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

Application Nos: 336/2010 & 373/2010

UNDER	Section 409B of the Cook Islands Act 1915
IN THE MATTER	of **MATOTEARE AND AREPORIA SECTION 6E, NGATANGIIA** (the Land)
AND **IN THE MATTER**	of an Application by **PHILLIP NICHOLAS** to determine the capital value of the Land (No. 336/2010) **Applicant**
AND **IN THE MATTER**	of an Application by **MARIA NICHOLAS** to determine the capital value of the Land (No. 373/2010) **Applicant**

Date: 24 March 2022 (NZT)

JUDGMENT OF JUSTICE C T COXHEAD AS TO COSTS

Introduction

[1] This decision for costs follows two 2010 applications, one filed by Phillip Nicholas and the other filed by Maria Nicholas (also known as Maria Henry or Maria Napa). Both applications were to determine capital value in terms of a lease so rental could be determined.

[2] At the hearing on 4 November 2021, I was informed that the capital value had been agreed by the parties. I made an order with regards to the capital value. To avoid doubt,

as there had been some confusion regarding previous orders, I dismissed two related injunction applications. I also made directions as to costs, by providing parties the opportunity to file submissions.

Background

[3] The two applications that were before the Court were both filed in 2010. These were application 336/2010 filed by Phillip Nicholas on behalf of himself and others and application 373/2010 filed by Maria Napa and Harry Napa as lessees.

[4] Both applications were to determine the capital value of the land in a deed of lease dated 1973. The lease provides that there are rental reviews every five years and the annual rental is calculated on the basis of five per centum (5%) of the capital value of the land, after deducting the value of all improvements made by the lessee. Therefore the capital value on the land is crucial in determining the annual rental.

Affidavits filed with costs submissions

[5] I do note that there have been two affidavits which have been filed. In my review of the information in the affidavits, the purpose of filing this information is to evidence that the land under lease is proposed to be used for commercial purposes. This is disputed by Maria Nicholas.

[6] Because the evidence has not been tested and it is disputed, it is relevant in terms of matters going forward; however it is about the land going forward as opposed to what has been happening on the land.

Submissions on behalf of Phillip Nicholas

[7] As I read the submissions filed by Mr Moore, he has provided two invoices. The invoice of Mrs Browne, bill of cost of 20 December 2012, shows a sum due of $9,657.25. Mr Moore submits that 75% of that bill, being $7,242.93, relates to the capital value review matters, as opposed to other related applications. The second invoice is provided as agents costs in the amount of $8,185.75. Mr Moore seeks full indemnity costs of 100%.

[8] In terms of Mrs Browne's expenses, he seeks an award of 80% to 90% of the $7,242.93.

[9] Mr Moore submits that an order for costs should made as:

(a) Clause 2(d) of the lease is quite clear that: "it shall be the duty of the lessees on the dates aforesaid and at the expense of the lessees to apply for and obtain such valuations or to apply to the Land Court to determine the Capital Value. If the lessees make default in doing so, the lessors may apply and recover the costs thereof from the lessees."

(b) Now on their third counsel, the leasee has never faced up to her obligation but has time after time provided arguments as to why she should not be bound by their contract. Mr Moore submits that Maria Nicholas has argued for years that as a landowner, she should be entitled to a peppercorn family lease given she has never used the property commercially. This he says is despite plans for significant commercial use of the land.

(c) At Court hearings on 20 October 2010, 7 March 2011, 5 October 2012 and 12 October 2012 the lessee provided evidence that Court found had no weight at all, as the purported experts were not experts. Therefore, on two occasions the lessee has provided evidence that the Court was not satisfied were valuations rather than providing proper valuations.

(d) It would be some 11 years before the lessee retained a valuer and this, Mr Moore submits, was only done after Phillip Nicholas retained a valuer having given up on the lessee fulfilling their obligations pursuant to the lease.

(e) Relevant to the question of costs is the liability that has now been created in terms of back rentals for the past 30 years. Mr Eggelton's capital value assessment obtained by Mr Nicholas, provides that a liability of some $280,750.00 in back rental for the 30 years. It is noted that the lessee disputes that valuation. However, even based on Mr Tizard's assessment, the

valuation obtained by the lessee, he assesses a liability of $264,600.00 in annual rents going forward of $11,000.00 per annum subject to two further capital value reviews.

(f) Given the lessee is approaching 90 years of age, with a leasehold with just 12 years remaining on the term and the only improvement being a single dwelling constructed without building consent that the lessee may see the leasehold as more of a liability than an asset and seek acceptance of a surrender from her co-owners. Indeed, Mr Phillip Nicholas has offered on three occasions to seek landowner acceptance of a surrender in exchange for Maria Nicholas making a contribution to his costs over some 11 years. The later such offer was made and rejected and no counteroffer made. It is for those reasons Mr Moore submits that an order for costs should be made.

