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

APPLICATION NO. 495/2019

IN THE MATTER	of the Declaratory Judgment Act 1994
AND	the land known as **MAII SECTION 12C, NGATANGIIA** and an application to determine costs
BETWEEN	**JANINE KAUVAI** Applicant
AND	**RUMOURS OF ROMANCE LTD or REFLECTIONS OF ROMANCE LTD** Respondent

Hearing date: 10 October 2019

Appearances: T Moore for the Applicant
L Rokoika for the Respondent

Decision: 11 June 2020

DECISION OF JUSTICE P J SAVAGE AS TO COSTS

Introduction

[1] On 10 October 2019, I heard an application to strike out by the respondent on an application for declarations in respect of a lease.

[2] The application to strike out was dismissed, and the substantive matter was adjourned to be heard by Isaac J in 2020.

[3] I granted leave for the applicant to make submissions as to costs. There is a reference in the minutes as to costs being at issue on two matters. There has obviously been a miscommunication as Mr Moore believes that I intended to deal with costs on the substantive matter. The substantive matter was never before me so I cannot order costs for that matter.

The reference to the second matter was the issue of discovery and inspection of financial records which, as it turned out, occupied a good deal of the hearing.

[4] The agent for the applicant invited the respondent to settle costs on 11 October 2019. After requesting more time to consider the offer, no further response was received from the respondent's counsel to settle costs.

Submissions

Applicant

[5] Agent for the applicant filed costs submissions on 20 December 2019.

[6] His bill of costs totals $11,783.25. The agent's hourly rate for the strike out application was charged at a 50% premium because he was pressed having 30 other matters before the Court in that session.

[7] The applicant submitted costs in both the substantive matter and strike out were reasonably incurred.

[8] On the substantive matter, it was submitted the respondent substantially added to the applicant's costs by failing to admit to facts, challenging the locus standi of the applicant, attacking the deponent and agent's motives in legal submissions and in affidavits, and repeatedly denying the lessors access to accounts, which was a clear breach of the terms and conditions of the lease. These matters are of course of limited relevance but will be relevant when the substantive matter is heard.

[9] The applicant submitted she had no choice but to defend the strike out application. It was submitted the respondent added to the applicant's costs by filing numerous detailed and repetitive submissions. Additionally, the strike out application was dismissed on its face. It was made without foundation and should never have been filed.

[10] The applicant noted further ways the respondent put her to additional cost which operates in favour an award of increased or indemnity costs:

(a) The respondent failed to recognise the clear wording of the terms and conditions of the deed of lease;

(b) The respondent failed to recognise clear law in respect of forfeiture;

(c) The respondent failed to recognise established practice in the Land Division of the Court; and

(d) The respondent failed to make a reasonable settlement as to costs.

[11] In regards to the quantum of costs to be awarded, the applicant submitted the respondent's conduct merits increased or indemnity costs, and asks the Court consider an award at 80% to 100% of actual costs.

Respondent

[12] Counsel for the respondent filed a memorandum in response on 7 January 2020.

[13] The primary argument made by the respondent was that the applicant filed her costs submissions out of time and therefore the costs application should not be entertained. It is to be noted that she made no submissions calling into question the quantum of costs.

[14] The respondent referred to me asking that the applicant's costs submissions be filed within one month, which would have been by 10 November 2019, but the applicant did not file until 20 December. The respondent submitted that no application was made by the applicant for an extension of time, nor was any reason supplied to explain the delay.

[15] The respondent submitted that considering the applicant's costs submission would be tantamount to the Court entertaining the abuse of its own orders. While acknowledging Courts are normally lenient on extensions of time, this is only where a satisfactory explanation is provided.

[16] In terms of rule 300(1) of the Code of Civil Procedure of the High Court 1972, costs shall be paid as the Court deems fit. In default of any special direction, costs shall abide the event of proceedings. The respondent submitted that as the direction for filing was not complied with, costs abide the event.

[17] The respondent also referred to rule 4(1) of the Code which states no practice inconsistent with the rules shall prevail in the Court.

[18] The respondent, citing the Privy Council decision of *Texan Management v Pacific Wire and Cable Co Ltd*,[1] submitted the Court's inherent jurisdiction cannot be used to circumvent rules in the Code. The applicant, therefore, cannot use the inherent jurisdiction of the Court to have their submissions considered, as this contravenes rule 300(1) of the Code.

[19] In the event the Court does not accept the above submissions, the respondent submitted that, given the applicant has breached rule 300, then rule 5 should be used, which provides:

> 5. Non-compliance with rules – Non-compliance with any of these rules shall not render void the proceedings in which the non-compliance has occurred, unless it is expressly so provided in these rules; but the proceedings may be set aside, either wholly or in part, as irregular or amended or otherwise dealt with on such terms as to costs and otherwise as the Court thinks fit.

