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

APPLICATION NO: 196/14

IN THE MATTER	of Section 3 of the Declaratory Judgments Act 1994 and Sections 446 and 448 of the Cook Islands Act 1915
AND	
IN THE MATTER	of the land known as **TEPUKA SECTION 106C, AVARUA**
BETWEEN	**ELLENA TAVIONI** on behalf of the successors of Makea Takau **Applicant**
AND	**THE COOK ISLANDS CHRISTIAN CHURCH INCORPORATED** of Avarua **First Respondent**
AND	**CAROLINE TUPOU BROWNE** **Second Respondent**

APPLICATION NO: 441/14

IN THE MATTER	of Section 3 of the Declaratory Judgments Act 1994 and Sections 416 and 421 of the Cook Islands Act 1915
AND	
IN THE MATTER	of the land known as **TEPUKA SECTION 106C, AVARUA**
BETWEEN	**CAROLINE TUPOU BROWNE** **Applicant**
AND	**THE COOK ISLANDS CHRISTIAN CHURCH INCORPORATED** of Avarua **First Respondent**
AND	**MAKEA ELLENA TAVIONI** on behalf of the descendants of Makea Takau **Second Respondent**

Hearing date: 25 and 26 July 2016
(Heard at Rarotonga)

Appearances: Mrs T Carr, for the applicant (196/14)
Mr R Holmes, for the applicant (441/15)
Mrs T Browne, for the first respondent (196/14 and 441/15)

Decision: 26 September 2018

DECISION OF JUSTICE W W ISAAC AS TO COSTS

Introduction

[1] This is an application for costs by the Cook Islands Christian Church against Ellena Tavioni in respect to application 196/14 and against Caroline Browne in respect to application 441/15.

[2] The costs application arises from my preliminary decision of 27 July 2016 and confirmed written decision of 24 November 2016. In those decisions, I found that the Court did not have jurisdiction in respect to the following:

a) To make declarations under the Declaratory Judgments Act 1994 regarding the validity of historic court orders;

b) To validate or invalidate orders which had been incorporated into legislation; or

c) To act as an appellate court for the purposes of s 399(3) of the Cook Islands Act 1915.

[3] The background of the two applications is set out in my written decision of 24 November 2016. There is no utility in repeating it here apart from setting out the positions of the parties.

[4] Ms Tavioni sought, firstly, a declaration under the Declaratory Judgments Act that a 1905 order stating that Makea Ariki held a life interest in the land was still valid; and secondly, the granting of a succession order in respect to the land in favour of the descendants of Makea Takau.

[5] Mrs Caroline Browne sought a declaration under the Declaratory Judgments Act that orders from 1904 were invalid for want of jurisdiction; and an order under s 421 of the Cook Islands Act declaring that the land is customary land.

[6] The Cook Islands Christian Church opposed the above applications and sought dismissal for lack of jurisdiction under Rule 333(3) of the Code of Civil Procedure.

[7] As set out earlier, I found that I did not have jurisdiction under either the Cook Islands Act or the Declaratory Judgments Act to make the declarations sought, nor did I have jurisdiction to challenge the Cook Islands Christian Church Incorporation Act 1968-1969 by amending or cancelling the orders complained of. All applications were therefore dismissed.

Submissions for Costs by Cook Islands Christian Church

[8] Mrs Tina Browne, counsel for the Cook Islands Christian Church (CICC), submitted that, in terms of s 92 of the Judicature Act 1980-1981, the Court has the widest discretion to make such orders as to costs as it thinks fit.

[9] The case of *Morton v Douglas Homes*[1] was referred to, which required the unsuccessful party to make a reasonable contribution to costs reasonably and properly incurred by the successful party.

[10] Also referred to was *Maina Traders Ltd v Ngaoa Ranginui*[2] which relied on *Tini v Cook Islands Investment Corporation*[3] which favoured a cross-check approach where costs are deemed to be an amount that falls within a range of 20-80% of a reasonable fee following consideration of a number of influencing factors.

[11] The influencing factors in this case are submitted to be the following:

a) Counsel for CICC advised counsel for Caroline Browne that she would be requesting dismissal and suggested that they deal initially with the preliminary application to dismiss before preparing for the substantive matters;

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[1] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548.
[2] *Maina Traders v Ngaoa Ranginui* (2013) CKHC, App 225/2011, 9 February 2013.
[3] *Tini v Cook Islands Investment Corporation* (2012) CKHC, App 22/2011, 14 March 2012.

b) Counsel for Caroline Browne opposed this logic of dealing with the preliminary dismissal application first and suggested instead that counsel for CICC prepare for all matters;

c) Counsel for CICC did prepare for all matters and now seeks 80-100% of total costs.

[12] Counsel therefore seeks indemnity costs or at least 80% of total costs of $39,126.13 plus disbursements of $500.87 on the basis that the CICC was successful in their dismissal application, and all costs should be included as it would not have been necessary for Mrs Browne to undertake the further work if counsel for Caroline Browne agreed with her initial proposal.

