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

PLAINT No. 1/99

BETWEEN	**A STEPHEN FARNSWORTH and BRENDA FARNSWORTH**
	Plaintiffs
AND	**RONDO W PERKINS, JULIE ANN PERKINS, ELOISE HURLEY and ZANDRA PERKINS**
	First Defendants
AND	**CROWN BEACH EXECUTIVE VILLAS LIMITED**
	Second Defendant

Hearing:	By memoranda
Counsel:	*R J Katz QC* for Plaintiffs *G B Chapman* and *Mrs A J M Weir* for First Defendants
Judgment:	14 May 1999

JUDGMENT OF P G HILLYER J AS TO COSTS

This is an application by the first defendants for costs against the plaintiffs. The plaintiffs were sole shareholders and directors of the second defendant which owned and managed a property known as Crown Beach Resort at Arorangi, Rarotonga. For the purpose of developing the assets of the second defendant the share capital of the second defendant was increased and further shareholders acquired a majority holding of 74% of the shares. The plaintiffs say that they had the right to purchase the shares held by the further shareholders if they were to be sold, on the same terms.

The second defendant started to have financial problems, and with the agreement of the plaintiff, 64% of the shares were sold to the first defendants. The plaintiffs say that the first-named plaintiff was to retain the right to manage and control the resort and that the first defendant agreed to this. But the first defendants deny this and were proposing to take over the management of the resort.

In about the beginning of January this year, the writ was issued seeking declarations as to the right of the plaintiffs and, in the alternative, damages of the order of $173,660. Both parties agreed that the matter was one of considerable urgency because the bank used by the second defendant was owed substantial sums and was preparing to put the company into liquidation. The statement of defence and the counter-claim was filed on 9 March 1999 and on 12 March 1999 a telephone conference was held before the Chief Justice, the Honourable Sir Peter Quilliam. With the agreement of all parties, a fixture was made for hearing the matter on 12-15 April 1999. The Chief Justice went to considerable trouble to make orders to hold the situation until a hearing could be held. He asked me to take the hearing and I agreed. Arrangements were made to obtain a courtroom in Auckland and the necessary staff. Orders were made regarding discovery and other interlocutory matters.

On Monday, 15 March 1999, however, I had a telephone conference with Mr Chapman, for the first defendants, and Mr Katz QC, for the plaintiffs. Mr Katz QC said he had an important application for a judicial review in the

shares. He produced a copy of a letter from Mr Arnold, who was Mr Katz QC's instructing solicitor, to Mr Manarangi, solicitor for the first defendants. That letter was dated 10 February 1999 and read in part:

> "I can indicate that it is not intended for now to amend the pleadings already filed. Rather, there will be added a further and additional cause of action relating to an alteration in the terms and conditions of the sale of the shares from that as represented to the Farnsworths when it was sought to have them waive their rights of first refusal afforded under the Article. Two specific allegations are made:
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> (a) That the price paid by the Perkins as the ongoing shareholders was considerably less than the figure represented to the Farnsworths and provided for in the Agreement for Sale and Purchase to which the waiver document refers, and
>
> (b) That the sale was not as represented to the Farnsworths and provided for in that agreement to be settled on the basis of an immediate cash payment but rather on the basis of deferred payment over a period of some months."

That letter was dated well before the fixture was made in the telephone conference of 12 March 1999 by His Honour the Chief Justice.

I came to the conclusion that there was no justification for an adjournment in all the circumstances. There may have been a further and additional cause of action as stated by Mr Arnold, but I did not decide that. I refused the application for adjournment and refused leave to amend the statement of claim. I made an order for discovery of documents relating to the sale of shares by the vendors.

That was not the end of the matter however. On 8 April 1999 there was an application by means of a telephone conference before the Chief Justice for leave to appeal against my decision to refuse an adjournment. That, of course, would have had the effect of granting an adjournment because an appeal could not possibly have come before the Court of Appeal before 12 April 1999. His Honour refused an adjournment and noted the further cause of action could come before the Court in due course if the parties thought fit.

When the matter came before me on 12 April 1999 Mr Katz QC, on behalf of the plaintiffs, elected a non suit on all causes of action and Mr Chapman and Mrs Weir elected non suit on the second counter-claim. I made orders as to the position of the first defendants and, by agreement, discharged the orders made as to the interim management of Crown Beach Resort. I made orders as to the filing of memoranda as to costs.

On 21 April 1999 I received an application from the first defendants for an order as to documents held by Clarkes P.C., who were formerly the company solicitors, and later, on 26 April 1999, a memorandum signed on behalf of Clarkes P.C., by Mr Arnold and Mr Manarangi, agreeing to the documents being made available. I made orders accordingly.

On 21 April 1999 I also received a lengthy memorandum on behalf of the first defendants as to costs. It set out that the costs and disbursements relating to the litigation paid or payable to the attorneys in the United States amounted to $NZ15,114.11, to the solicitors in the Cook Islands $NZ22,180.76, and to the solicitors in New Zealand $51,438.71, a total of $NZ88,732.58. It was submitted an order representing a reasonable contribution to the first defendants' costs would be $65,000. Copies of the accounts setting out full details of the work done were supplied.

In reply I received an equally lengthy memorandum from Mr Katz QC on behalf of the plaintiffs. He came to the conclusion that a sum not exceeding $5,000 would reflect the submissions he made and be a maximum contribution.

I have given the submissions by both counsel careful consideration. I appreciate that costs should not be punitive but there should be a reasonable contribution towards expenses to which the first defendants have been put. In all the circumstances, I consider an amount of $40,000 would be a minimum which should be awarded and would be fair to both parties. This would include the costs incurred in the applications before the Chief Justice, and disbursements.

There will therefore be judgment accordingly against the plaintiffs in the total sum of $40,000 for costs and disbursements.

P G Hillyer J