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

APPLICATION NO. 390A 7/16

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the lands known as **VAIMAANGA SECTIONS 3 & 3A, TAKITUMU** and **AKAPUAO 42E, TAKITUMU**
AND	
IN THE MATTER	of an application by **GEORGE HOSKING,** Raina Mataiapo
	Applicant
AND	**MIIMETUA JOSEPH MAREARAI and TEOKOTAI JOSEPH MAREARAI**
	Respondents

Date of referral of Application to Land Division:	22 July 2016
Date of Hearing:	28 July 2016
Report to the Chief Justice:	12 April 2018
Appearances:	Mr G Hosking / Mr R Holmes for Applicant (328/16) Mr T Moore / Mrs T Carr for Applicants (191/14, 194/14 & 558/14) and for Respondents (328/16)
Minute (No's 1-3):	5 July 2019; 25 July 2019; 18 September 2020
Judgment (No.1):	20 June 2018
Judgment (No.2)	17 December 2019
Judgment (No.3)	8 July 2020
Date of this Judgment:	11 November 2020

JUDGMENT (NO.4) OF HUGH WILLIAMS, CJ
[re. Costs]

[0038-39.dss]

Introduction

[1] The applications filed on 16 May and 15 June 2016 under s 390A of the Cook Islands Act 1915 (NZ) by the abovenamed applicant having been dismissed on 20 June 2018[1] the only matter outstanding is costs. This judgment deals with that issue.

[2] Because this application has followed a somewhat tortuous course and that course has repercussions for the issue of costs, though lengthy, it is appropriate to begin consideration of the costs issue by including a significant proportion of judgment (No.3) which reads:

> [1] In the judgment of 20 June 2018 in this longstanding application under s 390A of the Cook Islands Act 1915 (NZ) the matters in issue and the result were succinctly described in the following way:
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> > [1] By applications dated 16 May 2016 and 15 June 2016 the abovenamed applicant George Hosking as Raina Mataiapo sought a rehearing by way of rescinding Succession Orders to two land blocks known as Vaimaanga Section 3 and Akapuao Section 42E, both in Takitumu. More particularly, these were:
> >
> > a) a Succession Order made on 10 February 1964 vesting Te Rima Raina's 1/8th interest in Vaimaanga Section 3 in Metua a Maitoe as from 27 December 1983 (MB 26/49);
> >
> > b) a Succession Order also made on 10 February 1964 vesting Maitoe Raina's sole interest in Akapuao Section 42 in Metua a Maitoe as from 27 December 1983 (MB 26/49);
> >
> > c) a Succession Order made on 14 November 1994 vesting Metua a Maitoe's interest in both Vaimaanga Section 3 and Akapuao 42 in Miimetua Joseph Marearai and Teokotai Joseph Marearai as from 20 May 1984 (MB 10/46).
> >
> > [2] By Minute dated 22 July 2016 Weston CJ, after referring to a number of unsatisfactory aspects of the application, referred the file to the Land Division for preparation of the report.
> >
> > [3] A hearing of this and related applications took place on 28 July 2016 and by report dated 12 April 2018 Isaac J, after carefully reviewing the evidence of both parties, observed[2]:
> >
> > > "[29] Much of the evidence presented before me, and in fact much of the applicant's case, is based on a challenge to the evidence presented to the Court during the 1964 hearing. This includes Tutae Ateina's admission that she gave false evidence to the Court during that hearing. The evidence that was presented during that hearing has

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1 Judgment (No.1) of that date, at [5], confirmed in Judgment (No.3) of 8 July 2020, at [27].

2 At [29] – [32].

stood for multiple generations and being relied on by the Court for over fifty years. It should not be amended lightly.

[30] As previously noted, s 390A places a high burden of proof on the applicant and there are presumptions that the orders were made lawfully and that the evidence given at the time that the orders were made was correct.

[31] In my view there was a lack of verifiable evidence presented before me in this case to dispute the longstanding history of the Raina family and the evidence that was presented was insufficient to rebut the two presumptions discussed above. I consider, therefore, that the burden of proof required under s 390A to amend the Succession Orders has not been met.

