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

IN THE MATTER	of Section 409B of the Cook Islands Act 1915 (as inserted by Section 2 of the Cook Islands Amendment Act 1978-79)
AND	
IN THE MATTER	of an Application to Determine the Capital value of the land the subject of a Deed of Lease dated 17 September 1952 in respect of the land known as **TE TAMANU SECTION 100A AVARUA**
BETWEEN	**PHILIP NICHOLAS**
	Applicant
AND	**APEX AGENCIES LIMITED**
	Respondent

JUDGMENT OF THE COURT AS TO COSTS

Introduction

[1] In my Judgment of 19 March 2012 I signalled that *"on the face of it"* the respondent was entitled to costs. I invited the parties to confer and said that I would fix costs if they could not agree.

[2] The parties have conferred but have not been able to agree and I must now fix costs.

[3] I used the expression *"on the face of it"* to reflect some provisional views:

[a] the applicant had substantially failed;

[b] there was significance in my conclusion that the lease expired on 30 April;

[c] there may be circumstances which had not been revealed to the Court which would impact on the question of costs.

The respondent's submissions

[4] Mr Dale filed lengthy submissions dated 3 April 2012. He sought costs of $11,100 (being 20 hours at $555.00 per hour). Mr Dale specifically noted that this claim did not include the time and cost of travel to Rarotonga. I believe that is a material discount because in a significant case such as the present I think the respondent was entitled to retain senior counsel.

[5] Mr Dale emphasised the usual factors including the length of hearing, the amount at stake, the complexity of the issues, urgency and the amount of time required for preparation. He also argued that the applications were entirely misconceived, that there was an unreasonable refusal to settle and that there should be increased or indemnity costs (in which case, there would be an uplift from the figure mentioned above).

The applicant's submissions

[6] Mr Arnold joined issue with a number of the matters referred to above. He accepted, however, that there had been last minute preparation and this would have resulted in increased costs.

[7] There were a number of other issues raised by him including the determination of the capital value of the land and problems associated with that.

[8] Mr Arnold emphasised that the Court's clarification that the respondent had no right of access post 30 April was significant and was not achieved until late in the piece (if at all).

[9] He rejected the argument that there had been an unreasonable refusal to settle.

[10] He said that his client had now paid $3,000 into Court on account of costs.

The respondent's reply

[11] Mr Dale replied on 20 April in relation to a number of the points raised by Mr Arnold. He noted that, although the applicant had paid $3,000 into Court on account of costs, it was not accompanied by an offer or explanation and that the respondent had been forced to seek costs in order to achieve such clarification.

Decision

[12] The respondent prevailed in this urgent interim injunction application. Nevertheless, the Court's conclusion that the lease terminated on 30 April was a matter of some significance and, contrary to what Mr Dale says, was not clearly accepted by the respondent prior to the hearing on 19 March.

[13] Ultimately, the question of costs is a matter of judgement on balance. I do not think there is need to award costs at the level sought by Mr Dale and certainly not at the enhanced level sought by him. While there is authority that costs in the Cook Islands should not automatically be discounted (relative to New Zealand) there is a need to achieve relativity with costs otherwise awarded in the High Court of the Cook Islands.

[14] I need to bear in mind that the matters before the Court were essentially commercial even though the applicant, as representative land owner, does not fit the usual pattern of a commercial party.

[15] Mr Arnold has referred to a recent award by the Court of Appeal of costs of $5,000. As a general rule, costs at appellate levels fall within reasonably predictable bands and are not an entirely useful comparator.

[16] While I have rejected Mr Dale's claimed amount, I also think that $3,000 is too low.

[17] In my opinion, the sum of $5,000 would properly recognise the outcome of this interim injunction application and I order that the applicant pay that sum to the respondent.

Dated 26 April 2012 (NZT)

Weston CJ