(g) Mr Moore submits Mr Nicholas is mindful of the reality of awarding costs where the parties are co-owners and will remain co-owners in the land, however in the circumstances, where the lease was clearly seen by the assembled landowners and the lessees as commercial and Maria Nicholas continues to see the lease as commercial, this he says distinguishes this matter from a landowner dispute it does not have a commercial contract as its foundation.

[10] In terms of the amount of cost, Mr Moore submits:

(a) The lessee has defaulted on their mandatory obligation for some 38 years. In his view this is essential to the question of quantum of reasonable costs to be recovered, pursuant to clause 2(d) of the lease.

(b) That an award of two-thirds would normally be the starting point, however he submits that given the failure of the lessee to meet her obligations under the lease and there being three substantive hearings before two Judges, that an award of costs should be 80% to 90% of the costs of Mrs Browne that relates to the capital value review matters (as opposed to other related applications). Therefore, an award is sought of 80% to 90% of $7,242.93.

(c) In terms of his agent's fees, given that there was an apparent settlement brokered by Mr Mason, but Maria chose not to settle and continued the dispute, in the circumstances, it is submitted that the starting point for an award would be an increased cost of 80% but more appropriately full indemnity cost of 100%. Therefore $8,185.75.

[11] In concluding, Mr Moore submits that Phillip Nicholas has incurred reasonable and properly incurred cost but were for the most part unnecessarily incurred by the lessee's failure to keep to the lease obligations and therefore the quantum of cost to be paid should reflect over a decade of breaches.

Submissions of Maria Nicholas

[12] Counsel for Maria Nicholas has provided submissions that costs must lie where they fall.

[13] Counsel submits:

(a) The lease has provided for five yearly rent reviews but there have been no applications for rent reviews over 32 years by either the lessee or the lessor until 2010.

(b) Over the 11 years since the litigation began, the management of the case by all involved has left much to be desired. The case languished without prosecution by either side from 2015 until 31 July 2019 when Judge Savage issued a direction that the four applications must be dealt with, although the records show that the two injunction applications had been dismissed.

(c) Importantly, the parties settled the valuation issue and a capital value order has been made, sealed and served.

(d) If the Court is minded to award costs, the regulations cannot be applied to Mr Moore's work as a land agent. Mr Moore claims $150 per hour, Category B cost in the Regulations provides for $140 per hour.

(e) Mrs Browne's invoices are silent on hours of work and rate per hour and the Court is therefore unable to make a calculation under the regulations. This invoice in her view should be ignored or Mrs Browne should be required to produce an invoice that can be assessed against the regulations.

(f) Maria Nicholas and her nephew Mr Nicholas should each take responsibility for the way in which these applications were managed since 2010.

(g) Since 1978 neither side has pursued their rights or complied with their obligations in terms of rent reviews under the lease.

(h) It is not unusual to find lessor landowners who are unwilling to enforce lease provisions against their landowner relatives who are lessees.

(i) At a meeting of landowners on 21 September 2021 (although the Court has no evidence for this), Maria Nicholas has the majority support of her extended family who are lessors to not enforce the rent review provision. While Maria Nicholas has the majority support of her extended family, counsel submits that Mr Moore's submissions on behalf of one landowner with a very small share in the land are submitted in the face of the majority of the approximately 400 landowners entitled.

(j) With respect, some responsibility must also lie with the Court and counsel acting at the time, for what appears to have been confusion on the part of the Court and counsel as to what decisions had been made at previous hearings.

(k) Each party must take responsibility for the delay, the confusion and the comedy of errors consequent upon the delays.

(l) It would be unfair and unreasonable to award costs against Maria Nicholas given her husband Harry Napa has passed away and she has become sick with old age.

[14] Mrs Evans submits that in the interests in encouraging the maintenance of positive relationships within the Koputanga and of recognising the parties must take equal responsibility for the way in which this case has been managed and therefore costs must lie where they fall.

Law

[15] The Court can award costs under s 384 of the Cook Islands Act 1915, which provides:

> In any proceeding [the Land Court] may make such order as it thinks fit as to the payment of the costs thereof, or of any proceedings or matters incidental or preliminary thereto, by or to any person who is a party to that proceeding, whether the persons by and to whom the costs are made payable are parties in the same or different interests.

[16] As per s 92 of the Judicature Act 1980-81, costs are at the jurisdiction of the Court:

> Subject to this Act and to the provisions of the Crimes Act 1969, the High Court shall have the power to make such order as it thinks just for the payment of the costs of any proceedings by or to any party thereto. Such costs shall be in the discretion of the Court, and may, if the Court thinks fit, be ordered to be charged upon or paid out of any fund or estate before the Court.