[32] I recommend that the Chief Justice dismiss the application."

[4] It is clear from Isaac J's report that the success or otherwise of these applications depended on credibility findings concerning the evidence and that the Judge, after careful consideration of the competing submissions and testimony, reached the conclusion set out above.

[5] There is no basis on which the present Chief Justice could justifiably overturn the recommendations of Isaac J reached on the Judge's assessment of the credibility of the witnesses. The applications are accordingly dismissed.

[6] It is for the parties to decide the effect that decision might have on applications 328/16, 191/14, 194/14 and 558/14 and, if costs are in issue, memoranda may be filed.

[2] Minute (No.2) in this matter delivered on 25 July 2019 then read:

[1] Paragraphs 1 to 4 of the minute of 5 July 2019 in this matter read:

[1] On 29 April 2019[1] the applicant filed an application to recall the judgment of the Chief Justice in this matter delivered on 20 June 2018 – and, by extension, it would appear, the report to the Chief Justice of Isaac J dated 12 April 2018 on which the judgment was based – on a number of grounds including failure to refer Isaac J's report to counsel before delivery of the judgment and claimed factual or legal errors relevant to the 20 June 2018 judgment arising out of the decisions of the Privy Council in *Browne v Munokoa* [2018] UKPC 18 and *The Descendants of Utanga and Arorangi Tumu v The Descendants of Iopu Tumu* [2012] UKPC 34.

[2] The application was supported by full submissions from Mr Holmes, counsel for the applicant.

[3] On 24 June 2019, the respondents, through Mr Moore their agent, filed a detailed Notice of Objection to the recall application. In effect, it would appear, the notice largely doubled as the respondents' submissions.

[4] The Notice of Objection listed a number of other applications said to have been issued by the applicant involving these and other lands, including a partition application numbered 323/2017 which was in Isaac, J's panui for May 2019 but had to be adjourned and is now

listed in Coxhead, J's panui for the sessions which began on 8 July 2019.

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[1] First referred to Chief Justice 19 June 2019 (NZT).

[2] Since the date of the minute Mr Moore has filed a further memorandum dated 21 July 2019 dealing with issues relating to the recall application and Mr Holmes has filed further submissions dated 7 July 2019.

[3] A review of the judgment and the file in preparation for deciding how best to process the recall application showed, as paragraph 1 of the judgment of 20 June 2018 said, that at issue in this matter are applications dated 16 May and 15 June 2016 relating to succession orders made on 10 February 1964 and 14 November 1994 and, since the order was "dated more than five years previously to the receipt of the application" s 390A(8) required that "the [Chief Justice] shall first obtain the consent of [the Queen's Representative] before making any order".

[4] Although dismissal of an application under s 390A may arguably not be an order correcting a "mistake, error, omission, or erroneous decision in point of law" under s 390A(1), because property rights are involved in s 390A applications, it has been considered prudent to obtain the Queen's Representative's consent in all cases which qualify under s 390A(8) even where dismissal of the application is contemplated.

[5] The necessity or desirability of obtaining the Queen's Representative's consent to the orders in this case was realised shortly after the judgment of 20 June 2018 was issued and the necessary papers requesting consent were forwarded to the Official Secretary for submission to the Queen's Representative. However, despite the passage of time, no consent has been as yet received.

[6] Since s 390A(8) makes the obtaining of the Queen's Representative's consent in cases which qualify under the subsection a necessity before the Chief Justice may make any order under s 390A, it would appear possible that the orders contained in the judgment of 20 June 2018 may be a nullity.

[7] Mr Holmes and Mr Moore are to comment on that possibility by memoranda filed within 10 working days of delivery of this minute.

[8] While, if the judgment of 20 June 2018 is held a nullity, it will clearly supersede the application to recall, the submissions filed for and against recall deal with the procedure which should be followed by Chief Justices under s 390A after receiving a report from the Land Division following an inquiry on a referral.