[20] Therefore, the respondent submitted that its costs should be fixed at $8,000.00 and awarded as against the applicant. Further, that the applicant be ordered to pay the same into Court within the next 14 days. On receipt of which, the respondent should be ordered to submit its costs submission in response 30 days thereafter.

Submissions in response

[21] Mr Moore for the applicant filed submissions in response on 4 June 2020.

[22] The applicant submitted there was no prejudice to the respondent arising from the late filing and the issue of costs is not time sensitive.

[23] The applicant also submitted the case cited by the respondent, *Texan Management v Pacific Wire and Cable Co Ltd*, actually supports the applicant by reinforcing the importance of considering the overall interests of justice and that procedure must not take precedence over substance. There is nothing in the rules which prescribes when costs must be filed, rather it is a matter for the Judge as to whether or not to accept late filings.

[24] The applicant submitted it would not be in the overall interests of justice to determine no costs should be awarded simply on the basis of late filing.

---

[1] *Texan Management v Pacific Wire and Cable Co Ltd* [2009] UKPC 46 at [57].

Law

[25] The key principle is that costs usually follow the event. The general starting point is a contribution towards 66% of costs incurred by the successful party.[2]

[26] The Court can objectively assess the overall merits of the case, making an award that is reasonable and reflects the costs reasonably incurred.[3]

[27] The Court set out factors in *Maina Traders v Ngaoa Ranginui* which may influence an award of costs:[4]

a) The length of the hearing (the longer the hearing, the more it is worth, but waste of time should be penalised);

b) The amount of money involved (the greater the amount, the greater the responsibility, and the fee warranted);

c) The importance of the issues, in a monetary or a non-monetary sense, to either the parties or generally (the greater the importance, the greater the demand for skill and care, and a commensurate fee);

d) The legal and factual complexity (the more intricate and difficult the case, the greater the fee);

e) The amount of time required for effective preparation;

f) Whether argument(s) lacking substance (but not necessarily frivolous or vexatious) was/were advanced;

g) Abuse of the process of the Court;

h) Any failure to comply with the rules, or an order or direction of the Court (to the extent such non-compliance has impeded progress);

i) Unreasonable or obdurate refusal to settle, so far as known to the Court;

---

[2] *Tuake v Ngate – Akoa 65, Arorangi* (2014) at [29] citing *Glaister v Amalgamated Diaries Ltd* CA99/03, 1 March 2004 at [9] and [14].
[3] At [30].
[4] *Maina Traders v Ngaoa Ranginui* (2013) CKHC, App 225/2011, 9 February 2013 as cited in *Tavioni v Cook Islands Christian Church Inc* [2018] CKLC 2; Application 196.2014 (26 September 2018) at [19].

j) Unrealistic attitudes, or inadequate payments into Court;

k) Technical or unmeritorious points;

l) The degree of success achieved by the parties (a party may succeed on only one of a number of causes of action, or succeed but for significantly reduced relief. Success only in part frequently is recognised by significant reduction in costs awarded);

m) Whether the hearing was lengthened or shortened by the conduct of either party.

Discussion

[28] I should say at the beginning that I do not accept that where a timetabling direction is given and not met that the Court cannot then accept documents filed late and proceed to make orders.

[29] I do not accept that rule 300 has any relevance to the issue before me and it has been misread.

[30] The respondent was unsuccessful in the interlocutory proceedings before me and the usual rules apply. I have no intention of awarding costs against the applicant in favour of the respondent.

[31] I repeat that I am dealing with the issues decided before me at the interlocutory stage and not in relation to the substantive proceedings. Mr Moore's costs relate to both the interlocutory and substantive proceedings and I discount his bill in that regard by 50%. He further quite frankly advised his bill was charged at a 50% premium because of other work and commitments before the Court. I see no reason why the respondent should pay the extra but in fixing my award I accept there was a degree of urgency and complexity. The 50% premium means I should make a further deduction of one third.

[32] The issue is of great importance for both parties and was complicated. The respondent's attitude was unhelpful and unrealistic and the hearing was lengthened and the applicant was put to extra time and trouble by the respondent's reluctance to accept that the wording in the lease meant exactly what it said. The documents the respondent filed were lengthy, inexact and somewhat off the point.

[33] Having made the deductions that I have made, the bill payable by the applicant for the purposes of this decision is reduced to $3,927.

[34] In view of the complexity and other matters I have referred to, I am of the view that an award at 80% is appropriate and I order that the respondent pay the sum of $3,140 to the applicant.

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

Dated at Rotorua this 11th day of June 2020.

_____

P J Savage
JUSTICE