

**COURT OF APPEAL OF THE COOK ISLANDS  
HELD AT RAROTONGA**

**C.A. No. 2/2012**

**IN THE MATTER** of Articles 60(1) and 64(1)(b) of the  
Constitution and Section 54(1) of the Judicature  
Act 1980-81.

**AND**  
**IN THE MATTER** of Section 391 of the Cook Islands Act 1915  
and Section 50 of the Cook Islands Amendment  
Act 1946.

**AND**  
**IN THE MATTER** of the land known as Tuoro section 87A5,  
Arorangi

**BETWEEN** **ANNIE RANGIPIRI MAURANGI**  
**GEORGE** of Takuvaine, Rarotonga, Domestic  
Appellant

**AND** **TANGI TEAU** of Arorangi, Rarotonga,  
Domestic, **ELIZABETH MATAI MARI** of  
Arorangi, Rarotonga, Domestic, **MERE**  
**RATUMU** of Arorangi, Rarotonga, Domestic  
First Respondents

**AND** **TINA PUPUKE BROWNE** of Parekura,  
Rarotonga, Solicitor.  
Second Respondent

**Coram:** Barker P  
Williams JA  
Paterson J

**Hearing:** 28 November 2012

**Judgment** 20 FEBRUARY 2013

**Counsel:** N George for Appellant  
Ms S L Inder for Respondents

---

**REASONS FOR JUDGMENT OF THE COURT: JUDGMENT AS TO COSTS**

---

## *Introduction — Nature of the Appeal*

[1] On 28 November 2012 we heard an appeal from the judgment of Isaac J delivered on 20 April 2012. At the end of the hearing we dismissed the appeal with reasons to follow and also called for submissions on costs. This judgment provides our reasons and also deals with the question of costs.

[2] The judgment under appeal followed a defended hearing before Isaac J on 5 and 8 March 2012 in respect of three Applications by the Appellant Mrs Annie Rangipiri Maurangi George for annulment of three Occupation Right Orders made in favour of the three first-named Respondents (“the Annulment Applications”).

[3] The Applications for the Occupation Right Orders had been made under Section 50 of the Cook Islands Amendment Act 1956. The Applications were heard before Her Worship Justice of the Peace Rima David on 17 May 2011. The Second Respondent and her law firm Browne Harvey and Associates acted for the First Respondents in relation to the Applications. The Appellant was present at the hearing and objected to the Applications. At that stage the Appellant appeared in person. Mr Norman George was retained later and appeared for the Appellant before Isaac J and this Court. The decision of the Court on 17 May 2011 was to grant to each Applicant as tenants in common a right of occupation of the land known as Tuoro Section 87A5, Arorangi for residential purposes. The land in question is residential land on the western side in Aorangi on the inland hillside. We were told from the Bar that there were no buildings erected on the land and that, while the Appellant has no wish to build there herself, she was interested in seeing proper procedures followed by others in relation to family land.

[4] Before Isaac J, and again in this Court, it was contended that the First named Respondent had procured the orders by deception and fraud and that their counsel, Mrs Browne, knew of the fraudulent nature of the Applications but nevertheless put the Applications to the Court.

[5] The Annulment Applications were brought under Section 391 of the Cook Islands Act 1915 which provides that “the ... Court may at any time annul any order obtained by fraud”. The Annulment Applications were made upon the following grounds:

- “(i) That the First Respondents obtained the occupation right orders by deception and actual fraud;

- (ii) That the First Respondents knowingly or without belief in its truth or recklessly were directly involved in the deception and actual fraud in that they knew they did not have the support of the majority of owners and had no interest left in the land and so deprived other owners of their fair share of inheritance, occupancy, usage or enjoyment of the land; and,
- (iii) That the Second Respondent knew of the deception and actual fraud and presented fraudulent information and records to the Court purporting that the information and records were true and the Court could grant the occupation right sought."

[6] In short, it was asserted that the Respondents had used dishonest means to obtain the consent of owners in Tuoro Section 87A5 Arorangi to achieve the 50 per cent threshold required by Section 50 of the Cook Islands Amendment Act 1946. That section states:

- "(1) In any case where the Land Court is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.
- (2) Any person occupying any and under any such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.
- (3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted."

#### The judgment of Isaac J

[7] Isaac J summarised the facts and details of the alleged deception and fraud advanced before him as follows:

##### (i) The Court's Certificate

By using the Court's Certificate the Respondents claimed there were 249 owners and that 127 supported the applications. Mrs George maintained that there were 238 owners.

##### (ii) No Meeting of Owners

There was no meeting of owners called or held. Instead the Respondents relied on a consent form taken around the owners by Tangi Teau. The same consent form was photocopied and also taken to owners by Mere Ratumu and Elizabeth Marii.

(iii) The Consent form

From a study of the consent form, Mrs George maintained that 11 of the 127 signatories were not owners. She also claimed that 13 of the 127 signatories had no verification dates, 106 of the 127 were completed by powers of attorney, which were not validated, 26 of the 127 signatories were duplicates and three of the 127 signatories were deceased. In fact, she maintained only four of the 127 signatures were valid.

(iv) No Occupation Rights

Mrs George alleged that the First Respondents had given away their rights to an occupation rights order by consenting to other occupation rights and leases.

(v) The Second Respondent

In respect to the Second Respondent, the Applicant maintained that her fraud was committed by representing the above false information as truths at the hearing.

[8] Isaac J noted that, in presenting the case for the Applicant, Mr George of Counsel accepted that the fraud complained of must be actual fraud, that dishonesty must exist and that an intention to deceive is required. Mr George singled out the consent document as the most critical document evidencing the fraud alleged to have been committed and called evidence from Mrs George and Mr Joseph Ka, said to be an expert in land law and procedure, to substantiate the claims relating to the consent form.

[9] In relation to the Second Respondent, counsel submitted to Isaac J that her liability lay in her wilful blindness to the fraudulent nature of the consent document, which implied voluntary ignorance.

[10] In summary, the case for the Respondents was that the burden of proof to substantiate the allegations of fraud upon the Applicant and while the standard of proof was on the balance of probabilities, a high standard of proof was required. In this connection Counsel for the Respondents referred to the Cook Islands Court of Appeal judgment in *Mataiapo v Abera* 1985 CKCA 2 CAI 1985, 14/10/85 where the Court stated that “the burden of proof lying on the litigant who alleged fraud of this nature is not a light one. It can be satisfied on probabilities but only when they establish a clarity of proof which is commensurate with the seriousness of the allegations made”.

[11] After considering the submissions of both Counsel, Isaac J found that there was common ground as to the principles required to succeed in a fraud case under s 391. In general terms, the principles were agreed to include the following requirements:

- (i) That the fraud complained of must be actual fraud;
- (ii) Actual fraud requires an intention to deceive by some dishonest means which would deprive a person of money, property or his legal rights;
- (iii) The burden of proof rests with the Applicant, who must prove on the balance of probabilities that actual fraud existed; and,
- (iv) The standard of proof is high and the Applicant must establish a clarity of proof which is commensurate with the seriousness of the allegations made.

[12] Isaac J then examined the evidence to ascertain whether a case of fraud had been established. His findings were recorded as follows.

#### The Certificate of the Court

[13] Mrs George maintained that there were 238 actual owners in the block and not 249 as the Court Certificate and the Respondents in their application had stated. However, the Respondents submitted they were entitled to rely on this Court Certificate which had been prepared in reliance on a practice note of Hingston J of 12 December 2007. Furthermore, there was no evidence called from the Court officer who prepared the certificate to ascertain how the number of owners as set out in the certificate was arrived at. The Respondents said that if Mrs George had wished to challenge the certificate she should have called the Deputy Registrar for cross-examination. This was the procedure adopted in other cases.<sup>1</sup>

[14] Justice Hingston's 12 December 2007 Practice Note is as follows:

"TO: The Registrar

#### PRACTICE NOTE - OCCUPATION LICENCES

1. Before acceptance into the Register applications for occupation licences must present a plan certified by the Chief Surveyor or his delegate to the effect that there are no other plans of this land affecting the area sought in the occupation licence.

---

<sup>1</sup> For example, Re Application No. 141/06 by Amy Cecil for an Occupation Right on *Popoara Section 64*; 3 October 2011; Savage J (CIHC, Land Division)

2. Such applications must be accompanied by a clear and unambiguous statement as to how many owners consent/approve.
3. Before application is placed before a Judge or JP for consideration it must have a certificate signed by the Deputy Registrar stating the number of owners in the land (including deceased).
4. If the number of owners in (2) above are together not a majority of those shown in (3) above then the application shall not be placed before a Judge or Justice of the Peace for adjudication.

-----  
Hingston J  
12 December 2007"

[15] Isaac J noted that this Practice Note clearly sets out that it is the Deputy Registrar who must certify the numbers of owners in the land. In addition, the Deputy Registrar is required to do a calculation as to whether there is a majority of owners supporting the application before the application is placed before the Court. Isaac J considered that the Practice Notice was designed to ensure that a Court officer does the calculations required by the Court in terms of s 50 of the Cook Islands Amendment Act and not the Applicants. At paragraphs [19]–[24] Isaac J stressed the importance of the procedure called for by the Practice Note.

