

**IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND**

CA 3/2000

IN THE MATTER of Article 60(3) of the Cook Islands Constitution
Amendment Act (No.9) 1980-81.

A N D

IN THE MATTER of **CROWN BEACH EXECUTIVE VILLAS
LIMITED (In Receivership)**

BETWEEN **VAITAMANGA HOLDINGS LIMITED**

Appellant

A N D **KERRY MARK DOWNEY and MICHAEL
ROBERT CARR** as receivers of Crown Beach
Executive Villas Limited (In Receivership)

Respondents

Memorandum on Costs for Respondent: 11 August 2000
Memorandum on Costs for Appellant: 24 August 2000

Coram: Speight JA
David Williams J
Carter J

Judgment: 8 September 2000

JUDGMENT OF THE COURT ON COSTS

THE RESULT ON APPEAL

[1] In its Judgment of 24 July 2000 at paragraph 87(1) an order was made dismissing the appeal against the judgment of Smith J dated 9 June 2000. Costs were reserved. The Court has now received the written memoranda of the parties on costs.

RESPONDENT'S APPLICATION FOR COSTS

[2] The Respondents' application seeks:

1. Costs on a solicitor/client basis totalling \$27,500.00 together with disbursements of \$4,269.00 comprising:

\$2,358.00 - Judge's expenses; High Court
 \$1,116.00 - Airfare (counsel)
 \$ 250.00 - Accommodation (counsel)
 \$ 500.00 - Phone/Fax
 \$ 45.00 - Departure taxes

 \$4,269.00

Or alternatively if it is not appropriate to order solicitor/client costs a significant award of costs in the order of between \$10,000 and \$15,000 together with the above disbursements.

2. The Respondents suggest that whatever costs and disbursements are awarded they should be sourced from:
 - (i) The sum of \$5,000.00 secured by way of security.
 - (ii) \$6,050.00 approximately by way of waiving the amount due under paragraph 5(i)(e) of the lease; and
 - (iii) A further figure to make up the amount ordered.

SHOULD SOLICITOR/CLIENT COSTS BE AWARDED?

[3] The New Zealand Court of Appeal in the *Kuwait Asia Bank v National Mutual Life* [1991] 3 NZLR 457 at 460 stated that:

"In both Courts the guiding principle has been that, except where there is special reason for awarding costs on a solicitor and client basis, orders should be limited to a reasonable contribution towards the successful party's costs

on a party and party basis. This principle is represented in the prescribed scales and has been followed for many years. It reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalized by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. If a party has acted unreasonably - for instance by pursuing a wholly unmeritorious and hopeless claim or defence - a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice."

- [4] There seems to be no reason why this statement of principle should not apply to appeals to the Court of Appeal of the Cook Islands.
- [5] We have carefully examined the submissions for the Respondents but we do not find that this qualifies as one of those special cases where solicitor/client costs are appropriate. The various criticisms made by the Respondents as to the Appellant's conduct are sufficiently answered in paragraphs 6 - 9 of the Appellant's submissions.

WHAT IS A REASONABLE CONTRIBUTION TO THE RESPONDENTS' COSTS?

- [6] The Respondents suggest a figure between \$10,000 and \$15,000 plus disbursements. The Appellant suggests \$5,000 together with disbursements.

COSTS IN THE HIGH COURT

- [7] Costs in the High Court have not been fixed. The Respondents invite this Court to fix the costs. The Appellant suggests that the matter should be referred back to the High Court. This Court does not favour the latter course which will only cause further difficulty and expense to the parties.


DECISION


- [8] The Appellant is ordered to pay the sum of \$12,500 costs which order will cover the costs of the Respondent in the High Court and in this

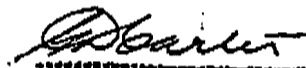
Court. The Respondent is also ordered to pay the disbursements listed above totalling \$4,269.00. The costs shall be paid as follows:

1. The sum of \$5,000 secured by way of security shall be released to the Respondents.
2. The sum of \$6,050.00 otherwise due under paragraph 5(1)(e) of the Lease shall be waived.
3. A further figure to make up the difference between \$11,050.00 and the total costs and disbursements of \$16,769.00 shall be paid to the Respondents' solicitors in the Cook Islands within 14 days.

SIGNED at Auckland this 8th day of September 2000


 Speight JA


 David Williams J


 Carter J

Solicitors: Clarke & Co, Rarotonga, Cook Islands for Appellant
 Stevenson Nelson & Mitchell, Rarotonga, Cook
 Islands for Respondents