IN THE HIGH COURT OF THE COOK ISLANDS
(LAND DIVISION)

APPLICATION NO. 254/2016

IN THE MATTER	of section 409B of the Cook Islands Act 1915
AND	
IN THE MATTER	of the land known as **AUREIKIREI PART SECTION 48B & C, KAUARE, TAKITUMU** and an application to determine current market value of land
BY	**BANK OF SOUTH PACIFIC LTD** **Applicant**

Hearing date: 18 August 2016

Appearances: Mrs T Browne for Uirangi Mataiapo on behalf of the landowners
Mr B Marshall for Bank of South Pacific Ltd

Decision: 26 September 2018

DECISION OF JUSTICE W W ISAAC AS TO COSTS

Introduction

[1] This application for costs relates to an order dated 18 August 2016 fixing the rental for the above block as at January 2016 at $603.00.

[2] The initial application to determine rental came before the Court on 9 May 2016 at which time the Court fixed the rental at $420.00 per annum as at January 2016.

[3] On 11 May 2016, the landowners filed an application to recall the judgment of 9 May 2016 on the grounds that there had been no consultation with the landowners and no opportunity was given to the landowners to consent to the rental.

[4] The recall application was granted on 17 May 2016 with reasons set out in a written decision of the same day.

Submissions of the applicant

[5] Counsel for the applicant refers to the law relating to the granting of costs, particularly to s 92 of the Judicature Act 1980-1981 and to the leading case on costs, *Morton v Douglas Holmes Ltd.*[1] Counsel also refers me to the decision *Maina Traders Ltd v Ngaoa Ranginui 1/12/2013* which cites the principle from *Tini v Cook Islands Investment Corporation.*[2] These set out the influencing factors to be considered when assessing the quantum of costs.

[6] The applicant submits the most relevant factor is the application being dealt with on 9 May 2016 without consultation with the landowners. Also relevant is that the application made by the landowners to have that order recalled was opposed by the current lessee and that following recall of the decision, the owners entered into negotiations and agreed to a rental of $603.00 per annum from 2016.

[7] Counsel submits that the landowners have incurred legal costs which could have been avoided had consultation with the owners taken place.

[8] It is also submitted that further costs were incurred when the recall application was opposed.

[9] Finally, counsel submits that the end result was that costs were actually and reasonably incurred by the landowners but would have been avoided had the lessees consulted with the landowners in accordance with the Lease Deed and consulted on the recall application.

Submissions of the lessees

[10] Counsel for the lessees does not consider that costs should be met by the lessees but rather that each party should bear their own costs.

[11] Counsel submits that there are more than 200 owners of which only 40 live in Rarotonga and it is therefore unreasonable for the lessees to negotiate with all those landowners given the majority are overseas.

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[1] *Morton v Douglas Holmes Ltd* [1984] 2 NZLR 620.

[2] *Tini v Cook Islands Investment Corporation* [2010] CKHC 90 as cited in *Maina Traders v Ngaoa Ranginui* [2013] CKHC, App 225/2011, 9 February 2013.

[12] In such circumstances, Counsel relied on the overarching jurisdiction of the Court in s 409B of the Cook Islands Act 1915 which provides that:

> **409B Land Rental Arbitration**
> Notwithstanding anything in any lease, contract or other document conferring rights in any person to land or an interest in land the Land Court may upon application by any interested party and upon sufficient cause being shown, hear, determine and fix the capital value of any land or interest in land or the current market rental of any land or interest in land.

[13] Prior to the recall application, the rental of $420.00 per annum was fixed on the basis of recommendations made by Frame Group Ltd. Frame Group Ltd provide expert valuation services.

[14] Counsel submits that the landowners did not accept this rental and proceeded with the application to recall and the lessees should not be prejudiced by the landowners' decision to apply for the recall.

[15] Counsel also disagrees that the lessees' argument lacked substance and this was not referred to in the Court decision.

[16] The lessees' decision to contest the recall application was based on the fact that the Court's initial decision to determine rental was made within the Court's jurisdiction and based on the evidence provided. As such, counsel submit their contesting the recall should not be held against the lessees.

[17] Furthermore, it submitted that the lessees have provided all the expert evidence in this case and the landowners have provided no expert evidence. Regardless, the rental agreed between the parties is higher than the expert recommendation and will benefit the landowners more over the course of the lease than payment of the counsel for the landowners' costs.

[18] Finally, counsel submits that rent reviews are largely non-contentious in that there is no successful party and therefore there is no basis for one party to pay the other's costs

Discussion

[19] I accept the relevant law set out by Counsel for the landowners and note this is not disputed by Counsel for the lessees.

[20] As set out in the case law, costs generally follow the event. Counsel for the lessees contends that normally in rent review cases there is no winner or loser and therefore costs should lie where they fall.

[21] That was not the situation in this case. The landowners sought to recall the original decision. The lessees opposed this application and made submissions against it. After considering the submissions of counsel, the Court agreed with the landowners and recalled the Judgment. The end result was that the rental was increased from $420.00 to $603.00 in the final decision.

[22] Therefore, what started as an uncontested application ended as a contested application and which contributed to the landowners' costs.

[23] The factors relevant to both the landowners and the lessees are set out by counsel.

[24] The major factor in this case which differs from many rent review applications is that the landowners sought to have the original decision determining the rental recalled. This was done on the basis that they had not been consulted, had not seen the expert evidence relating to the rental and had not agreed with the rental recommended.

[25] Whilst counsel for the lessee is correct that the Court has jurisdiction to make the original order, it cannot be overlooked that the lease agreement is between the lessees and landowners. The lease sets out that rental changes require agreement from the landowners and if this cannot be obtained then the matter is to be referred to arbitration.

[26] As stated in my recall decision, consultation with the owners was missing in the process and although this missing step was acknowledged in the lessees' case, the lessees opposed the recall application which lead to submissions being presented to the Court and the Court issuing written reasons for allowing the recall application.

[27] Only then did the lessees enter negotiation with landowners and come to an agreement.

[28] In short, if the process of consultation had been carried out from the outset and if the recall application had been unopposed, considerable time and expense would have been saved by all concerned.

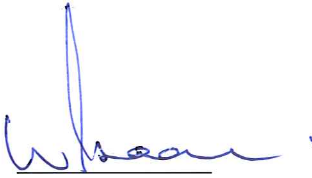
Decision

[29] For these reasons, I find that the lessee should contribute 55% of the landowners' costs, amounting to $521.61.

[30] As to the balance of costs for Counsel for the landowners, I order in terms of s 492(4) of the Cook Islands Act 1915 that $426.77 be charged against the rental monies held in Court so that the applicant landowner is not the only person contributing to these costs.

[31] A copy of this decision is to be distributed to all parties.

Dated at Wellington this 26th day of September 2018.



W W Isaac
JUSTICE