"[19] This certification is presumably completed by the Deputy Registrar assessing the documentation that has been filed in support of the application, and also the title records of the Court. In making this assessment, the Deputy Registrar would clearly look at the consent forms on the file and consider which consents should be used or not. The Deputy Registrar would also consider which proxies should be accepted and whether the consents that were obtained were valid. The deputy Registrar would then calculate whether the majority of owners supported the application in terms of s 50.

[20] The important point here is that the Certificate is completed by the Deputy Registrar of the Court and not the Applicant. The onus is removed from the Applicant and the information required by the Court is collated by the Deputy Registrar and it is information upon which the Court and the Applicant rely when an application under s 50 is considered.

[21] If there are concerns or questions in relation to the Certificate, then these should be raised in Court and the Deputy Registrar questioned as to how the calculations were done.

[22] Mrs George did raise concerns with the Court but there was no questioning of the Deputy Registrar as to how the calculations relied upon by the Court were prepared.

[23] If there are concerns as to process or calculation, this is a matter to be raised at the hearing or through an appeal process.

[24] In summary, I agree with the Respondents, that the use and reliance upon the Court Certificate cannot and does not amount to fraud. The Applicant fails on this ground."

### No Meeting of Owners

[16] Isaac J then moved to the next ground the Applicant relied on in alleging fraud. This was that the Respondents did not hold a meeting of owners to obtain the consent of the owners. He pointed out, correctly in our view, that “there is no one way to obtain the consent of owners. The Applicant may choose the meeting of owner process or obtain consents in writing as was done in this case. As set out by the *Mataiapo* case, s 50 simply requires the Court to be satisfied as to the wishes of the majority of the owners. There is no requirement as to how those views are obtained.” We shall return to the *Mataiapo* case below.

[17] Isaac J, therefore, held that the fact that the Respondents did not follow the meeting of owners process did not amount to fraud. Therefore, that ground failed.

### The Consent forms

[18] Isaac J then passed to the Applicant’s submission that the consent form document was the most critical evidence that fraud was committed by the Respondents. Mrs George alleged that the consent document was obtained by the First Respondents and relied on by the Second Respondent as true and correct, and the liability of the Second Respondent lay in her “wilful blindness to the consent document which implied voluntary ignorance”. In essence the allegations of fraud were that 11 out of 127 signatories were not owners, 13 of the 127 consents had no verification dates, 106 of the 127 were completed by powers of attorney which were not validated, 26 of the 127 signatures were duplicates and three of the 127 signatories were deceased.

[19] On this topic Isaac J began by recalling his earlier statement that it was the certificate prepared by the Court upon which the Court relies when determining whether a majority of owners support the application, and there was no evidence brought before the Court to determine how the figures in the certificate were arrived at. He added that when the evidence of the Applicant was subject to cross-examination it showed inconsistencies, inaccuracies and exaggeration of the true picture. For example, Mrs George put to the Court that 26 of the 127 signatures were duplicated. In cross-examination Mrs George accepted that she was mistaken in at least eight of the examples that she had given. It was also accepted in cross-examination that the only way in which the Court certificate could be challenged would be to question the Deputy Registrar who prepared the certificate. This did not happen.



[20] In relation to the use of representatives to sign on behalf of owners or the use of powers of attorney, Isaac J accepted the submission of Counsel for the Respondents that it had become established practice in the Cook Islands that representatives are accepted as speaking for owners and that there is no obligation on the Respondents to validate the power of attorney.<sup>2</sup> He said that the Applicant was alleging fraud by the Respondents even where owners had signed, powers of attorney had been signed or representatives of owners had signed consents who were not the Respondents. Furthermore there was no evidence that these owners, power of attorney holders or representatives had been forced to sign the consents or that the Respondents had illegally obtained their signatures. Nor was there any evidence that the actions of the Respondents had sought to deceive the owners or deprive the owners of their rights.

[21] In relation to the allegations against the Second Respondent, Isaac J upheld the submission that Mrs Browne was entitled to rely on the certificate and the information provided to her by her clients. She submitted these documents to the Court and then relied on the Certificate prepared by the Court. He ruled that this did not amount to actual fraud or the reduced allegation of wilful blindness or voluntary ignorance. As he put it, "Mrs Browne was simply doing her job".

#### Decision of Isaac J

[22] Isaac J dismissed all of the Applications. In the result, Isaac J agreed with the Respondents that the Applicants had not provided the necessary evidence to demonstrate actual fraud was committed by the First and Second Respondents in relation to the consent form and dismissed the applications. He concluded his judgment with the following summary:

"[58] The law in the *Mataiapo* case is clear. The burden of proving actual fraud is not a light one and can only be satisfied when the Applicant establishes a clarity of proof commensurate with the seriousness of the allegations made.

[59] In this case Counsel for the Applicant was cautioned prior to proceeding that the burden of proof in such a case was high. Nevertheless, Counsel proceeded with a case which in my view was weak, lacking in evidence and many steps removed from showing actual fraud.

[60] Furthermore, the grounds and evidence relied on were more akin to grounds and evidence relied on in an appeal. This was accepted by Mr Ka who was called by the Applicant as an Expert Witness in Court procedures.

[61] Section 391 cannot and should not be used as a quasi-appeal section. While I will take the issue no further, to use s 391 in this way may amount to an abuse of process."

---

<sup>2</sup> Isaac J referred to the *Mataiapo* and *Popoara Section 64* cases.



[23] As to the comments in paragraphs [60] and [61], under s 8A of the Judicature Act 1980-1981 it was open to the Appellant to appeal the decision of JP David within 21 Days of the date of her decision.<sup>3</sup> No appeal was lodged. Nor was any application for an extension of time to appeal JP David's decision ever made. When the s 391 Application first came before the Court (Justice Savage) on 20 October 2011 it was adjourned. Justice Savage indicated to the Appellant's counsel, Mr George, that serious allegations had been made but commented that "my initial response was that they weren't allegations of fraud .... [W]here's the fraud ... The allegation [is] that somebody or people haven't treated her as they should but what's the fraud". On the same day the Appellant filed an Application under s 390A of the Cook Islands Act which contained the same allegations as those included in the s 391 Application. However, this application was not served or pursued and Counsel for the Respondents only came to know of it when served with a Notice of Withdrawal on 22 October 2012 signed by Mr George as counsel. At the hearing before Isaac J the late Mr Joseph Ka, the land agent who gave evidence for the Appellant, was questioned about the s 390A Application and said that, being out of time for an appeal against the JP's decision, the Appellant had elected to pursue the s 391 application instead of the s 390A Application.

#### *Grounds of Appeal*

[24] The grounds of appeal were not characterised by undue brevity, nor did they identify with precision any discrete issues of fact and law. Instead, passages from the judgment were quoted and under each passage were listed a series of rhetorical questions or queries. A slightly better indication of what appeared to be the central grounds of appeal may be obtained from the Appellant's written submissions in this Court. In those submissions it was said that the main issues being raised in the Appeal were:

- "(1) What amounts to fraud when land owners applying for consent to seek occupation rights, when they collect the consent signatures from the land owners for submitting their Applications before the Land Court?

---

<sup>3</sup> As to Appeals from Justices, Article 63(3) of the Constitution provides that "An Act shall provide ... for an Appeal to lie to the High Court from a final judgment of a Justice of the Peace." The Act in question is the Judicature Act 1980-1981 which in s 76 provides that "...where on the determination of any proceedings, civil or criminal, by a Justice sitting alone... and any party thereto is not satisfied with a decision therein he may appeal to a Judge." Section 76(2) provides that a Notice of Appeal is to be filed with the Court within 21 days. One then turns to the Code of Civil Procedure of the High Court 1981 which provides in Rule 130(1) that "any of the times fixed by these rules for ... taking any steps in any proceedings ... may be enlarged or abridged ... by the Court on the application of any party." Rule 130(2) states that such "an order enlarging time may be made although the application therefor is not made until after the expiration of the time allowed or appointed." Rule 363 provides that the expression "Judge ... shall be read as including Justice or Justices of the Peace in respect of the exercise of the jurisdiction conferred on him or them by statute."

- (2) Is fraud confined to the actual acts of the Applicant land owners and does it include agents or representatives acting on their behalf, fraudulently to secure the majority consents needed.
- (3) Can fraud be implied by the actions of a fraudulent land owner or his agents or representative intended to falsely obtain a majority consent from the rest of the land owners in order to secure an occupation right or other interest.
- (4) Powers of Attorney: is it a legal requirement by those holding a written power of attorney, to act on behalf of absent land owners to produce a written copy of such power of attorney to prove its authenticity before claiming the right to use such authority in all land related matters. Is it fraud to claim in the consent document that a power of attorney is used to sign on behalf of other land owners when one does not exist?
- (5) Is it admissible or acceptable for the Land Court Division to admit the oral and unverified or unverifiable evidence of a land owner claiming to act as the “representative” of absent land owner to give consent for Section 50 Occupation Right Applications?
- (6) How many acts of fraud are needed before fraud is complete under s 391 of the Cook Islands Act 1915?”