[9] That may remain a live issue in this case and Messrs Holmes and Moore are to make submissions on that point in the memoranda directed in paragraph [7].

[3] Since 25 July 2019 the events which occurred in relation to this (and other) applications under s 390A were summarised in paras [1]-[3] of judgment (No.2) delivered on 17 December 2019, which said:

> **Application**
>
> [1] As noted in Minute (No.1) issued on 5 July 2019[3] the application, by extension, would appear to include an application to recall the report to the Chief Justice of Isaac J dated 12 April 2018 though Mr Holmes, in his reply submissions[4] disputed that characterisation of the application on the ground that Isaac J's report is not a judgment of the Court. That issue will require consideration later.
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> [2] The recall application was opposed by Mr Moore, agent for the respondents, on the basis that the judgment is a perfected order having been signed by the Chief Justice and delivered to the parties; that it has never been the practice pursuant to s 390A for Chief Justices to refer the report of a Land Division Judge to counsel for the parties; that the recall application is a device to circumvent s 390A(2); that Mr Hosking is "quite clearly unhappy with the s 390A judgment and wants a different decision and yet another bite at the cherry"; and that, by reference to other applications brought by Mr Hosking, the recall application is an abuse of process.
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> [3] The interval between the filing of the recall application on 29 April 2019 and the date of delivery of this judgment was partly utilised in the filing and service of submissions by Messrs Holmes and Moore, mainly Mr Moore's memorandum of 8 August 2019. Following that, consideration of the judgment was put to one side until after a discussion group meeting took place in Rarotonga on 15 November 2019 concerning the procedure which should apply to s 390A applications. On that date, a discussion was held between the Chief Justice and practitioners and members of the public frequently engaged in such applications. It was thought matters might emerge which would impact on recall applications such as the present. It did, but only to a limited degree.

[4] That led to a discussion on s 390A(8) in the following terms:

> [6] Section 390A(8) reads:
>
> > (8) This section shall extend and apply (with the exception hereinafter mentioned) to orders, whether made before or after the commencement of this section, save that in all cases where an order is dated more than 5 years previously to the receipt of the application under this section the Chief Judge shall first obtain the consent of the [Queen's Representative] before making any order hereunder. The Chief Judge shall nevertheless have full power without that consent to dismiss any such application or to refer it to the Land Court for inquiry and report.
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> [7] Several points arise out of the wording of subs (8).

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3 At [1].

4 7 July 2019, para 21.

[8] The first is the effect, on orders which require the Queen's Representative's consent under the first sentence of the subsection, of lack of consent, either because consent has not been sought or because consent has been sought but has not been given, including when a judgment has been delivered.

[9] As to the former, it is understood that the Queen's Representative's consent may have been sought for orders made in qualifying applications only in the last few years. If so, the validity of Chief Justices' orders in those applications – other than dismissals – may be open to doubt, but as nothing is known of individual cases and the situation does not apply to the present application, that matter can be put to one side.

[10] Secondly, although the subsection is silent as to whether the Queen's Representative's consent may be general or must be specific, the better view is that the consent must be sought as a prerequisite to the making of the orders for which consent is applied for, despite the second sentence of the subsection.

[11] The third point is that the two sentences of the subsection in combination make clear that, first, Chief Justices may dismiss applications without the Queen's Representative's consent and without referring the application to the Land Division of the High Court for enquiry and report and, secondly, that the power to dismiss applications without consent also applies to dismissals by Chief Justices following receipt of Land Divisions' reports since s 390A(8) applies to the Chief Justice "making any order hereunder", that is to say orders made both before and after reference of applications to the Land Division for inquiry and report. The subsection therefore applies to two, quite distinct, aspects of the process of determining applications under s 390A.

[12] Following on from that, although applications under s 390A can be validly dismissed by Chief Justices without the Queen's Representative's consent, it is to be noted that, because persons' property rights are affected by orders made under s 390A, even when the Chief Justice intends to dismiss the application the Queen's Representative's consent has been sought to all disposals of s 390A applications as a matter of prudence.

