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

OA: 5/2000

IN THE MATTER	of the Declaratory Judgments Act 1945
A N D	
IN THE MATTER	of a Debenture and a Deed of Mortgage both dated 19 April 1999 (the "Securities") made between Crown Beach Executive Villas Limited (In Receivership) ("Crown Beach") and Rondo W. Perkins, Julie Ann Perkins and Eloise Hurley
BETWEEN	**RONDO W. PERKINS** and **JULIE ANN PERKINS** of Idaho, United States of America, Company Directors **Applicants**
A N D	**ELOISE HURLEY** of Salt Lake City, Utah, United States of America, Auditor **Respondent**

JUDGMENT OF DAVID WILLIAMS J AS TO COSTS

Date of Judgment: 13 September 2004

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Background

[1] This case involved a dispute between the Applicants and the Respondent, both shareholders in Crown Beach Executive Villas Limited ("Crown Beach"), regarding two key issues; first, the correct ranking priority of the Trustees Securities and the Perkins/Hurley Securities over Crown Beach, and second whether the Respondent's entitlement under the Perkins/Hurley Securities was limited to a proportion of her contribution under the Securities or included, as the Respondent claimed, monies for accounting work done for Crown Beach, management fees during her period of management, and various disbursements and legal fees.

[2] On 19 May 2000 the Applicants sought, *inter alia* declarations:

a) determining what priority was to be accorded the Securities granted by Crown Beach;

b) that the loan made by the Respondent to Crown Beach was limited to $35,025.41; and

c) that if all monies due and owing under the Securities were paid, then nothing more was due to the Respondent as she had already received payments in excess of her advance.

[3] Notice that a hearing was to take place on 7 April 2003 in Auckland was duly served on the Respondent but Ms Hurley did not appear at the hearing. At the hearing on 7 April 2003, after hearing counsel for the Applicants (Mr Anthony M. Manarangi), evidence from Mr Peter J. Brannigan (a chartered accountant called by the Applicants), and Mr Rondo W. Perkins who, having been sworn, produced a signed brief of evidence, the Court reserved its judgment. In the reserved judgment of this Court delivered the next day on 8 April 2003, the Court found in favour of the Applicants and ruled as follows:

"(1) That the Debenture and Mortgage both dated 17 September 199 (the Kotaa Trustee Securities) have priority over the Debenture and Mortgage both dated 19 April 1999 (the Perkins/Hurley Securities).

(2) That the Respondent has received payment in excess of her entitlement and therefore is not entitled to a payment out of monies paid to Court.

(3) That the Registrar be directed to release the $137,000 paid into Court together with any accrued interest to the Applicants or their solicitor, Mr A.M. Manarangi.

(4) The Applicants are entitled to costs. A memorandum is to be submitted within 14 days as to the appropriate quantum of those costs."

[4] Due to other pressing arrangements which had arisen, on 14 May 2003 Mr Manarangi sought an extension of 14 days within which to submit the Applicants' memorandum on costs, which was granted on 16 May 2003. On 13 June 2003 Mr Manarangi sought a further extension of 14 days from 16 June 2003 for filing the memorandum. The Court's attention was drawn to Rule 130(2) of the Code of Civil Procedure of the High Court 1981 which allowed an order enlarging time to be granted notwithstanding that the application was not made until the expiration of time allocated. The Court granted the extension as sought on 16 June 2003. The memorandum on costs was filed on 3 July 2003. No memorandum as to the appropriate quantum of costs was filed on behalf of the Respondent.

[5] The Court subsequently sought a short supplementary memorandum from Mr Manarangi outlining the relevant rules, provisions and legal authorities applicable in the High Court of the Cook Islands on costs. This memorandum was filed on 23 March 2004 but was not received by the Court until 2 September 2004. The Court accepts that the delay was not caused by counsel. It appears that due to administrative oversight the submissions were not forwarded to me until September 2004.

Applicable Statutory Provisions

[6] With respect to the relevant rules and statutory provisions regarding costs, Mr Manarangi's supplementary memorandum directed the Court to s 92 of the Judicature Act 1980-81, Rule 300(1) of the Code of Civil Procedure of the High Court, and the scale of solicitor's costs as set out in the High Court Fees Costs and Allowances Regulations 1997. Section 92 of the Judicature Act 1980-81 provides:

> "92. Costs – Subject to this Act and to the provisions of the Crimes Act 1969, the High Court shall have power to make such order as it thinks just for the payment of the costs of any proceedings by or to any party thereto. Such costs shall be in the discretion of the Court, and may, if the Court thinks fit, be ordered to be charged upon or paid out of any fund or estate before the Court."

[7] Rule 300(1) of the Code of Civil Procedure of the High Court provides:

> "300. Costs – (1) Subject to the provisions of these rules, the costs of any proceedings shall be paid by or apportioned between the parties in such manner as the Court sees fit; and in default of any special directing such costs shall abide the event of the proceedings."

