

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

**APPLICATION NO. 501/2019**

IN THE MATTER of sections 446, 448 and 450 of the Cook  
Islands Act 1915

AND the land known as **PAPA'AROA  
SECTION 36A, TAKITUMU** and an  
application to determine costs

BETWEEN **WILLIAM TEPARE JUNIOR  
CUTHERS**  
Applicant

AND **TEOKOTAI JOSEPH MAREARAI  
AND MIIMETUA JOSEPH  
MAREARAI**  
Respondent

Hearing date: 2 October 2019

Appearances: T Moore for Respondent  
L Rokoika for the Applicant

Decision: 25 November 2019

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**DECISION OF JUSTICE P J SAVAGE AS TO COSTS**

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**Introduction**

[1] On 2 October 2019, I dismissed the applicant's case and reserved the question of costs.

[2] By email dated 3 October 2019, agent for the respondent, Mr Moore, invited the applicant's counsel to settle costs at \$1,000 on the grounds the applicant filed a wholly misconceived application and cited a decision they were told was of no use. Counsel for the applicant then sought an itemised bill, which was sent to them on the same day in the form of a pro-forma invoice with the caveat that it was prepared in haste for settlement purposes.

[3] The applicant refused the respondents offer and parties now seek a decision from the Court on costs.

## **Submissions**

### *Respondents*

[4] The agent's adjusted bill of costs totals \$1,831.25.

[5] Mr Moore submitted the respondents costs were reasonably incurred in the circumstances, as the respondents had no choice but to defend the action.

[6] Mr Moore submitted the Court should take into account the overall conduct of the applicant and the merit of his case. Mr Moore submitted the applicant's conduct put the respondents to additional cost and expense and they are entitled to recover on two grounds. Firstly, the applicant failed to recognise a clear point of law, by continuing to cite a case the Court found was not useful authority in the circumstances. Secondly, the applicant failed to reasonably settle the question of costs.

[7] Mr Moore cited *George v Teau* as authority for making an award of increased or indemnity costs and submitted the applicant's conduct merits such costs.<sup>1</sup> In regard to quantum, the respondent asked the Court to consider an award at 80% to 100% of actual costs.

### *Applicant*

[8] Counsel for the applicant, Ms Rokoika, submitted the respondent's analogy of being entitled full indemnity costs based on *George v Teau* is misconceived. This present case was a preliminary direction of the Court as to the proper forum while *George v Teau* was a defended hearing of allegations of fraud that went to the Court of Appeal.

[9] Ms Rokoika considered none of the five circumstances set out in *George v Teau* were relevant on the facts of the present case. There was no allegation of fraud, only five minutes of the Court's time was used, the applicant was entitled by law to issue succession proceedings, the Court gave directions as to the proper forum and the application was neither hopeless nor groundless.

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<sup>1</sup> *George v Teau* [2013] CKCA 1; CA 2 of 2012 (20 February 2013).

[10] Ms Rokoika submitted the Land Agent's application for costs ought to be dismissed as the costs claimed are exorbitant for an application called and dealt with at first call, taking less than five minutes.

[11] If the Court determines the Land Agent is entitled to costs, the applicant submitted a reasonable apportionment should be \$100 according to Schedule 4(B)7 of the High Court Fees, Costs and Allowances Regulations 2016. Counsel submitted the respondent's submissions were routine and standard as to procedure and no substantive opposition disputing the application by way of notice or affidavit was received.

### *Submissions in reply*

[12] Mr Moore filed submissions in reply on 24 October 2019.

[13] Mr Moore cited a recent judgment where very little of the Court's time was used, but costs were awarded at 75%.

[14] The applicant's offer of \$100, the respondent submitted, fails to recognise the actual costs of the respondents having to defend an action that had no hope of success. Therefore, the respondents seek indemnity costs in the amount of \$1,831.25.

### **Law**

[15] The key principle is that costs usually follow the event, with a general starting point being a contribution towards 66% of costs incurred by the successful party.<sup>2</sup>

[16] The Court can also objectively assess the overall merits of the case, making an award that is reasonable, and also reflects costs reasonably incurred.<sup>3</sup>

[17] In *Maina Traders v Ngaoa Ranginui* the Court set out factors which may influence an award of costs.<sup>4</sup>

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<sup>2</sup> *Tuake v Ngate – Akoa 65, Arorangi* (2014) at [29] citing *Glaister v Amalgamated Diaries Ltd* CA99/03, 1 March 2004 at [9] and [14].

<sup>3</sup> At [30].

<sup>4</sup> *Maina Traders v Ngaoa Ranginui* (2013) CKHC, App 225/2011, 9 February 2013 as cited in *Tavioni v Cook Islands Christian Church Inc* [2018] CKLC 2; Application 196.2014 (26 September 2018) at [19].

- 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);
- 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**

[18] Mr Moore's bill of costs is in dispute. While it is substantial, the respondents were entitled to have the matter fully researched and full preparation was not unreasonable. I am not prepared to hold that it is excessive.

[19] I do not accept that an award of 80-100% is reasonable in the circumstances of this case.

[20] While the matter only occupied a short time in Court, that would not reflect the amount of work that the respondent agent was put to.

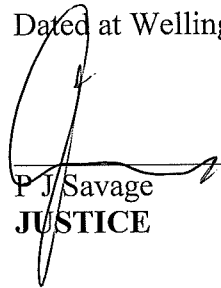
[21] On balance, I believe a fair and proper result is an award in the region of 60% and I now make an order for costs in the sum of \$1,100.00.

**Decision**

[22] I find that the applicant should contribute to the respondent's costs, amounting to \$1,100.00.

[23] A copy of this decision is to be distributed to all parties.

Dated at Wellington this 25th day of November 2019.



P J Savage  
**JUSTICE**