[13] As far as this application is concerned, the upshot of that discussion is to hold that the orders made in the judgment of 20 June 2018, qualifying under s 390A(8) but never having received the consent of the Queen's Representative, are nullities and the applications listed in the judgment remain undetermined.

[14] That finding disposes of Mr Hosking's recall application since, now, in law, the applications listed in paragraph [1] of the judgment of 20 June 2018 remain undetermined, but subject to the recommendation in Isaac J's report of 12 April 2018 that they be dismissed and there is now no judgment to be recalled.[5]

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5 The application for the Queen's Representative's consent was administratively recalled on 25 July 2019 but is subject to the Chief Justice's indication in the now inchoate judgment as to the Chief Justice's intentions.

> [15] In formal terms, that means Mr Hosking's recall application must be dismissed as having no foundation but the submissions of Messrs Holmes and Moore on what should occur following receipt of Isaac J's report remain relevant.

[5] The judgment then dealt with the jurisdiction to recall judgments[6] and then passed to a discussion of s 390A(3) in the following terms:

> [19] Section 390A(3) reads:
>
> > (3) The Chief Judge may refer any such application to the Land Court for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.
>
> [20] It is by no means clear from the wording of the section how s 390A applications should proceed and be determined following a Land Division enquiry and the making of the report to the Chief Justice and, in particular, whether the parties are entitled to participate further and, if so, to what extent.
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> [21] Practice to date concerning distribution of the Land Division reports has varied: some Land Division Judges direct they be sent to the parties, some do not, some do on occasions but not invariably. The practice of Chief Justices has similarly varied according to the circumstances of individual cases.
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> [22] What is clear is that, upon receiving Land Division reports on s 390A applications, Chief Justices may, "act upon that report or otherwise deal with the application" as appears appropriate in the individual case and they may do so "without holding formal sittings or hearing the parties in open Court".
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> [23] That, on its face, gives Chief Justices the power to finalise s 390A applications following receipt of a Land Division report without involving the parties[7] but, as the discussion group paper said:
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> > [26] It is considered that, being reports, (usually following evidence and submissions), from the Land Division to the Chief Justice to assist in the exercise of a jurisdiction exclusively vested in the Chief Justice, such reports should be sent initially to the Chief Justice alone, but that the default position thereafter should be that they be circulated to the parties by the Chief Justice for comment within a specified period. Such referrals may be accompanied by a tentative judgment indicating the possible result of the application. There will be exceptions to that position, such as when the Land Division's report is based on credibility issues reached after seeing and hearing witnesses, but circulation to the parties by the Chief Justice should be the norm.
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> > [27] It should be emphasised that the prime purpose of seeking comment from the parties on the report is not to enable a re-run of arguments which failed to find favour in the Land

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6 At paras 16-18.

7 But subject, in qualifying cases, to the consent of the Queen's Representative.

> Division hearing but to point to errors which might vitiate the Land Division recommendations, and to provide input concerning orders which need to be made to implement them.
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> [28] Following consideration of the further submissions, the Chief Justice will then decide the application, with the options including delivery of a judgment (with or without the seeking the Queen's Representative's consent depending on the age of the order being amended), the making of the consequential orders required (see s 390A(7)), or, possibly, referral of the matter back to the Land Division.
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> [29] That mode of proceeding would seem to best reconcile the dictates of natural justice and the terms of s 390A(3). In addition, in that it should reduce applications for recall following circulation of the Chief Justice's final judgment, it should abbreviate proceedings.

