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

APPLICATIONS: 122/10, 339/11, 338/11, 472/11, 482/11, 76/12, 421/12, and 434/12

UNDER	Sections 421 and 423, Cook Islands Act 1915
IN THE MATTER OF	Pokoinu Sections 227 and 228 in the Tapere of Pokoinu, District of Avarua, Rarotonga
BETWEEN	TUPA, TUEREI, KOKAUA, TAMARANGATIRA, TUTINI, RIMA, MATA, TOREKA AND VAKATINI Third Applicants
AND	MAKEA ARERA TEANUANUA TEREKURA VAKATINITINI AND NGAMARAMA A APAI TURURANGI Fourth Applicants
AND	SUCCESSORS OF MAKEA TAKAU Fifth Applicants
AND	MAKEA NUI ARIKI, APAI MATAIAPO, ARAITI MATAIAPO, TARAARE MATAIAPO, VAKAPORA MATAIAPO, UIRANGI MATAIAPO, TAMAIVA MATAIAPO, PI MATAIAPO, AND KAMOE MATAIAPO Sixth Applicants
AND	DESCENDANTS OF MAKEA DAVIDA AND MAKEA TE VAERUA Seventh Applicants
AND	PHILLIP NICHOLAS Eighth Applicant
Hearing:	On the papers
Judgment:	4 December 2020 (NZ)

JUDGMENT OF JUSTICE P J SAVAGE AS TO COSTS

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Introduction

[1] This decision concerns applications for an award of costs, which arise following my decision regarding the investigation of title to Pokoinu Sections 227 and 228, Avarua, issued on 1 November 2017.[1]

[2] That decision found that both the third and fourth applicants were entitled to be owners in the lands in accordance with the 1905 investigation of the Pokoinu tapere and with orders issued in relation to Pokoinu Section 107. However, both the third and fourth applicants failed to convince the Court that each should be excluded from the title, and the fourth applicants' success was not based on their arguments advanced during the proceedings. The applications of the fifth to eighth applicants were dismissed.

[3] The third applicants now claim costs from the fourth to eighth applicants, while the fourth applicants also claim costs against the fifth to eighth applicants. The award of costs is opposed by those remaining parties.

[4] Submissions as to costs were all filed in late 2017 and early 2018, however, were not referred to me until 2020. I regret the resulting delay in the issue of this decision.

Third applicants' submissions

[5] Mrs Browne, for the third applicants, filed invoices totalling $34,950.00 plus VAT and disbursements. She sought an award of 80 per cent of the total costs, to be divided equally amongst the other five applicants.

[6] Mrs Browne referred to the decisions of *Morton v Douglas Homes Ltd* and *Maina Traders Ltd v Ranginui*, noting that the purpose of an award was to impose on the unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party.[2] What a reasonable contribution is will depend on all the material circumstances and involves a two-step approach. Firstly, whether the costs were reasonably incurred and, secondly, what level of costs represents a

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1 *Tupa – Pokoinu Sections 227 and 228* HC Cook Islands (Land Division), Apps 122/10, 339/11, 338/11, 472/11, 482/11, 76/12, 421/12, 434/12, 1 November 2017.

2 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 620; and *Maina Traders Ltd v Ranginui* HC Cook Islands (Land Division), App 225/11, 1 February 2013.

reasonable contribution. Those cases further noted that, while two-thirds or 66 per cent is a helpful starting point in ordinary cases, it is more useful to objectively assess the overall merits of the case and there are a number of influencing factors to be considered.

[7] Mrs Browne submitted that the relevant factors the Court should take into account in assessing costs in the present case are:

(a) The length of the hearings;

(b) The legal and factual complexity of the issues;

(c) The time required for effective preparation;

(d) The arguments advanced which lacked substance; and

(e) The degree of success achieved by the parties.

[8] Mrs Browne submitted that the first application with regard to this land was filed in 2010, with successive applications filed in 2011 and 2012. The substantive hearings took place in 2012, 2013 and 2015, with the total time in Court approximately 15 days; the longest hearing of competing applications that counsel was aware of. In the judgment, which runs to 89 pages, the Court recognised the complexity of the issues and the history of the matter. Mrs Browne noted that the invoices refer to the hours of preparation and she contended that those costs were reasonably incurred.