Submissions for Ellena Tavioni

[13] Mrs Carr submitted on behalf of Ellena Tavioni that her claim raised an issue of public interest, being the integrity and security of original Court records over 100 years old. The nature of the public interest in this claim should be given weight in any awarding of costs.

[14] Counsel further submits that the costs claimed by counsel for CICC cannot be justified as they are derived from work completed by three practitioners including double-charging for some work and there is no task-by-task breakdown of costs incurred. Therefore any costs award should be made for 20%, being the smaller end of the scale set out by Justice Grice.

[15] There is no way of calculating how much of Mrs Browne's time was spent in defence of Mrs Tavioni's narrow claims. Counsel submits that counsel for CICC's costs should be reduced by at least half and Ms Tavioni's share be no more than 20% of counsel for CICC's total costs.

Submissions for Caroline Browne

[16] Mr Holmes, counsel for Mrs Caroline Browne, submits that it is inappropriate to award costs against Mrs Browne until the merits of the case have been determined by the Court of Appeal. Alternatively, counsel submits that it would be inappropriate to make a costs order before considering the question of whether a case should be stated to the Court of Appeal under s 58(4) of the Judicature Act 1980-1981.

[17] If the above is not accepted, counsel submits that the following matters should be considered in making a costs award:

a) The respondent's delay in making the application under Rule 333(3);

b) Mrs Tina Browne's failure to make a prompt application after the hearing on 24 September 2015 so that the application could be dealt with on the papers with limited costs;

c) The substantial amounts of money received by the Respondents for the sale of leases on the land to which they have no legal entitlement;

d) The invoice dated 29 July 2016 provided by Mrs Tina Browne includes costs relating to application 198/14 which predates Caroline Browne's application. Caroline Browne cannot be held responsible for these costs, and Mrs Tina Browne provided no breakdown of costs which relate to Caroline Browne's application; and

e) The costs in Mr Frame's invoice of 3 June 2016 include advice sought by Mrs Tina Browne prior to her memorandum dated 23 June 2016 and advice sought on matters not in issue, specifically that Mrs Tina Browne sought advice from Mr Frame on the application of s 390A of the Cook Islands Act when application 5/11 had been withdrawn.

Law

[18] The Court has a wide discretion in relation to costs orders in terms of s 384 of the Cook Islands Act 1915:

> **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.

[19] I adopt the following influencing factors set out in *Maina Traders*:[4]

a) The length of the hearing (the longer the hearing, the more it is worth, but waste of time should be penalised);

[4] Above n 2, at [16]-[18].

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);
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.

Discussion

[20] This case dealt with the question of whether the Court had jurisdiction to deal with the applications of Ms Ellena Tavioni and Mrs Caroline Browne. I concluded that the Court did not have jurisdiction and invited counsel to file submissions as to costs.

[21] Counsel for CICC has claimed 80% of her costs on the basis that she had to prepare in particular for the broad issue set out in the application of Mrs Caroline Browne. It also appears as if the assistance sought by counsel for CICC by external barristers may have been largely in respect to the application of Caroline Browne.

[22] Counsel for Ms Tavioni brings this issue to the Court's attention and refers to the focussed nature of her application in comparison to that of Mrs Caroline Browne.

[23] Furthermore, counsel for Ms Tavioni also focussed her submissions on the issue in question, namely the proportion of costs to be awarded to the CICC. This is in stark contrast to the submission of counsel for Mrs Caroline Browne who, with the exception of paragraph 13 of his submissions (summarised at [17] above), continues to pursue the claim of his client.

[24] The short point is that the application before me was whether the Court had jurisdiction to determine the applications of Ms Tavioni and Mrs Browne. I found that I did not. Therefore, the issue is simply what reasonable costs should be paid to the CICC.

[25] As stated, Mrs Tavioni's application was focussed and confined. Mrs Caroline Browne's was wide reaching and it is important to note that, in preparation, counsel for Mrs Caroline Browne suggested that counsel for CICC should prepare for all matters, notwithstanding that counsel meant to seek dismissal on the limited issue of jurisdiction.

[26] It also appears as if the work completed by outside barristers may have been done for the Caroline Browne applications but this is difficult to substantiate. What is not difficult to substantiate is that counsel for Caroline Browne has not focussed on the issue which lead to unnecessary work by counsel for CICC.

Decision

[27] Having considered all the above matters I am satisfied that costs should be set at 55 per cent of costs incurred by Mrs Browne on behalf of the Cook Islands Christian Church ($39,126.13 plus disbursements of $500.87), being $21,794.85. This award is to be split as follows:

a) Caroline Browne to pay 70 per cent or $15,256.40; and

b) Ellena Tavioni to pay 30 per cent or $6,538.45.

Dated at Wellington, New Zealand this 26th day of September 2018.

W W Isaac
JUSTICE