[24] It is also well settled that s 390A applications are not to be regarded as applications for rehearing, the equivalent of an appeal or justified because the losing party disagrees with the recommendation in the Land Division report but are dealt with in accordance with the following principles:

> [8] …
>
> The burden of proof rests on the applicant to prove that there was a mistake, error or omission in relation to the order in question which satisfies the grounds in s 390A. It is well-established from previous cases that this burden is not easily satisfied. Discharging that burden must also satisfy the following criteria.
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> The approach to be taken to applications pursuant to s 390A is:
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> (i) The Chief Justice needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition) at any s 390A hearing;
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> (ii) The principle of Omnia Praesumuntur Rite Esse Acta (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies. Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct;
>
> (iii) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;
>
> (iv) The burden of proof is on the applicant to rebut the two presumptions above.
>
> It is also worth noting that s 390A stands in direct contrast to the well-established principle of finality and certainty of decisions. As such, the power to amend orders should only be exercised in exceptional circumstances such as:

> These principles in my view make it clear that the general intent of the legislation is that orders of the Court should be binding and conclusive on all parties and that the applications to the Chief Justice are made only in exceptional circumstances where the applicant can show a clear mistake or error in the original order which the Chief Judge deems necessary or expedient to remedy.
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> …

[25] To those principles needs to be added consideration as to what Parliament intended to achieve by enacting the referral and report provisions in s 390A(3).

[26] The answer appears to be twofold.

[27] The first purpose must have been to free Chief Justices[8] from the necessity to hold the frequently lengthy and complex hearings the numerous s 390A applications require, delegate that power to Land Division judges steeped in the intricacies of Cook Islands and Maori land law, and thus gain the double advantages of one person not having to hear every s 390A application and obtain access to the expertise of the Land Division Judges.

[28] The second purpose, and consequent on the first, is that, although the ultimate decision on any s 390A application is for the Chief Justice alone,[9] appropriate weight should be accorded the reports of such experienced Judges – particularly where they have reached views on credibility after hearing witnesses – so their conclusions and recommendations are likely to be adopted by Chief Justices unless parties can point to errors in their reports which vitiate their findings.

[29] In this case, Mr Holmes submitted that in every s 390A case the Chief Justice should refer the report to counsel for the parties for submission, consider all the documents filed at every earlier stage of the application and, where appropriate, hold a further hearing.

[30] For the reasons outlined, it is considered that, while possibly appropriate in certain cases, the procedure for which Mr Holmes argued goes beyond the requirements of s 390A, particularly in subs (3), is not to be adopted as the general rule and need not be followed at this point of Mr Hosking's application.

[6] Judgment (No.2) concluded in the following way:

[31] That said, for the reasons set out in his detailed submissions, Mr Holmes submitted that Isaac J overlooked a number of passages of evidence and dealt with the issue of adoption relevant to the case in a way which might have been affected by the judgment of the Privy Council in *Browne v.*

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8 All, to date, non-resident in the Cook Islands.

9 Subject to any input in qualifying applications from the Queen's Representative. None is known to have eventuated.

> *Munokoa*[10] which was delivered on 16 July 2018, some months after Isaac J's report.
>
> [32] In those circumstances, it is appropriate to refer file 7/2019 back to Isaac J for him to consider, on the documents now filed and the Privy Council judgment, whether there is now material which disturbs the findings in his report and, if so, in what manner.
>
> [33] It is to be emphasised that the referral back to Isaac J is solely because of the matters discussed in the last paragraph of this judgment and on the papers now comprising part of the file and that there is no suggestion the Judge should feel it necessary to convene a further hearing of the matter unless he chooses so to do.
>
> [34] On receipt of Isaac J's further report the application will be determined in what then seems to be the appropriate fashion.

[7] File 7/2019 was accordingly referred to Isaac J. In his further report dated 3 March 2020 the Judge recounted paras [32]-[34] of judgment (No.2) and said:

> [2] I have reviewed the decision of the Chief Justice of 17 December 2019 and my report of 12 April 2018. The presumptions I relied on in my report and recommendation included that everything is presumed to have been done lawfully in the order complained of and that evidence given at the time of the order by persons more closely associated in time and knowledge is deemed correct.
>
> [3] The burden of proof is on the applicant to rebut those 2 presumptions. In my view the lack of verifiable evidence presented was insufficient to rebut those 2 presumptions.
>
> [4] After reviewing the material and what has taken place since my report, I see no reason to change the recommendation made in my report of 12 April 2018.
>
> [5] This matter is now referred to the Chief Justice for conclusion.