It will be seen at once that no attempt was made either in the Notice of Appeal grounds of appeal or in the Appellant’s written submissions to identify any specific errors of law or fact in the judgment under appeal. Such an approach is wholly unacceptable and is in direct conflict with the specific requirements for a Notice of Appeal contained in Rule 14 and Form 1 of the Court of Appeal Rules 2012.

#### *Oral Argument for Appellant*

[25] In view of the absence of specific points on appeal and the consequential difficulty in understanding how it was said that Isaac J had erred, the Court was compelled to question Counsel for the Appellant to an unusual degree in the course of his oral argument. What follows is a summary of the exchanges.

#### Standard of proof for fraud

[26] In his oral argument before this Court, Counsel for the Appellant first raised the issue of the appropriate standard of proof in respect of fraud. Acknowledging that in the leading case on s 39 *Mataiapo v Amarama* CA 181/85, judgment 14.10.85 (Sir Thaddeus McCarthy, McMullin J, Sir Clinton Roper) established that the burden of proof was a high one, the Court asked Counsel about paragraph [30] of the judgment of Isaac J. As noted above, paragraphs [29] and [30] of the judgment recorded that when the submissions of both Counsel were considered it appeared there was common ground as to the principles required to succeed in a case under s 391. In light of that passage,

the Court asked Counsel whether it was suggested that the Judge's summary of the proof principle at paragraph [30] was incorrect in any way. Counsel confirmed that that summary was not challenged but asked that the Court give a definition of "high" since it was obvious that the standard of proof was high. The Court said that it could not give a definition of "high" because in the end it was a matter of judgment for the trial judge to apply to the facts that were before him the standard of proof laid down in the *Mataiapo* case and summarised by Isaac J. Counsel agreed that this was the correct approach. The Court then asked whether the position of the Appellant was that the Judge applied the correct principles but he erred as to the facts. Counsel confirmed that such was the Appellant's position.

[27] The Court drew to the attention of Counsel paragraphs [35], [36], and [37] in which Isaac J outlined the central role of the Deputy Registrar who serves as an intermediary exercising a supervisory function in examining material that comes before the Court. Thereafter, the Registrar is certified to grant consents. Counsel for the Appellant appeared to suggest that this consenting procedure somehow shifted unfairly the onus of proof on to those challenging the application for occupation orders. It was said that to shift the onus of proof in this way would serve to alienate the Land Court from the people for whom it was meant to cater. Such a shift in onus thereby invited dishonesty and fraud. With the diminishing land space in the Cook Islands, the opportunity for fraud was thus significantly increased. Subject to the comments below about the Practice Note procedures, this Court cannot accept this submission. It considers that the roles of the Deputy Registrar and the Registrar are an appropriate preliminary procedure in occupation right cases and that no procedural or other unfairness is created.

#### Fraud Allegations

[28] Counsel stated that the Appellant's case was that the Respondents used dishonest means to obtain the consent of owners in Tuoro section 87A5 Arorangi to achieve the 51 per cent threshold required by s 50 of the Cook Islands Amendment Act 1946. The activities of the three Respondents led by the First Respondent, Tangi Teau directly, or through the sympathetic support of other landowners, especially those from whom they had previously tried to obtain occupation rights, were designed to obtain the requisite number of consents to secure the occupation rights of the Respondents. The Appellant claimed that the scheme adopted by the Applicants to secure the consents included the use of dishonest means, first, through false claims of some landowners to be representatives of other landowners, allowing them to give the consent of other

absent landowners which consent could not be verified, or, secondly, through powers of attorney that did not exist.

[29] Counsel for the Appellant therefore submitted that when these serious series of actions by the Respondents and their supporters were combined, it amounted to a dishonest and fraudulent scheme to get the support of the landowners.

[30] As to the facts in support, Counsel for the Appellant pointed to the evidence of the written consent documents containing the names of three deceased persons, 11 non-landowners, and 106 unverified powers of attorney. These were said to illustrate fraud on the part of the Respondent. Counsel also pointed to what was said to be further evidence of nine names from the Ngere family who were unverifiable. Counsel argued that these names were misrepresented. This evidence indicated there was enough contamination in the consent documents to defeat their purpose. The fraudulent consents were the product of a deliberate plan and design.

[31] With respect to these assertions, the Court reminded counsel that misrepresentation was not in itself fraud. All that evidence proved was that perhaps those providing their consent lacked the authority to do so, or that perhaps the Registrar acted wrongly or mistakenly. But that did not necessarily mean fraud, especially given the high standard of proof.

[32] Counsel then referred to evidence of three ticks next to the name of Tuku Pirangi and submitted that this was an attempt to increase the numbers of the consent. The Court observed that it did not consider this to be fraud, but, if anything, negligence.

[33] Next, Counsel referred to the consent document of the Respondent, Tangi Teau, whose signature appeared twice on that document. At this point the Court noted that, given the serious nature of the allegation, to prove fraud, the party against whom fraud is alleged must be given the opportunity to rebut the allegations. This had not occurred in the Court below because the pleadings did not specify in detail any allegations against specific individuals.

[34] Counsel said that the names Elizabeth Greig and Elizabeth Rimatua Turi were of the same person. Later in the document she used the name Elizabeth Ngametua Turi and later her maiden name Elizabeth Turi. Counsel submitted that this was “a name twist to increase the number of consent signatures”. The Court noted that this submission had not been pleaded and again the Court reminded counsel of the serious nature of the allegation and that Mrs Greig (Ms Turi) should have been given a chance to defend

herself. This lady had not been a named Respondent in the proceedings. The Court found it astonishing that, without having mentioned her in particulars, Counsel for the Appellant had accused Elizabeth Turi of fraud.

[35] Counsel also referred to the evidence of the Applicant, who had testified that six names from the Karitaua family were not listed on the title, yet appeared on the consent document. The Court suggested that, because they were beneficial owners, they might have thought their names were on the title. This matter did not necessarily indicate fraud on their part.

#### Validity of Powers of Attorney

[36] Counsel for the Appellant disputed “the veracity of powers of attorney and representatives”. Counsel submitted it was the Respondent’s duty to prove that they had legitimate powers of attorney and that representatives had authority to give consent of the landowner at the time they filed their applications with the Land Court.

[37] Counsel asserted that other landowners and the Land Court were deceived into granting the occupation right to the three Respondents as follows:

- (a) No letter of consent was given by the Respondent and the other landowners did not have knowledge of that fact;
- (b) The Respondents behaved like defendants in a criminal proceeding. They refused to testify, even though they were in Court during the proceedings;
- (c) The Deputy Registrar was clearly deceived when he or she declared that the benchmark 51 per cent from the “rigged” consent document was achieved when compared to the list of landowners on the Court Land Title Register; and,
- (d) By obtaining consent by dishonest and fraudulent means, the other landowners lost their chance to claim occupation rights to the same three sections.

#### Appellant’s Case against Second Respondent for Alleged Fraud

[38] Counsel for the Appellant submitted that, in acting previously for Mrs David JP, in another case, Mrs Browne had a conflict of interest in this case. The Court reminded counsel that conflict of interest does not equal fraud.

[39] The Court referred to the responsibility and obligation of counsel not to make allegations of fraud, especially against a fellow practitioner, without having adequate



evidence to justify such allegations. Moreover, it was no answer to an inappropriate allegation of fraud for counsel to state that “it was the client’s view”. Where counsel do not consider such serious allegations can be sustained, they were under a duty to withdraw the claims and apologise accordingly.

[40] The Court then indicated that, irrespective of the result of Counsel’s submissions on the appeal against the First Respondent, Mrs Browne would have to be dismissed from the proceedings and she would be entitled to costs because she had been wrongly joined and wrongly pursued. Counsel had failed to take earlier opportunities to dismiss Mrs Browne from the proceedings.

[41] In this connection, the Court referred counsel to certain passages from the judgment of Goldberg J in the Federal Court of Australia in *White Industries v Flower & Hart* (1998) 156 ALR 169, a case involving the issue of whether to order a law firm to pay costs for alleging fraud in circumstances where there was no factual basis for making the allegation. Goldberg J at 103 stated:

“White submits that *Flower and Hart* should pay its costs because it delivered a statement of claim alleging fraud in circumstances where there was no factual basis for making the allegation. The principle of law upon which this allegation is based is rooted in the serious consequences of an allegation which should not be made lightly. The relevant obligation cast upon legal practitioners in pleading fraud was identified by the New South Wales Court of Appeal in *Minister Administering the Crown Land (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201 in the following terms at 203–204:

‘In a pleading of fraud, some requirements of the law are clear beyond argument. These requirements are not only rules of pleading in practice established by decisions of the Courts. They are rules of ethical conduct binding on members of the legal profession. It is a serious matter to allege fraud against a party in pleadings to which attach the privileges incidental to Court proceedings. Reports of such allegations may be recounted in the community and through the public media. They may do great harm to a party before a word of evidence has been offered and submitted to the searching scrutiny of cross-examination or to rebuttal. It is for this reason, amongst others, that legal practitioners must take care to have specific instructions and an appropriate evidentiary foundation direct or inferred for alleging in pleading fraud. We say inferred, because it will sometimes be impossible to prove fraud by direct evidence. The tribunal of fact may be invited to draw an irresistible inference of fraud on the facts proved. Of its nature, fraud is often perpetuated covertly. The perpetrators of fraud will often take means to cover their tracks.’”