[9] Mrs Browne submitted that the claims of the fourth to the eighth applicants lacked substance. Each failed to establish their link to the source of the land and to the occupiers. Each also failed to establish occupation by their respective families. By contrast, Mrs Browne noted that the third applicants had been successful with regard to the large majority of their claims, with the exception of two of the findings of the Court.

[10] Mrs Browne submitted that, for these reasons, an award of costs to the third applicants should be higher than the normal 66 per cent and sought an award of 80 per cent. While she suggested that the costs be divided equally amongst the fourth to eighth applicants, she accepted that the fourth applicants were partly successful. For that reason, she advised she

would support an apportionment of the award, with 16 per cent to be borne by the fourth applicants and 21 per cent to be borne by each of the other four parties.

Fourth applicants' submissions

[11] The fourth applicants opposed the third applicants' claim of costs against them but also sought their own costs against the fifth to eighth applicants. Counsel, Mr Manarangi, filed invoices totalling $19,600 plus VAT and disbursements. He sought an award of their total costs, to be borne in equal proportions by the fifth to eighth applicants.

[12] Mr Manarangi submitted that, although not all members of the fourth applicants were found entitled to be owners of Pokoinu 227 and 228, the fourth applicants were nevertheless successful along with the third applicants. He says it was not unreasonable for the unsuccessful members to be included in the application as they were acknowledged blood descendants of a common ancestor, and blood descent is a factor to be taken into account when investigating title to customary land. In any case, this in no way affected the costs incurred by the third applicants.

[13] Mr Manarangi agreed with the submissions of Mrs Browne as to the relevant law. He submitted that the fourth applicants' costs are reasonable, particularly having regard to the length of the hearing and the importance of the issues involved. Mr Manarangi submitted that the third and fourth applicants were successful, and all other applicants were unsuccessful. He contended that there were no factors that would preclude costs following the event, and those unsuccessful parties should therefore meet the costs of the third and fourth applicants.

Submissions in opposition

Sixth applicants' submissions

[14] Mr Framhein, for the sixth applicants, opposed the applications of the third and fourth applicants for an award of costs. He submitted that costs should lie with each applicant.

[15] Mr Framhein submitted that a meeting was held between counsel and the Court on 5 October 2012, to discuss preliminary matters. All counsel were present, with the exception of Mr Manarangi. At that meeting, agreements were reached on several matters, including that costs should lie with each applicant. This was proposed by Mr Mitchell as former counsel for

the fourth applicants. Mr Framhein notes there was no formal minute of the meeting and nor was it recorded in minutes of the Court hearing on 8 October 2012. However, he asks that the Court apply this agreement in regard to costs.

[16] Mr Framhein referred to the Judicature Act 1980-1981 and the Code of Civil Procedure 1981. He submitted that the Court has the widest discretion to disallow costs and can disallow the whole or any part of any costs. He also referred to authorities where the Court has declined to award costs on the basis of public interest in the proceedings.

[17] Mr Framhein noted that from the commencement of these proceedings, both this Court and the Court of Appeal have not awarded costs. In supplementary submissions, Mr Framhein also noted that in all investigation of title applications in the Cook Islands, the costs have lain with the applicants. He submitted that, given the public interest in this matter, the Court should not award costs and instead costs should lie with each applicant.

Fifth applicants' submissions

[18] Mrs Carr, for the fifth applicants, opposed the award of any costs in this matter. She concurred with the submissions of the sixth applicants that costs should lie where they fall.

[19] Mrs Carr submitted that the application of Native custom is fundamental to Māori land tenure. She says there was nothing in ancient custom and usage that allowed for monetary costs to be awarded against losing parties where there was competition in an investigation of title for a parcel of customary land. She submitted that there is no record of any award of costs ever granted by Chief Judge Gudgeon in any application for investigation of title conducted after the Land Court was established in 1902.

[20] Mrs Carr contended that the Court should adopt the same approach as Chief Judge Gudgeon. To impose costs would prejudicially affect any party from contesting future applications for investigation of title to customary land, on the basis they would be subject to a costs award should they lose. She says costs should therefore lie where they fall.