[8] In the meantime Mr Moore, agent for the respondents, filed a memorandum dated 20 February 2020 urging final completion of application 7/16 to clear the way for Isaac J to deal with an application to partition Akapuao 42E[11] which has been outstanding for nearly six years, partly on the ground of the age of that application and partly to meet the expectations of some 200 landowners interested in the outcome of the partition.

Discussion and decision

[9] The upshot of all of that is that the applications to the Chief Justice under s 390A of the Cook Islands Act 1915 in this matter dated 18 May 2016 and 15 June

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10 *Browne v. Munokoa* [2018] UKPC 18.

11 Application 191/2014.

> 2016 are undetermined, the judgment of 20 June 2018 having been declared a nullity for lack of consent of the Queen's Representative[12] and the application for recall of the judgment having been dismissed.
>
> [10] More specifically the judgment of 20 June 2018 indicated the Chief Justice's intention to accept the recommendation of Isaac J in his 12 April 2018 report, reinforced by the Judge's comments in his report of 3 March 2020. The former followed a hearing on 28 July 2016 and the Judge's conclusions which underpinned his recommendations were that the verifiable evidence was insufficient to rebut the presumptions and onus of proof referred to in the 12 April 2018 report.
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> [11] All the material filed since that date was reviewed again by Isaac J and found to make no impact on his original recommendations. In effect, the further report found no weight in Mr Holmes' submissions summarised at [31] in judgment (No.2)[13]. In view of the terms of Isaac, J's second report there was no call to refer it to counsel before completing this judgment.

[3] That consideration led to a further examination of the terms of s 390A – particularly s 390A(8) – and the conclusion:

> [27] In Mr Hosking's case, the Chief Justice adopts all of Isaac J's recommendations[14]. The decision that the judgment of 20 June 2018 was a nullity is rescinded and the application under s 390A of the Cook Islands Act 1915 (NZ) numbered 7/2016 is confirmed as dismissed accordingly.
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> [28] If costs are sought, memoranda may be filed with that from the respondents being filed and served within 20 workings days of delivery of this judgment; that from the applicant with a further 10 working days and any submissions in reply from the respondents to be filed and served within a further 10 working days.

Costs submissions

[4] Mr Moore's submissions on costs were presented in two parts, the first dated 20 August 2018 following issue of judgment (No.1) covering the period to that date and the second dated 6 August 2020 covering Mr Moore's subsequent costs.

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12 A view rescinded below.
13 Recounted at [6] above.
14 In the two reports attached and forming part of this judgment.

[5] In the former Mr Moore detailed the efforts he had made to engage Mr Holmes, counsel for the applicant, in discussions as to costs culminating in the suggestion that Mr Hosking "has learned little from the dismissal of the instant challenge"[15] or, as he put it in his later submissions, the way he acted was "further evidence of Mr Hosking's inability to face reality". He submitted that the conduct of the applicant and the lack of merit in his case were matters to be taken into account[16]. Mr Moore submitted the applicant had acted in a way which was "reprehensible" so indemnity costs or costs above the normal of two-thirds should be ordered.

[6] Mr Moore noted that s 92 of the Judicature Act 1980-81 provides that costs are to in the Court's discretion, the criteria are set out in R300 of the Code of Civil Procedure and there is a two-step process in deciding costs issues, namely whether the costs sought were reasonably incurred, and then what contribution the unsuccessful party should make to the successful party's costs.

[7] His accounts to that date of $6,180.50 included Mrs Carr's costs of $3,060[17] when she researched the matter and participated in the initial inquiry. He said Mrs Carr had been retained for "her superior expertise in matters of papaanga" and that the transcript of the inquiry was 63 pages in length.

[8] Mr Moore submitted the s 390A had to be filed because Land 328/2017, alleging fraud, was misconceived. The papers in the two matters were largely identical.