The Court went on to say:

“Professional discipline may follow if allegations of fraud are made where the foregoing conditions are not satisfied. By such means Courts protect their processes from the abuse which would follow from the two ready assertion of fraud against a party in circumstances

where it could not be proved to the high standard required of such allegations.”

Having drawn the *Flower & Hart* case to the attention of Counsel the Court stated in announcing its judgment discussing the appeal that the Respondents were entitled to costs but left that matter over for further submissions.

*Submissions for Respondents*

[42] Ms Inder for the Respondent submitted that the alleged errors of law appeared to be:

- (a) The required standard of proof in fraud proceedings;
- (b) Matters relating to the Court’s Certificate;
- (c) The procedure for obtaining consents; and,
- (d) What amounts to an abuse of process?

[43] As to standard of proof, it was observed that the Appellant had acknowledged that in fraud proceedings the standard of proof was high but stated that it must still be within the scope of the civil standard of proof, being on the balance of probabilities. Counsel for the Respondent referred to paragraph [30(iii)] of the judgment and noted that this was the standard applied by Isaac J. Counsel submitted there was no error in law in the standard of proof applied by Isaac J.

[44] As to the Certificate of the Court, the Respondent submitted, as was the case at the hearing, that the Appellant appeared to ignore the fact that the document which was relied on by the Respondents in their applications for Occupation Rights was the certificate prepared by the Court. This was prepared, as Isaac J noted, with reference to the consent forms submitted, along with the Court’s Register of Titles and land records.

[45] As was put to the Appellant at the hearing during cross examination, and agreed to by her, the total number of those consenting according to the Court certificate, was less than the number of signatures on the consent form. Therefore, obviously some names had been discounted by the Court in its scrutiny procedure. However, without the Appellant calling the Deputy Registrar who prepared the certificate to give evidence, it was unknown which ones were discounted.



[46] The document was prepared by the Deputy Registrar of the Court, not the Respondents. Any errors in that calculation could not amount to acts of fraud by the Respondents.

[47] The Respondents (including their Counsel, the Second Respondent) were entitled to rely on the Court's Certificate as accepted procedure in the Land Court as set out in the Practice Note of Hingston J. The Appellant and Counsel for the Appellant offered no evidence or legal authority to suggest otherwise.

[48] There was no assertion by Isaac J in his decision that the parties were not allowed to question the accuracy and reliability of the contents of the certificate, but logically, and as agreed by the Appellant under cross examination, to challenge the numbers in the certificate one would need to question the person who prepared it. It was the Appellant who brought this application and, of course, the burden was on her to prove the allegations. Obviously, she must be the one to call the Deputy Registrar to give evidence if she wished to challenge it. This was made clear to the Appellant in the original hearing for the Occupation Rights. It was absurd for Counsel for the Appellant to say that if this was required the Judge should have suggested it. It was not up to the Judge to advise Counsel how to run their case.

[49] Counsel for the Appellant's assertion that the Deputy Registrar had never been called before in such cases to give such evidence was incorrect. This was a regular occurrence where the Court records (including the Courts Certificate recording consent) were challenged. For an example, reference was made to *Popoara Section 64*, which was a case relied on by the Respondents at the hearing before Isaac J.

[50] As to consent procedure, Counsel for the Appellant disagreed that it has become established practice in the Cook Islands that representatives are accepted as speaking for owners but he gave no legal authority to support this view. That assertion should be compared with the submission of the Respondents that this was acceptable practice for ascertaining the wishes of landowners in relation to Occupation Rights. Such was supported by both the *Mataiapo* and *Popoara Section 64* cases, as cited by Isaac J at paragraph [51] of his judgment.

[51] Counsel for the Appellant asserted that the use of representatives was confined to the Court room where the presiding Justice of the Peace or Judge could see them but again gave no authority to support this assertion. Nor had this point been raised or argued at the hearing below.

[52] Similarly, the assertion that powers of attorney were required to prove consent (and furthermore to be attached to the application for Occupation Rights), was not substantiated and was, in fact, contrary to the findings in *Mataiapo* and *Popoara Section 64*.

[53] The Appellant claimed that “false powers of attorney” were used to obtain the Occupation rights but with no evidence in support. She swore in her Affidavit that “the validity of those powers of attorney have remained unproved ... despite numerous requests from me for proofs”. However, when questioned during cross examination this turned out to be false. The Appellant admitted she had made no inquiries of any of the people (including the Respondents) who had said that they had powers of attorney. The burden of proof was on the Appellant and the Respondents were not required to prove anything.

[54] As to abuse of process, what His Honour Justice Isaac said in his judgment was that the use of a s391 application in this case “may amount to an abuse of process”. The amount of work and expense incurred by the Appellant was irrelevant. The real question was, “what about the expense to the Respondents having to defend totally unsubstantiated and seriously prejudicial allegations of fraud?” The fact remained that the Appellant and her Counsel were given a number of warnings by both Savage and Isaac JJ as to what was required to prove fraud, yet persisted with the Application.

[55] As to alleged errors of fact the Appellant claimed only 4 out of the 127 (although she meant out of 106) of the signatures on the consent form were valid. Not all of these remaining consents were signed by the Respondents. This was an allegation of fraud against people other than the named Respondents, but who were not named as parties to the fraud proceedings.

[56] The Appellant had not questioned the Respondent Tangi Teau as to whether she had the powers of attorney she claimed to have. She simply alleged that she did not have such powers.

[57] The Appellant claimed people (not only the Respondents) were claiming powers of attorney when they clearly were signing only as representatives. There was no evidence to establish that the powers of attorney claimed were false. This was established through cross-examination and questions from the Judge. Counsel for the Respondents put to the Appellant that rather than 106 powers of attorney, there were only 27, which showed the Appellant grossly exaggerated this number.

[58] In summary, Counsel for the Respondents argued that there was no error in law in His Honour Justice Isaac's decision. The findings were based on relevant legal authority and established practise of the Cook Islands Land Court. Neither were there any errors of fact. The findings were based on the evidence given by the Appellant herself, and her "expert" witness during the hearing, where through cross-examination and questions from the Judge, the Appellants evidence was shown to be inconsistent, inaccurate and exaggerated.

[59] The Appellant was given every opportunity to present her case to the Court and, in fact, indulged with a number of adjournments, which added to the prejudice against the Respondents, and resulted in greater costs being incurred by them.

[60] In short, the Appellant had failed to prove each of the required elements of fraud, and to meet the required standard of proof. His Honour Justice Isaac was correct to dismiss the applications.

#### *The Court's Findings*

[61] This Court had no difficulty in concluding at the end of the oral arguments that this appeal was meritless and must be dismissed. First, there can be no suggestion that Isaac J misstated or misapplied the standard of proof for fraud. Indeed, Counsel for the Appellant conceded both in the Court below and in this Court that this was the case: see Isaac J at paragraphs [29]–[31].

[62] Secondly, the suggestion that the Appellant had established fraud to the requisite standard was, and is, fanciful. As Isaac J said at paragraph [42] the use and reliance upon a Court certificate cannot and does not amount to fraud. The occurrence of the authorised acts of the Deputy Registrar and the Registrar make it impossible to find fraud on the part of the Respondents. In any event, as may be seen from our exchanges with counsel, such flimsy evidence as was relied upon by the Appellant fell nowhere near establishing fraud. It was found by Isaac J to be full of inconsistencies, inaccuracies and exaggeration of the picture and no real progress was made by Counsel for the Appellant in his attempt in this Court to rehabilitate that flimsy evidence.

[63] Finally, the contention that a meeting of owners is an indispensable element of a valid majority vote is flatly contradicted by the longstanding decision of this Court in the *Matiapo* case.

[64] As to the position of the Second Respondent, Isaac J was right to find that Mrs Browne was entitled to rely upon the Court certificate and the information provided to her by her clients. Her conduct in no way amounted to actual fraud, wilful blindness, or voluntary ignorance. On the contrary, she was as Isaac J found, simply doing her job. The allegations against her should never have been made before Isaac J, let alone pursued until a late stage in this Court. We discuss this matter further below in dealing with costs.

### *Concluding Comments*

[65] This was a completely hopeless appeal. It failed to identify any serious question of law or fact for argument. It should never have been launched or pursued and it is nothing short of astonishing that a senior counsel of longstanding in this Court should have accepted instructions to pursue it. All the more so when it was revealed in this Court that an Application under s 390A was withdrawn in favour of pursuing this fraud case. It was even suggested obliquely by Counsel for the Appellant in his argument in this Court that it might now be appropriate for the Appellant to initiate and pursue a fresh s 390A application. In case that possibility is still being considered it should be noted by the Appellant that such a course would amount to an abuse of process under the *Henderson v Henderson* principles and would result in the striking out of the Application with costs. In *Henderson v Henderson* the Court held that:<sup>4</sup>

[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The Appellant should have pursued her original s 390A application. She withdrew it. It would be an abuse of process now to commence another s 390A Application.

