it became clear that an application would have to be filed with the Court – this was done by the first applicant in good faith to reach a mutually beneficial conclusion.

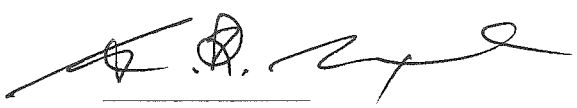
[38] In this situation, it is my view that the Court should attempt to facilitate amicable relationships between parties who are invariably connected by genealogy to both the land and each other. An award of cost would not help those relationships.

[39] In my view costs should not be awarded and all parties should bear their own costs.

Decision

[40] The application for costs is dismissed.

Dated at Rotorua, Aotearoa/New Zealand at 2.45pm this 8th day of August 2019.



C T Coxhead
JUSTICE