[9] Enlarging on that, he noted that Isaac J, conducting the inquiry, had suggested to counsel that the wrong succession order was challenged, commented on the submissions put forward in 328/2017 and emphasised the applicant's lack of recognition of the flimsy merit of his case.

[10] He relied on authority in the Maori Land Court and the Land Division of this Court for the award of indemnity costs[18]. The latter held indemnity costs should only be considered

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15 20.8.2018, at [4].
16 *Binnie v. Pacific Health Limited*, CA 65/02, 1 April 2003.
17 Which do not appear to include VAT.
18 *Housing New Zealand v. Tawhi* (2001) 13 Takitimu Appellate Court MB184; *George v. Teau* [2013] CKCA 1, 20 February 2013.

when the losing party's conduct was relevant overall as shown by the way the case was pursued.

[11] Accordingly Mr Moore sought indemnity costs or increased costs at 85% of the accounts.

[12] Mr Moore's memorandum of 6 August 2020 covered his costs for the previous two years. They amounting to $4,053.75. He again relied on the fact that the s 390A application was ultimately a matter of credibility; relied on the applicant's refusal for more than two years to negotiate costs; repeated the submissions that increased or indemnity costs were warranted; and made submissions on whether an award of costs in this matter would hamper future reconciliation, a possibility he submitted was remote in the present generation where the applicant bears a chiefly title and is not merely one of many owners.

[13] In his memorandum of 20 August 2018[19] Mr Moore chronicled his efforts to engage Mr Holmes in discussions on the question of costs and led him to seek indemnity costs or increased costs above two-thirds.

[14] Mr Holmes' submissions of 12 October 2020 observed that he had only received Isaac J's report of 3 March 2020 from Mr Moore on 10 October 2020 complaining that the Court forwarded him no copy.

[15] That may well be correct. As is now established practice, reports from the Land Division following an inquiry under s 390A are reports to the Chief Justice to assist in the Chief Justice's judgment on the application. While the default position is that such reports will normally be circulated to counsel by the Chief Justice together with a tentative or a provisional judgment, that need not invariably be the case.

[16] In any event, the issue was adequately covered by the whole of the relevant provisions of Isaac J's report of 3 March 2020 being recounted in Judgment (No.3)[20].

[17] Mr Holmes adverted to passages from Judgment (No.2) and Isaac J's first report, particularly the Judge's comment that the "lack of verifiable evidence presented was

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19 Which followed delivery of Judgment (No.1) on 20 June 2018.

20 At [7]-[11].

insufficient to rebut" the maxim omnia praesumuntur rite esse acta and the presumption that evidence given originally is deemed correct. Mr Holmes was critical of Isaac J's comment on the lack of verifiable evidence without the Judge canvassing what Mr Holmes submitted was the verifiable evidence detailed in his submissions in support of the recall application, a submission he supported by again referring to that evidence in his costs submissions. That led, he submitted, despite Isaac J's first report saying the "issue as to entitlement to succeed as an adopted child will need to be considered," no detailed discussion on that topic ever being undertaken. Those matters, he submitted, resulted in the applicant and Mr Holmes not knowing why the application failed.

[18] In light of that, Mr Holmes submitted that Isaac J's reports were unsound because of the lack of reasons.

[19] He therefore submitted that the evidence to which he had referred justified the filing of the application and the application for recall. Accordingly there should be no order for costs either way.

[20] Mr Moore's response submissions of 13 October 2020 noted the lack of submissions as to costs in Mr Holmes' response, submitting that the result should be a finding that Mr Hosking did not oppose either the quantum of the bills or the percentage of recovery sought.

Discussion and Decision

[21] The tenor of Mr Holmes' response and the lack of response and the lack of engagement in his submissions on issues of costs does not simplify resolution of that question, but it must at once be said that Mr Holmes misconstrues both the nature of a Chief Justice's referral of a s 390A application to the Land Division of the Court for inquiry and report and the now-accepted approach by Land Division Judges and the Chief Justices to the resolution of such matters.