---

<sup>4</sup> *Henderson v Henderson* (1843) 3 Hare 100 at 115. See the following cases for modern applications of the principle: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 (HCA). The extended principle of *Henderson v Henderson*, found in *Johnson v Gore Wood & Co* [2000] UKHL 65, [2001] 1 All ER 481, [2001] 2 WLR 72 has been approved in several New Zealand decisions, including *Crompton v Turner* [1994] 2 NZLR 489 (HC), *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7; *Commissioner of Inland Revenue v Bhanabhai* [2006] 1 NZLR 797 (HC); and *Contact Energy Ltd v Attorney-General* [2009] NZCA 351.

## Costs

[66] As noted earlier at the conclusion of the hearing the Court intimated that the Respondents were entitled to orders for costs. Written submission were called for, with the Respondents being asked first to address three matters, namely whether party and party or indemnity costs were sought, and, if so, against whom costs were sought, and finally the quantum of costs sought.

[67] The requested submissions were duly filed. In summary, the Respondents submitted that both the Appellant and Counsel for the Appellant should be jointly and severally liable for full indemnity costs since, first, the appeal had no merit whatsoever and amounted to vexatious litigation and, secondly, in pursuing it the conduct of the Appellant and her Counsel was reprehensible. The Appellant and her Counsel opposed any order for costs, whether on an indemnity basis or otherwise and questioned whether the *White Industries* case principles were relevant and appropriate in the Cook Islands, and pleaded impecuniosity.

### *Whether Respondents entitled to Award of Indemnity Costs — Applicable Legal Principles concerning Indemnity Costs*

[68] The Respondents' two-stage approach, derived from the judgment of the New Zealand Court of Appeal in *Binnie v Pacific Health Limited* CA 65/02, 1 April 2003, was appropriate. Dr Binnie had been employed by the respondent, Pacific Health in Tauranga and had brought common law proceedings in the Employment Court claiming damages for breach of his contract of employment. Dr Binnie had been suspended and subjected to inquiry in relation to the suggestion of professional misconduct. Colgan J in the Employment Court found for Binnie after an 8-day hearing rejecting the completely unfounded allegations of professional misconduct made against him. The judge found there were aggravating features of Pacific Health Conduct towards Dr Binnie that met the threshold test of being so flagrant and outrageous that punishment of its actions was warranted. At page 21 the Court of Appeal commented on an earlier Employment Court case where Chief Judge Goddard in *Counties Manukau Limited v Pack*, Auckland Registry AEC 69/0025 October 2002 had suggested a two-stage approach under which full indemnity costs shall ordinarily be reserved for a case in which the losing party's case was (1) wholly lacking in merit; and, (2) its stance had been pursued in a way that could be described as reprehensible. The Court of Appeal regarded this to be a rather too narrow approach to whether the discretion toward full



indemnity costs should be exercised. It made the following observations at paragraph [21]:

“Certainly, if these two criteria can be shown to exist, a strong case for full indemnity costs would be present but they should not be regarded as mandatory considerations requiring some special reason to depart from them. For example, the losing party’s conduct will be relevant overall, not just in the way the case was pursued. The nature of the conduct which entitles the winning party to relief can be relevant to the level at which costs should be awarded.”

[69] The Respondent’s contended that both elements had been established in this case. The Respondent also relied upon *White Industries (QLD) Pty Limited v Flower & Hart (a firm)* (1998) FCA 806 to which this Court had referred during the hearing. That case is of great relevance here because it involved the principles to be applied in deciding whether the solicitors for a party which had alleged fraud without any proper foundation for the allegation should be themselves subjected to indemnity costs instead of the party represented by those solicitors. In *White Industries* the Federal Court of Australia determined that there was jurisdiction to order solicitors alone to pay the opposing party’s costs where solicitors instituted proceedings or continued proceedings relying on a cause of action in fraud when there was no factual basis for that allegation and where no consideration was given before the institution of the proceedings as to whether there was a factual basis. Because of the importance of this matter, it is appropriate to refer to some further passages from the judgment of Goldberg J in the *White Industries* case at 104:

“As a matter of principle an unwarranted allegation of fraud by a solicitor or, putting the matter more precisely, an allegation of fraud when there is no factual basis for it is sufficient, in my view to constitute a serious dereliction of duty or serious misconduct by a solicitor which will enliven the jurisdiction to order costs against the solicitor.

The significance and seriousness attached by the law to the making of the allegation of fraud was identified by the Supreme Court of New South Wales in *Oldfield v Keogh* [1941] 41 SR (NSW) 206. The Court found it difficult to understand what could have led to the making of the charge as there was no evidence to support it. The Court said at 211:

‘In this connection it is useful to repeat some observations by Lord Macmillan with respect to attacks on character. His Lordship points out that when such an attack is suggested, ‘counsel ... must insist upon being supplied with all the information which is thought by his client to justify the attack, and then he must decide for himself whether the charges made are such as can be justifiably made. In exercising his judgement in such a matter the advocate is fulfilling one of the most delicate duties to society which his profession casts upon him. It is no small responsibility which the State throws upon the lawyer in thus confiding to his discretion the reputation of the citizen. No enthusiasm for his client’s case, no specious assurance from his client that the insertion of some strong allegations will coerce a favourable settlement, no desire to fortify the relevance of his client’s case,

entitles the advocate to trespass, in matters involving reputation, a hair's breadth beyond what the facts as laid before him and duly vouched and tested will justify. It will not do to say lightly that it is for the Court to decide the matter. It is for counsel to see that no man's good name is wantonly attacked': *The Ethics of Advocacy* in *'Law and other Things'*, pp 191-2.'

Although Lord Macmillan refers to counsel in this passage the principles are equally applicable, in my view, to solicitors particularly where the solicitors sign the pleading containing the allegation."

[70] Mr George in his post-hearing submissions was dismissive of *White Industries v Flower & Hart*. He stated:

"For a start we have never heard of the Australian case of *White Industries Queensland Pty Limited v Flower & Hart*. This appeal is different to the *White* case. There were no deliberate delays, adjournments and there was no abuse of process by the appellants in our respectful submission. We submit that while the above case can be a good guide that it should not be treated as binding in the Cook Islands. In assessing the costs issues we submit that the Court of Appeal should base their decision on conditions on the ground in the Cook Islands and not New Zealand or Australia in terms of earnings and income."

[71] Mr George was right to say that *White Industries v Flower & Hart* can be a good guide. In answer to his last assertion we specifically endorse all of the principles set out in the passages quoted above as applicable in the Cook Islands while of course accepting that the quantum of costs awards in cases of this kind in the Cook Islands will need to be appropriate to the circumstances of the Cook Islands.

[72] Reference to several additional cases will demonstrate sufficiently that the legal principles applicable in this area are of universal application in England, Australia and New Zealand and, as we now confirm, in the Cook Islands. The further cases to which we make shall reference are *Guo v Minister for Immigration and Multicultural Affairs* [2000] FCA 146, another decision of the Federal Court of Australia, *Y v M* [1994] 3 NZLR 581 at 581, a decision of Temm J in the New Zealand High Court, *Rondel v Worsley* [1969] 1 AC 191 (HL) and finally *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400. In *Guo v Minister for Immigration and Multicultural Affairs*, O'Loughlin J said at paragraphs [23]–[30] as follows:

"23. There remains an additional matter that warrants strong comment. In the original application for review, one of the claimed grounds was that:

'... the decision was induced or affected by fraud or by actual bias.'



No particulars of this alleged fraud or bias were set out in the application. Instead there was a statement:

*'Affidavit and particulars will be supplied'.*

No such affidavit or particulars were supplied; no reference was made to this serious allegation in counsel's written submissions and at the end of counsel's oral submissions nothing had been said in respect of the allegation. As a result of my inquiry, I was told that the allegation would not be pursued. I regard that as an intolerable situation. No formal notice of abandonment of the allegation has been filed. The delegate is left with an allegation of fraud and actual bias having been made against him which, whilst not substantiated, has not been withdrawn. Counsel informed me that at the time of taking original instructions there was a possibility that fraud might be raised. As to that I say two things: there is nothing in the papers that would suggest the existence of any such possibility. Secondly, a "possibility" is not enough to warrant the making of such a serious allegation. Legal practitioners have a duty to the Court to ensure that unsubstantiated allegations of such import are not made."

This case is highly pertinent here in view of the late withdrawal of the allegations against Mrs Browne in this case.