[8] The High Court Fees Costs and Allowances Regulations 1997 provide for a scale of solicitor's costs. The Regulations relevantly provide for costs where the claim is for a sum of money in excess of $20,000 as follows:

"4.1	Preparing statement of claim	$100.00
4.2	Appearing on undefended hearing	
	where evidence is adduced	$ 40.00"

[9] Mr Peter Brannigan, a chartered accountant who had advised the Applicants, and who had given extensive evidence at the hearing, charged $11,812.50 for his services in relation to the hearing. It is therefore necessary to add to this list that the Fifth Schedule of the

Regulations provides, in respect of scale of payment to witnesses and interpreters:

> "C ... Any other allowances and expenses shall be such as the Court or Registrar thinks just and reasonable."

Applicable Legal Principles

[10] The underlying basis for awarding costs in the Cook Islands is that which applied in the New Zealand High Court prior to the new regime introduced in New Zealand on 1 January 2000. The basic principles are that costs are in the discretion of the Court; the party who fails with respect to the proceeding should pay the costs of the party who succeeds; they are generally awarded on a party and party basis and rarely on an indemnity basis. Therefore a successful party is, in the normal course, entitled to a reasonable contribution of actual and reasonable costs incurred.

[11] Mr Manarangi referred the Court to its judgments as to interest and costs *Messine v Mitchell* [11 February 2004] ("*Messine*") and *Farnsworth v Perkins* [9 August 1999] ("*Farnsworth*") and submitted that a similar approach should be taken in the present case. In *Farnswoth* the Cook Islands Court of Appeal, in dealing with an appeal against costs, considered that the appropriate approach was that taken by the New Zealand High Court in *Morton v Douglas Homes Ltd (No 2)* [1984] 2 NZLR 620 ("*Morton*"), where it was held that the purpose of an award of party and party costs was to impose on the successful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party. With reference to the similar scale of costs then included in the New Zealand Code of Civil Procedure, the High Court held that the scale was a legislative direction as to what was to be regarded as a reasonable contribution in the ordinary kind of case. If, in the circumstances of a particular case, compliance with that direction in the scale would not achieve the purpose of an award of costs, the Court in its discretion was

entitled to award more. It was further held in *Morton* that the nature and course of the proceedings would always be the dominant consideration but there was room for recognising the amount of solicitor and client costs reasonably incurred in the particular case.

[12] In *Farnsworth* the appellant elected a non-suit one day before trial. The High Court awarded costs of $40,000 to the respondents out of an actual total incurred of $88,732.58. The Court of Appeal expressly recognised that Hillyer J, in the lower court, was "entitled to award for costs whatever amount seemed just to him in all the circumstances of the case" but, after consideration of the nature and course of the High Court proceeding and all other relevant factors, concluded that "an award of this dimension went beyond the acceptable limits of the discretion for a matter of this nature" and reduced the award to $20,000 inclusive of disbursements.

[13] Mr Manarangi noted that a similar approach to *Fansworth* was recently taken by the High Court in *Messine.* In *Messine* the Court cited *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143 ("*Holden*") where it was held that a successful party was entitled to a reasonable contribution to costs actually and reasonably incurred unless there were good reasons to the contrary. Notably McGechan J emphasised that the public interest in allocating scare Court time required disincentives against any parties wasting time by unwarranted or inefficient practice within proceedings. The scale was described as a "starting point" against which other relevant factors such as the length of the hearing, amount involved, importance to the parties and generally, legal and factual complexity, and time required for preparation should be considered. The Court further noted that disbursements are generally recoverable.

Submissions in Support of Costs

[14] In his memorandum dated 3 July 2003 Mr Manarangi submitted that the award should be in the nature of indemnity costs amounting to a total of

$33,258.54, comprising of Applicants' airfares, legal costs, accommodation and disbursements. Essentially, the justification for the award was that the Respondent's conduct in opposing the application had put the Applicants to additional cost and expense that they were entitled to recover. This argument was supported by three grounds: the Respondent's procedural conduct, the Respondent's conduct in relation to the substantive hearing, and the lack of merit in the Respondent's defence. These grounds are summarised as follows.

First Ground: Respondent's Procedural Conduct

[15] After setting out the relevant procedural history, Mr Manarangi described how the Respondent's procedural conduct had resulted in additional cost and delay:

> "The Respondent's conduct of her opposition to this proceeding has been less than diligent. The Applicants have been put to unnecessary expense on several occasions as a result. Two applications to bar the Respondent from defending were filed as a result of failure to comply with the Court's orders and directions. The fixture of 29 November 2002 was vacated partially as a result of the Respondent's submission that discovery and inspection had not been attended to and that there were further interlocutory matters that had yet to be made all of which should have been completed by 20 April 2001. The interlocutory applications foreshadowed did not materialise and neither did inspection by the Respondent take place. At the very least the Respondent might have notified with Court of her address and contact details by her memorandum of 20 August 2002. This alone would have enabled the Applicants, and Counsel to notify the Respondent of developments and the Court to determine whether she had received proper notice."