[22] Section 390A creates an extraordinary jurisdiction for Chief Justices to correct mistakes, errors or omissions or other matters coming within s 390A(1) and, to assist in Chief Justices discharging that function, contains the useful power in s 390A(3) to refer applications to the Land Division for inquiry and report.

[23] Both s 390A applications themselves and the conduct of Land Division inquiries are now, in default of much guidance in the terms of s 390A itself, governed by the approach as to the burden and onus of proof and applicable presumptions which are recorded in, amongst other sources, Judgment (No.3) quoted earlier.

[24] Further, it needs to be recognised that Land Division reports to Chief Justices under s 390A are not judgments. Such reports are sought and made for the purposes described in the earlier judgments cited above. If an analogy is sought, such reports are more akin to the powers of reference to Registrars or referees under Part XIX of the Code of Civil Procedure.

[25] Those matters, in combination, mean that, as is the case in any judgment, there is no obligation for Chief Justices or for Land Division Judges to embark on a detailed consideration of every detail of the evidence or submissions, particularly when the matters are capable of determination in accordance with the well-recognised modes of drafting judgments in a way sufficient to explain the result to those interested, and, in s 390A matters, particularly where the result conforms to accepted protocols and the terms of the section itself.

[26] That notwithstanding, while it may be going too far to suggest, as Mr Moore does, that Mr Holmes' submissions are "further evidence of Mr Hosking's inability to face reality", it is certainly the case that the applicant, by declining for lengthy periods to engage on issues of costs, means that, in light of the above comments, the Court has little to go on from the applicant's side of the matter to gainsay Mr Moore's submissions.

[27] This matter has now been ongoing for over four years. It has involved a lengthy inquiry by the Land Division and a referral back. It has resulted in two reports from Isaac J. It has involved a lengthy and continued refusal on the applicant's part to recognise what Isaac J found were the lack of merits of his case.

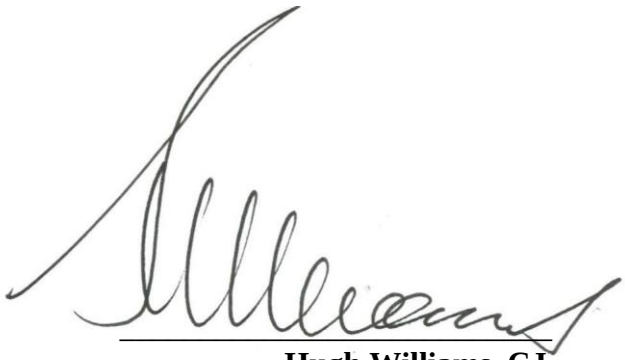
[28] That said, no party should not be penalised by the fact that the application has necessitated three judgments by the Chief Justice and has arguably been prolonged, to some degree at least, by the iterative nature of the overall approach to s 390A applications appearing in those judgments.

[29] Despite Mr Moore's submissions, the conduct of the applicant does not appear to have reached the point where it can be said that indemnity costs are justified. Though the applicant's case has been dismissed, that result only occurred after all points in his favour had been made by Mr Holmes. Mr Hosking was entitled to take that continuing stance in pursuit of what he saw as the merits of his application.

[30] Mr Moore's charges to the respondents total $10234.25 including Mrs Carr's costs of $3,060. Because of his approach to the matter, Mr Holmes does not comment on whether Mrs Carr's costs are properly included in the overall charges to the respondents, but the reasons given by Mr Moore for her engagement are persuasive.

[31] Mr Moore's charge out rates do not seem unreasonable for an experienced Land Agent. The narrative of his accounts does not suggest that the nearly 43 hours which his bills of costs say he has expended on the matter were extravagant. Although the application has become drawn out, Mr Moore's participation was necessitated by the course of the litigation. Ultimately, his clients were successful.

[32] In those circumstances, an award of $7,000, slightly in excess of two-thirds of the amounts charged, would appear to be appropriate and there will accordingly be an order that the applicant pay the respondents' costs in that sum.



Hugh Williams, CJ