[73] *Y v M* [1994] 3 NZLR 581 (HC) involved a Family Court dispute in which the father alleged that the affidavits filed by the mother were damaging to his character and did not need to be and should not have been filed. The affidavits concerned allegations of sexual abuse which had led to the father having no access to his child for two years. Temm J said at 585:

"The father also relies upon the Rules of Professional Conduct of the New Zealand Law Society which contain the following rule:

**'8.05 Rule**

**A practitioner must not attack a person's reputation without good cause.**

**Commentary**

- (1) This rule applies equally both in Court during the course of proceedings and out of Court by inclusion of statements in documents which are to be filed in the Court.
- (2) A practitioner should not be a party to the filing of a pleading or other Court document containing an allegation of fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the practitioner has first satisfied himself or herself that such allegation can be properly justified on the facts of the case. For a practitioner to allow such an

allegation to be made, without the fullest investigation, could be an abuse of the protection which the law affords to the practitioner in the drawing and filing of pleadings and other Court documents. Practitioners should also bear in mind that costs can be awarded against a practitioner for unfounded allegations of fraud.

- (3) If necessary a practitioner must test the instructions which have been given, by independent inquiry, before making such allegations.
- (4) Practitioners are referred for further guidance to:
  - (i) *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 (SC).
  - (ii) *McKaskell v Benseman* [1989] 3 NZLR 75 (HC).

In my judgment on appeal [1993] NZFLR 609, 645–646 I referred to a lawyer’s duty in terms which I repeat here for convenience:

‘It appears to be a misconception of some prevalence that a solicitor’s only duty is to the interests of the client. That is not right. The lawyer undoubtedly has a duty to the Court that the Court be not misled. There is a wider public duty allied to that, by which a lawyer is under an obligation to refuse to make allegations that are not sufficiently based. It can be unprofessional conduct to make allegations of dishonesty without a proper basis. It is equally unacceptable for a solicitor to make accusations of fraud or of criminal activity such as sexual abuse without adequate grounds for doing so. An assertion unsupported by evidence is not enough. An accusation is not evidence.

The authority for this expression of a lawyer’s duty is to be found in the speech of Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 in which it was stated:

“Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information.”

And

‘The same public duty applies when drawing pleadings or conducting subsequent stages in a case as applies to counsel’s conduct during the trial.’

That statement of the law was considered by a Full Court in New Zealand in the case of *Gazley v Wellington District Law Society* [1976] 1 NZLR 452, in which Their Honours said, speaking of Lord Reid’s admonition:

‘Clearly, in our view, what is said applies to a practitioner acting as both barrister and solicitor in the conduct of litigation in New Zealand.’ (at p.454)

Accusations of wrongdoing against a citizen are not to be made lightly. Solicitors who are instructed by a client to make such allegations in guardianship proceedings or otherwise should proceed with care and apply these principles.”

[74] Since the judgment of Temm J, the question of indemnity costs has been further developed and refined in New Zealand. First, in the High Court Rules introduced in 2008 by the Judicature (High Court Rules Amendment Act) 2008, it has now provided in Rule 14.6(4)(f) that indemnity costs may be ordered in the following circumstances:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) particular misconduct that causes loss of time to the Court and to other parties;
- (c) commencing or continuing proceedings for some ulterior motive;
- (d) doing so in wilful disregard of known facts or clearly established law;
- (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J’s “hopeless case” test.

In *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400, the New Zealand Court of Appeal had to consider the ambit of paragraph 14.6(4)(f). The Court of Appeal conducted a review of the authorities from Australia and the United Kingdom and summarised the law in paragraph [29] as follows:

We therefore endorse Goddard J’s adoption in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 at [11] (HC) of Sheppard J’s summary in *Colgate v Cussons* at [24]. While recognising that the categories in respect of which the discretion may be exercised are not closed (see r 14.6(4)(f)), it listed the following circumstances in which indemnity costs have been ordered:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) particular misconduct that causes loss of time to the Court and to other parties;
- (c) commencing or continuing proceedings for some ulterior motive;
- (d) doing so in wilful disregard of known facts or clearly established law;
- (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

We consider that the same principles apply in the Cook Islands.

*Should Indemnity Costs be ordered against Appellant or her Counsel — Submissions of Respondents*

[75] Against the background of those principles it is now necessary to decide whether indemnity costs should be awarded in this Court against either the Appellant and/or her Counsel. This calls for a careful examination of the sequence of events in relation to the allegation of fraud in these proceedings to see whether the appeal was wholly lacking in merit and whether it was pursued in a reprehensible way. The nature of the conduct of the Appellant will be relevant to the quantum of any costs to be awarded.

[76] The Court finds the sequence of events in these proceedings to have been accurately summarised in the Respondent's submissions on costs as follows (paragraph [20]). The summary was as follows. First, the proceedings began with an Application for an occupation right order which was heard by Her Worship Justice of the Peace Mrs Rema David on 17 May 2011. The Application was granted. On 17 June 2011, the Appellant made an Application for annulment of the occupation right order pursuant to s 391 of the Cook Islands Act 1915 which alleged fraud. The three grounds stated were:

- (a) First that the First Respondent had obtained the occupation right by deception and actual fraud;
- (b) The second ground was that the First Respondent knowingly or without belief in its truth or recklessly, was directly involved in the alleged deception and actual fraud; in that she was aware and knew that she did not, not only have the support of the majority of the owners but also had, with the few supporting her, no interest left in the land to give so did so to deprive the Applicant and other owners who are not in their group, of

their fair share of inheritance, occupancy, usage or enjoyment of the land; and,

- (c) That the Second Respondent knew of the deception and actual fraud; and still knowingly or without belief in its truth or recklessly, perpetuated the alleged deception and actual fraud by presenting fraudulent information and records in the Court purporting that the said information and records were true and that the Court may then grant the Occupation Right Order the First Respondent was seeking with the assistance of her representation.

[77] Turning to the hearing before Justice Isaac, through the cross-examination of the Appellant and Mr Ka at the hearing, it became evident that the affidavit relied upon by the Appellant contained wrong, exaggerated and misleading statements. As a consequence, the Appellant was warned on a number of occasions as to the high standard that had to be met and what was needed to establish fraud, but pursued her application despite the warning. The same warnings had been first given in interlocutory proceedings by Savage J on 20 October 2011 referred to earlier. Thus, from this early stage in the proceedings the Appellant should have been aware of the deficiencies of her application.

[78] Isaac J again warned Counsel for the Appellant of what was required to establish fraud when this matter was called on 22nd February 2012 and again during the hearing on 2 March 2012 where he said:

*“..the onus is on you to prove fraud and as I said it's a very high hurdle to jump, a very high hurdle, and these applications should not be made willy-nilly...they should not be made prior to other matters being considered lie applications for rehearing or appeal...I note from Judge Savage's Minute that he said that the issue of costs is very real in these applications.”* (Emphasis added)

[79] There were more appropriate avenues available to the Appellant than to pursue a fraud case. During his evidence, Mr Ka (who had originally assisted the Appellant with preparation of her application and affidavit) advised he had discussed alternatives with the Appellant, and warned her of the “high bar” (as he referred to it) with allegations of fraud, but said she chose to pursue these allegations regardless. This was a deliberate decision, as was the subsequent decision to appeal.

[80] As to the reprehensible conduct by the Appellant's counsel, the Respondents asserted that, despite Counsel for the Appellant filing three applications for leave to

appeal to the Court of Appeal, he still failed to clearly set out what were the grounds of appeal relied on. This continued in his written submissions in this Court where he merely quoted parts from Isaac J's decision and then asked rhetorical questions.

[81] In addition, Counsel for the Appellant appears to have explicitly conceded only at the appeal hearing before us that the standard of proof applied by Isaac J (being broadly that established in the case of *Mataiapo v Abera*) was correct and that the interpretation of Savage J as to what was required under s 50 of the Cook Islands Act 1915 in obtaining the consent of landowners for Occupation Rights (as set out in the case *Popoara Section 64*) was correct, despite having never produced previously any legal authority to suggest otherwise. The late abandonment of these "alleged errors of law" meant the Respondents were put to the unnecessary cost of responding to them.

[82] In relation to reliance on the Court's Certificate and the role of the Deputy Registrar, Counsel for the Appellant emphatically stated his client's position, but provided no evidence or authority to support those submissions, other than an attempt to give evidence from the bar, and to refer to unspecified cases from his past experience. Copies of those decisions were not provided so that what he was claiming had occurred in those cases could not be verified.

[83] In regard to the alleged errors of fact, in this Court Counsel for the Respondent either reiterated the original allegations set out in the application and affidavit of the Appellant, (neglecting to appreciate these allegations had been rebutted by his own clients statements during cross-examination at the hearing and misleading the Court by failing to advise them of this); or raised new "questions" that were not before His Honour Justice Isaac, and thus could not be "errors of fact" made by him. Again, other than attempts to give evidence from the bar, there was no evidentiary basis for these submissions.

[84] To appeal a decision regarding fraud where there was no evidentiary basis to support the serious allegations and where there are more appropriate alternatives available to the Appellant, was an abuse of process. As to the alternatives, the Appellant had filed a s 390A Application on 20 October 2011. This was never served on the Respondents or their Counsel and was not brought to their attention or the attention of the Court during the substantive hearing despite Counsel for the Respondents questioning the Appellant witnesses directly on the subject. Counsel for the Appellant was Counsel on record on 20 October 2011, (the date the s 390A



application was filed) and the Notice of Discontinuance was filed by his firm on 17 October 2012. He failed to bring the existence of this application to the attention of the Court at the substantive hearing or at the appeal stage. He made no mention of it in his written submissions, and when questioned by the Court of Appeal about it, only responded “I think it was discontinued”.