Seventh and eighth applicants' submissions

[21] Both the seventh and eighth applicants opposed any award of costs. They both agreed with the submissions filed by the sixth applicants and contended that costs should lie where they fall.

[22] Mr Hunt, for the seventh applicants, also noted that this Court did not award costs earlier in these proceedings and asked the Court to apply the agreement as to costs agreed to by the applicants on 5 October 2012.

The Law

[23] Section 384 of the Cook Islands Act 1915 provides:

> **384 Costs**
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> 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.

[24] Further jurisdiction as to costs is also provided in the Code of Civil Procedure 1981 and the Judicature Act 1980-1981. The Code of Civil Procedure 1981 states:

> **300 Costs**
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> (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.
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> (2) The amount of costs awarded shall be ascertained and stated in the judgment or order.
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> (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.
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> (4) The Court may in its discretion disallow the whole or any part of any costs.
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> (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.

[25] The Judicature Act 1980-1981 provides:

> **92 Costs**
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> 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.

[26] The Court therefore has a wide discretion as to costs and, while a key principle is that costs usually follow the event, the Court also has discretion to refuse an award of costs.

[27] In considering a grant of costs, although it is often stated that a general starting point is an award of two-thirds of costs incurred, a successful party should receive a reasonable contribution towards costs deemed reasonable.[3] In *Tini v Cook Island Investment Corporation*, the Court favoured a cross-check approach, where costs are deemed to be an amount that falls within the range of 20 to 80 per cent of a reasonable fee, following consideration of a number of influencing factors.[4] Several of those relevant factors were set out by the Court in *Maina Traders Ltd v Ranginui.*[5]

[28] I also note that in the recent decision of *Puia – House site 163A, Avarua,* this Court found that public interest is a relevant factor to be considered in an award of costs.[6] The Court stated:

> [19] This issue of significant public interest has been long-standing. In my view, the decision has clarified the position of rights in respect to 'taura oria' titles. In doing so, it should bring significant clarity to Cook Islands land owners with interests in such titles.
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> [20] Having regard to the public importance of this decision I do not consider that costs should be set at 80% of Counsel's costs as sought by Mrs Browne.

Discussion

[29] The proceedings in the present case were indeed long-running. As Mrs Browne noted, the first application with regard to this land was filed in 2010, with successive applications

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3 *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [14].

4 *Tini v Cook Islands Investment Corporation* HC Cook Islands (Civil Division) Plt 22/11, 13 March 2012.

5 *Maina Traders Ltd v Ranginui – Areau Section 35, Arutanga, Aitutaki* HC Cook Islands (Land Division), App 225/11, 1 February 2011 citing *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143.

6 *Puia – House Site 163A, Avarua* HC Cook Islands (Land Division), Apps 558/12, 28/16, 18 October 2018. See also *Tavioni v Cook Islands Christian Church Corporation Ltd* HC Cook Islands (Land Division), App 5/11, 31 December 2016.

filed in 2011 and 2012. The substantive hearings took place in 2012, 2013 and 2015, encompassing approximately 15 days total hearing time in Court, with hearings before both this Court and the Court of Appeal.

[30] The proceedings were also complex. The application dealt with an investigation of title to customary land, reaching back to 1905. Determination of the application involved the examination of historical Court records and other documents, along with consideration of evidence of ancient Cook Island custom and usage. As there was no single source from which all the relevant material could be drawn, that information had to be distilled from the evidence and authorities presented by the parties. The depth of consideration of such material by the Court is evident in the decision, which runs to some 89 pages.

[31] While the third and fourth applicants were the successful parties, I consider that all parties made significant contribution to the proceedings and, ultimately, the decision, in terms of identifying the applicable ancient custom and usage regarding land ownership and related concepts. Ancestral links to customary land through papa'anga and custom are of significant importance in Cook Island society and I consider the proceedings were therefore of significant public interest. I also agree there is some force in the submission that a costs award in a case such as this could act as a deterrent for genuine parties attempting to assert their interests. For these reasons, my view is that costs should lie where they fall.

Decision

[32] The application for costs is dismissed.

Dated at Rotorua in New Zealand on the 4th day of December 2020.

P J Savage
JUSTICE