Second Ground: Respondent's Conduct in Relation to Substantive Hearing

[16] Under this ground it was submitted that the Respondent knew for some time that she would not offer a defence in person yet chose a course of conduct that caused maximum inconvenience for the Applicants. In particular, it was submitted that up to the time of the substantive hearing on 7 April 2003 there was no certainty that the Respondent would not

appear in person to defend that Applicants' claim. Mr Manarangi and the Applicants therefore delayed confirmation of their airline travel until the "last minute" and Mr Manarangi delayed final preparatory work until 2 April 2003, which was, in the absence of indication to the contrary, undertaken on the basis that a full defended hearing would take place. The Court notes that it was reasonable for Mr Brannigan, the Applicants and Mr Manarangi to come prepared for a defended hearing because on 25 May 2001 the Respondent had filed an affidavit, which indicated that she was opposed to the application.

[17] Mr Manarangi further submitted that, had the Respondent confessed the Applicants' claim, or alternatively indicated that nothing further than the affidavit and the submission of 20 August 2002 would be offered by way of defence, preparatory work would have been limited to formal proof and conceivably that proof could have been presented to the Court by affidavit.

Third Ground: No Merit in Respondent's Defence

[18] With respect to the two issues in dispute (outlined at paragraph 1 of this judgment), it was submitted that, in relation to the first issue, if the Respondent was to receive payment out of monies secured by the Perkins/Hurley Securities it was necessary for her to demonstrate that either of those securities had priority or, if they did not have priority, that there was a money surplus to the receivership sufficient to provide for a payment under the Perkins/Hurley Securities after payment of all money due under the Trustees Securities. Priority in favour of the Perkins/Hurley Securities was highly unlikely as a result of the debt to equity ratio having been exceeded and a surplus was either also highly unlikely (given the amount due under the Trustee Securities) or if there was to be a surplus, the amount was minimal such that the Respondent's proportionate entitlement was negligible.

[19] With regard to the second issue, it was submitted that even if the Respondent could have demonstrated that the Perkins/Hurley Securities had priority, the second issue had to be answered in the affirmative because of the payments received from the ANZ Bank account. As this Court previously observed, the Respondent chose not to offer any evidence that would explain the unusual circumstances in which these payments were made or that they were justified reimbursements for supplies and therefore other than what the Respondent claimed was due to her under the Perkins/Hurley securities.

[20] On the basis of these submissions, the Applicants claimed the following costs:

"Airfares		
Perkins(Mr and Mrs)	:US$3,881.56 @.5555	$ 6,987.50
Fees		
Counsel		$ 11,250.00
Mr Brannigan		$ 11,812.50
Accommodation		
Perkins	:3 April – 11 April 2003 100 x 7 days	$700.00
Disbursements		
As per Counsel's fees invoice		$2,508.54
TOTAL		**$33,258.54"**

Result

[21] Travelling and accommodation expenses were incurred by Mr and Mrs Perkins to fly from the United States to attend the hearing, and for Mr Perkins to give evidence at the hearing. The majority of Mr Manarangi's disbursements comprised of his airfare ($1,800.00) to fly to Auckland to attend the hearing, with the remainder comprising of disbursements associated with and arising out of the hearing. I consider that these costs are reasonable and hold that the Applicants are entitled to recover the air fares claimed of $6,987.50, accommodation of $700.00 and the disbursements of $2,508.54, ie $10,196.04.

[22] This leaves the question of whether full indemnity costs should be awarded, ie the full amount of actual fees billed to the Applicants by Counsel and Mr Brannigan totalling $23,062.50. This must be decided on the basis of the applicable legal principles and whether the application of the scale would achieve the true purpose of an award of costs. I do not think that full indemnity would be reasonable or appropriate especially since the defences raised could not be seen as hopelessly untenable or unarguable. However, the Court accepts the submissions of the Applicants that something above the scale is justified in the present case. I consider that the applicants have made out a case for costs in excess of the scale but not to a full indemnity. While the purpose of a costs award is not to punish the unsuccessful party, in terms of the *Holden* case, the Respondent's inefficient conduct within these proceedings has generated additional legal expenses a significant proportion of which the Applicants are entitled to recover. In all the circumstances, the Applicants will be awarded two-thirds of the amount of actual fees incurred, namely $15,375. Thus the total amount of costs to be awarded to the Applicants is $25,571.04.

[23] For all the foregoing reasons I enter judgment in favour of the Applicants for $25,517.04.

SIGNED at Auckland on Monday, the 13th of September 2004 at 9.00 am.

David Williams J