*Findings on Conduct of the Appellant*

[85] In summary, the Court accepts the analysis of the Respondents which was as follows:

“32. The Appellant pursued her application for fraud against all four Respondents despite having no substantial evidentiary basis to support her claims, and despite the warnings given by both Justice Savage and Justice Isaac —

32.1 of the serious nature of the allegations;

32.2 that what she alleged did not amount to fraud; and

32.3 that there were more appropriate applications, such as an appeal of the decision of Justice of the Peace Rima David, or an application for rehearing under s 390A of the Cook Islands Act.

To then appeal the decision where there were insufficient grounds for appeal, and no further admissible evidence in support, was reprehensible conduct.”

[86] The s 390A application was filed by the Appellant herself, so she was obviously aware of it. Similarly she was aware from the responses she gave during cross-examination at the substantive hearing that her original evidence was inaccurate, exaggerated and misleading. To pursue an appeal relying on the information already found to be false amounted to reprehensible conduct. The Appellant has made serious but wholly unsubstantiated allegations against the Respondents that were potentially harmful to their reputation. The damage was done as soon as the allegations were made. The appropriate way to address this was to make the Appellant liable for the unnecessary costs she has caused the Respondents to incur, and in the case of the Second Respondent, the very serious reputational damage to her as a professional.

[87] Even if the Appellant was not advised by her Counsel of the likely consequence if she was unsuccessful in her application, namely substantial costs being awarded against her, she was told this clearly by His Honour Justice Savage at the hearing on 20 October 2011. Justice Savage granted an adjournment by a very narrow margin and on



“a very strict timetable for [filing] further particulars,” and advised Counsel for the Appellant, at page 45 lines 19–20:

*“But he will know that his client is running the risk of a substantial cost order against her.”* (Emphasis added)

[88] At the commencement of the substantive hearing, Isaac J again warned the Appellant and her Counsel to think about the application being made and repeated Justice Savage's comments that costs were a real issue.

[89] At the time the appeal was filed, the Appellant's Counsel had been served with the Respondents submissions regarding costs before Isaac J, so she was aware that full indemnity costs were sought.

#### *Conduct of Appellant's Counsel*

[90] The Court again accepts the submissions of the Respondents as follows. At the hearing of this appeal Counsel for the Appellant agreed with the Court's comment that Mr Ka was the engineer of the application, but this did not excuse Counsel from his obligation to do his own review of the information and assessment as to its merit, and to not continue an application which could be seen as an abuse of process of the Court, once he became Counsel on the record on 20 October 2011. He chose to continue to act for the Appellant and pursue the fraud application from that date and was Counsel on the record when the “inaccurate, exaggerated and misleading” affidavit was filed, throughout the four day substantive hearing where the Appellants evidence was rebutted, and when the appeal to the Court of Appeal was filed.

[91] Where allegations of fraud are made there is an obligation on Counsel to obtain all the information which is sought by his client to justify the attack and then assess for himself whether the charges made are such as can be made justifiably. Counsel must be satisfied that there is a factual basis for fraud allegations.

[92] Counsel for the Appellant argued that there was no harm done because there had been no publicity about the application. However, Rarotonga is a small community where people take great interest in land matters. The Court documents are public records and the hearing is open for the public. It was incorrect to suggest that because there had not been specific publicity about the matter that there had been no harm to the reputation of the Respondents.

[93] Counsel had an ethical duty to the Court to:

- (a) Ensure an action which can be viewed as an abuse of process of the Court is not brought or continued;
- (b) Maintain due respect towards the Court; and
- (c) Never knowingly give to the Court incorrect factual information.

[94] As previously stated, Mr George became Counsel on the record on 20 October 2011 when he appeared on behalf of the Appellant before his Honour Justice Savage. This was prior to the Appellant completing her affidavit which is dated 2 November 2011. Certainly, Counsel had an obligation to ensure that the contents of the affidavit were accurate and provide a sufficient evidentiary basis to prove fraud. It was obvious from the errors in that affidavit that were identified through cross-examination that no such assessment was undertaken by Counsel for the Appellant. These errors referred to were apparent just from reviewing the contents. For example:

- (a) The Appellant swore in her affidavit that there were 106 signatures on the consent form represented by Power of Attorneys. There were only 27. This was one of the exaggerations by the Appellant. Mr George repeated this inaccuracy at the appeal stage before Isaac J;
- (b) The duplicates schedule prepared by the Appellant contained numerous errors and in fact contained duplications itself. The result being, as the Appellant agreed during cross-examination before Isaac J that, at least 13 of those stated as duplications in this schedule were not in fact duplicated. As was also accepted by the Appellant in cross-examination it was not known whether the remaining duplicates were included in the Deputy Registrars calculation. Mr George only referred to 8 concessions being made in the appeal, failing to take into account the further responses by his client in cross-examination; and,
- (c) At paragraph [13] of her Affidavit the Appellant swore “[t]he Second Respondent represented all the above deceptive and false information to the Court at the *hearing of her APP NO. 115/2011 on 17<sup>th</sup> May 2011 were truths*” but when asked to point to any such representations in the transcript (which she attached as an exhibit to her Affidavit) she was unable to do so, because they simply did not exist.

[95] Mr George signed and filed the Particulars of Fraud document which reiterated the allegations set out in the Affidavit. At that stage he should have recognised, that even if the information was correct, without substantiating evidence the identified acts did not amount to fraud.

[96] Mr George was Counsel for the Appellant at the substantive hearing before Isaac J and despite the very clear evidence given by the Appellant and Mr Ka, which rebutted the original affidavit evidence, Mr George proceeded to file the Application for Appeal to the Court of Appeal relying on the same unsubstantiated allegations.

[97] In his written submissions on appeal Mr George supported the above with quotes from the examination-in-chief but failed to state that the statements were rebutted during cross-examination. This was misleading to the Court at best, and amounted to a breach of ethical conduct in that he knowingly gave to the Court of Appeal incorrect factual information.

[98] Mr George was Counsel for the Appellant at the time the s 390A application was filed and signed the Application to Discontinue the proceedings on 17 October 2012. Despite questions put to the witnesses directly as to why the s 390A alternative route had not been pursued, Counsel did not alert the Respondents or the Court that an application had actually been filed. Counsel for the Respondents discovered this when served with the Notice to Discontinue and the matter was raised in the written submissions of the Respondents filed for the appeal. Although Counsel received these submissions prior to him filing his submissions in this Court, again Mr George neglected to mention this matter.

[99] Counsel for the Appellant stated in his written submissions in this Court that the appeal was not against the Second Respondent and said in his submissions at the hearing of the appeal that he had indicated this as early as his closing submissions at the substantive hearing and that he personally had advised the Second Respondent of this. This was untrue. As was shown by reference to the transcript of the closing submissions, Counsel for the Appellant did not withdraw or discontinue the claim against the Second Respondent. In fact, he attempted to enlarge the allegations to be made against the Second Respondent's entire firm. To make such false statements to the Court was more than misleading. It was a breach of conduct as an officer of the Court. His statements against other Counsel were also contrary to the duty to treat his professional colleagues with the utmost courtesy and fairness."

*Appellant's Submissions concerning Costs Claim against Appellant*

[100] By way of introduction, Counsel for the Appellant stated in the Appellant's written submissions on costs that "a number of events and factors have emerged from this appeal which are startling, unexpected, and of grave concern. That to use one's legal rights to file an appeal can bring upon the Appellant and Counsel such heavy punitive costs". The Appellant then proceeded to make the following submissions.

- "1. Mrs. Annie Rangipiri George was an objector before a J.P. Hearing before Justice of the Peace Mrs. Rima David on 17 May 2011.
2. Mrs. George alleged that Mrs. Browne, after her Application for occupation rights for her three clients were declined previously by Mr. Justice Hingston in 2007, had reapplied, using the same consent documents again, but this time before Justice of the Peace Mrs Rima David, as Mrs. Browne knew, having acted for Mrs. David in land matters previously, she will favour her.
3. The Appellant alleged that at the hearing, Justice of the Peace David stopped her from objecting and told her to shut up.
4. This is the basis of the grievances the Appellant had for bringing her action against the three Respondents, which included Mrs. Browne as the Second Respondent.
5. The Appellant and her Land Agent Advisor Mr. Joseph Ka believed that all parties had acted in a fraudulent manner, supported by the use of dead peoples names on consent documents etc.
6. During the appeal hearing it was suggested that a Justice of the Peace Appeal should have been filed, despite the Appellant running out of time, instead of using the fraud provision under section 391 of the Cook Islands Act 1915.
7. This appears to support the contention that this action was not vexatious but may have been filed under the wrong issue at law.
8. It is submitted that this appeal was filed in good faith as the Appellant was legally entitled to do, but followed the wrong procedures in law.
9. It is submitted that Cook Islanders should be encouraged to use their Courts as of right and not be locked out by prohibitive and exorbitant Court costs."