[17] The Code of Civil Procedure 1980-1981 provides:

> **300. Costs** –
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> (1) Subject to the provisions of these rules, the costs of any proceedings shall be paid by or apportioned between the parties in such manner as the Court thinks fit; and in default of any special direction such costs shall abide the event of the proceedings.
>
> (2) The amount of costs awarded shall be ascertained and stated in the judgment or order.
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> (3) The costs on any judgement or order carrying costs shall include any moneys paid or payable for Court fees under the High Court Fees Costs and Allowances Regulations 1981, for allowances to witnesses under the High Court Fees Costs And Allowances Regulations 1981, or for other necessary payments or disbursements, together with solicitors' costs on the appropriate scale prescribed in the High Court Fees Costs And Allowances Regulations 1981.

(4) The Court may in its discretion disallow the whole or any part of any costs.

(5) Nothing in these rules shall be construed to deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would otherwise be entitled under any Act or rule of law.

[18] Costs usually follow the event, with a general starting point being a two-thirds contribution towards the costs incurred by the successful party.[1]

[19] In *Maina Traders Ltd v Ranginui* the Court set out factors which may influence an award of costs:[2]

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;

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

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1 *Tuake v Ngate – Akaoa 65, Arorangi* HC Cook Islands (Land Division) 213/2013, 4 March 2014 at [30] citing *Glaister v Amalgamated Diaries Ltd* [2004] NZCA99/03.

2 *Maina Traders Ltd v Ranginui – Areau 35, Arutanga, Aitutaki* HC Cook Islands (Land Division) 225/2011, 9 February 2013 as cited in *Tavioni v Cook Islands Christian Church Inc* HC Cook Islands (Land Division) 196/2014, 26 September 2018 at [19].

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.

[20] Regarding whether costs can be awarded to a party represented by a land agent, in *Bates v Mateara*, I considered this issue and found:[3]

> If our starting point is that an award of costs is to reimburse a successful party for having to appear in Court then whether they were represented by an agent or a solicitor should make no difference. It is about the burden on the successful party in bringing or defending a matter, and not the qualifications of their authorised representative.
> …
> To be able to award punitive costs against an agent in the same manner as a solicitor implies an equality in their treatment within the Cook Islands context. To refuse to award costs to a party represented, in the Land Division of the High Court, by a land agent would then create an unreasonable injustice. The Land Agents Registration Act 2009 appears to be about improving access to justice by providing people with the option of engaging a land agent when bringing a matter to the Land Division of the High Court. I find a refusal to award costs to a party because they chose to employ a land agent would risk nullifying that benefit.

[21] Given the purpose for an award of costs is to make a reasonable contribution towards the legal costs of the successful party, I found that this should be extended to include the costs of a land agent who has been authorised by legislation to represent a party in the Land Division of the High Court.[4]

Decision

Should costs be awarded?

[22] In my view Mr Phillip Nicholas is entitled to costs given:

(a) The lessee was under an obligation to obtain a capital value for the purposes of a rent review. They failed to do so. They failed to address the issue of rental review for a number of years. Rather than providing a valuation as per the lease, they have prolonged matters by providing valuations which were not provided by expert valuers.

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3 *Bates v Mateara – Kainganui 92G3, Arorangi, Rarotonga*, HC Cook Islands (Land Division) 319/2018, 8 August 2019 at [31], [34].

4 At [35].

(b) This is a commercial lease, not a family-type lease arrangement.

(c) There have been a number of opportunities to resolve issues.

(d) There was a settlement proposed and brokered by Mr Mason which could have resolved all matters.

(e) It has been at Mr Phillip Nicholas' instigation in obtaining a valuation report that the applicants have finally taken a step to obtain an expert valuer's report.

(f) The matter could have been resolved in 2012 where the parties had made final submissions and reported to Judge Savage, but matters were not completed.

[23] The valuation report of Mr Tizard has been accepted. Given the values he notes of the land and the implications of those values for the rental, it is a clear situation where Maria Nicholas' relations, who are owners in the land, have been deprived of substantial rentals which have been due to them.

What amount of costs should be awarded?

[24] In terms of the amount of costs to be awarded, I do take into account a number of factors which I think persuade me that costs should be discounted. These factors are that:

(a) While this is a commercial lease, this is still a family arrangement where owners in the land are leasing the land from their own Kopu, albeit on a commercial basis.

(b) While it is not totally clear to me as to why matters have taken so long to be resolved since the original applications were filed in 2010, it does appear that there has been some confusion on the part of a number of parties, which has contributed to the delays.

(c) I also note Ms Evan's submission that Mr Moore claims $150.00 per hour which Category B costs in the Regulations provides for $140.00 per hour.

(d) I also note Ms Evan's submission Mrs Browne's invoices are silent on hours of work and rate per hour, although in my view the invoice does seem reasonable for the services provided.

[25] Taking the above matters into consideration, the Court orders Maria Nicholas to pay costs to Mr Phillip Nicholas of:

(a) 50% of Mrs Browne's costs of $7,242.93 being $3,621.46; and

(b) 50% of Mr Moore's costs of $8,185.75 being $4,092.87.

Dated at Rotorua, Aotearoa/New Zealand on this 24th day of March 2022.

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C T Coxhead
JUSTICE