[101] These submissions are wholly unpersuasive. First, if in truth the heart of Mrs George's complaint was the past or likely future behaviour of Mrs David JP, the proper course would have been to ask for the matter to be heard before another JP. It is likely that such a request would have been granted. However, any perceived inherent partiality on the part of Mrs David cannot possibly justify bringing a wholly meritless fraud Application. Secondly, the fact that a timely appeal from the decision of the Justice of Appeal was not taken nor leave sought to file an appeal out of time cannot justify the

initiation of the fraud Application. Thirdly, the suggestion that Court costs should not be used as a means of discouraging Cook Islanders from access to the Courts was true as far as it goes, but of course there must be an allowance for the use of costs orders as a disincentive to bringing proceedings which are an abuse of process.

*Appellant's Submissions concerning Costs Claim against Counsel*

[102] Passing to the submissions concerning the position of Counsel:

"Counsel's position:

1. Prior to this appeal, I was totally unaware of the heavy burden on Counsel to act decisively against domineering clients.
2. I proceeded with the complaint against Mrs Browne in the Land Court halfheartedly and never pushed for a remedy or punishment.
3. Mrs Browne was not the subject of this Appeal, she was not on the intituling in the Case on Appeal and I had mentioned that she was not part of the appeal in my submissions.
4. I formally withdrew the actions against Mrs Browne during the Appeal hearing on 28 November 2012.

Award of Costs:

1. This is ground breaking precedent if the Court of Appeal is allowing this Application to include counsel to pay for the costs of this Appeal.
2. The failure of this Appeal is related to procedural issues such as—
  - a) No J.P. Appeal being filed.
  - b) No production of the Court Clerk who verified the Consent documents which were successfully used to obtain the Occupation Right Orders.
  - c) No witnesses were called to link the Respondents to their alleged fraudulent acts.
3. The Right to Appeal was correctly used.
4. There were extraordinary facts which included dead people providing consent and equitable landowners also giving consent when in other land cases they are disqualified.
5. To say that this appeal was frivolous and vexatious is not true, there were abuses in the obtaining of the consents."

[103] There are similar flaws in the submissions. First, whether a client be of a domineering disposition or otherwise, is irrelevant to the overarching duty of solicitors

and counsel to examine carefully materials said to justify the commencement of fraud proceedings and not to participate or advance those proceedings if no sufficient materials are found to justify pursuing the allegations. Secondly, it is not a question whether the case against Mrs Browne was pursued strongly: the issue is whether it should have been launched at all. Thirdly, as to the suggestion that Mrs Browne was not the subject of the appeal, that is a misstatement of fact. First, there is no doubt that the appeal was launched with the Second Respondent as a party. Secondly, the transcript of the closing submissions in the fraud proceeding shows that Counsel for the Appellant did not withdraw or discontinue the claim against the Second Respondent. In fact, he attempted before Isaac J to enlarge the allegations so that they were made against the Second Respondent's entire firm. As to the situation before this Court, it was only during the appeal hearing on 28 November 2012 that Mr George formally withdrew the allegations against Mrs Browne.

*Conclusion as to Indemnity Costs — Quantum of Costs — Who should pay the Costs Award?*

[104] This Court finds it is sufficient to affirm that part of Isaac J's decision on page 11, paragraph [59]:

“In this case Counsel for the Applicant was cautioned prior to the proceeding that the burden of proof in such case was high. **Nevertheless, Counsel proceeded with a case which in my view was weak, lacking in evidence and many steps removed from showing actual fraud.**” (Emphasis added)

[105] In our view the two criteria mentioned in the *Binnie* case have been established i.e., the appeal to this Court was totally lacking in merit and its stance was pursued in a way that can be described as reprehensible and in breach of all the established principles concerning the duties of counsel in relation to allegations of fraud. In summary, there were never any facts which justified advancing the allegations of fraud. Notwithstanding clear and explicit warnings from two very experienced judges of the Land Division about the impropriety and danger of proceeding with those allegations, they were pursued vigorously both before Isaac J and in this Court. The proceedings before Isaac J were misconceived and came close to amounting to an abuse of process but perhaps did not quite meet that threshold. However, the pursuit of this hopeless appeal after explicit warning from the judges undoubtedly did constitute an abuse of process.



[106] The only remaining question, therefore, is how the discretion on indemnity costs should be exercised and, in particular, which of the Appellant or her counsel should meet the costs award, and the amount to be awarded.

[107] As to a possible costs award against the Appellant, Counsel for the Appellant submitted that, in reaching its decision on costs, the Court should not punish for her Counsel's carelessness and imprudence.

[108] It is highly doubtful whether the Appellant herself would have understood the principles of law relating to allegations of fraud. However, she would have heard the warnings given by the two Land Division judges about the dangers of proceeding. There can be no doubt that a senior practitioner of the experience of Mr George must have known that he was in a dangerous position in view of the warnings of the judges. He elected to pursue the fraud allegations on appeal without any new evidence which would justify their pursuit in a case where, one judge in a preliminary way, and one judge substantively, found that there was no justification for the fraud allegations. The Court finds that, in the circumstances, it is appropriate that Counsel for the Appellant should bear 50 per cent of an indemnity costs award with the Appellant to bear the other 50 per cent.

#### *Quantum of Costs*

[109] We find that the costs claimed by the First Respondents amounting to \$6,287.50 and covering the invoices of Browne Harvey acting from 18 May 2012 until the lodging of submissions on costs are reasonable both as to the time involved and the hourly rate of \$200 per hour.

[110] As to the Second Respondent, it was explained that as the Second Respondent is a lawyer in the Respondent's firm, no invoice for costs was rendered for the High Court proceedings. However, the work was undertaken by Counsel and had it been invoiced it would have been in the amount of \$2,000.00. Also, the Second Respondent herself was penalised by the proceedings in that she had to take time out to defend these allegations, (therefore suffering a loss of opportunity for other fee paying work at \$2,000.00 per day for 4 days of the substantive hearing and a half-day at the appeal) which were harmful to her reputation as a Solicitor and a professional generally.

[111] We do not consider it appropriate to award the sum claimed by Mrs Browne for her lost time, etc and it is a matter for Isaac J as to what costs, if any, he awards in relation to the Lower Court proceedings. The only amounts that she can recover are



those incurred by her firm in defending her in respect of this appeal only. However, the additional arguments which had to be made for her in the Court of Appeal were not extensive. We allow \$2000 in that regard.

[112] Counsel said the Court should take into account the financial situation of the Appellant and added that he was unable personally to pay any costs of the magnitude suggested by Respondents. The Court has not been provided with any details of counsel's current financial position or that of the Appellant. In any event, ability to pay is not an element which plays a part in the making of costs awards.

[113] Taking into account all of the relevant circumstances, the Court finds that it is appropriate that the Appellant and Counsel for the Appellant each be ordered to pay to the First Respondents the sum of \$3,143.75 (i.e. 50 per cent of \$6,287.50) and to the Second Respondent \$1,000.00 (i.e. 50 per cent of \$2,000.00).

#### *Reference to the Chief Justice*

[114] As explained earlier in this judgment, there is a disciplinary component involved where counsel pursues abusively allegations of fraud without foundation. We hereby refer this judgment to the Chief Justice for him to investigate and decide what sanctions, if any, are appropriate in relation to Mr George for his conduct in this case.

#### *Land Division Practice Note*

[115] While we confirm that the orders made by JP David were soundly based and procedurally in conformity with the law of the Cook Islands, we consider that it may be possible for the Land Division to formulate a more comprehensive note as to the procedures to be followed in providing evidence to the Court in support of occupation order applications. The present practice note of 12 December 2007 in our view needs some expansion and tightening up. For example, paragraph [2] says that applications for occupation licences "must be accompanied by a clear and unambiguous statement as to how many owners consent/approve". It seems to us that the application should indicate also the capacity in which a signatory is giving his consent i.e., for himself or on behalf of another owner and if so, which owner or whether he is signing by virtue of a power of attorney and if so, from whom the power of attorney derives and the date of the power of attorney.

## Formal Orders

[116] The Court confirms its oral pronouncement at the end of the hearing that the Appeal is dismissed.

[117] The Appellant shall forthwith pay to the First Respondent for costs the sum of \$3,143.75 and to the Second Respondent the sum of \$1,000.00. Counsel for the Appellant, Mr Norman George shall also forthwith pay to the First Respondent for costs the sum of \$3,143.75 and to the Second Respondent the sum of \$1,000.00.

[118] This judgment and the accompanying file are to be forwarded to the Chief Justice so that he may consider what disciplinary action, if any, is appropriate under the Law Practitioners' Act 1993–1994.

[119] The Registrar shall provide a copy of this judgment to the President of the Law Society who is directed to distribute a copy of the judgment, or a summary thereof, to all registered members of the Cook Islands Bar.



Sir Ian Barker JA  
President



David Williams JA



Barry Paterson J