

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
[LAND DIVISION]

C.A. No 3/2000

IN THE MATTER of the Property law
Act 1952

AND

IN THE MATTER of the land known
as Maii sec 12C at
Ngatangia.

AND

IN THE MATTER of an application
by the landowners
["the Appellants"]
to appeal the
decision of the
Court dated the
6th July, 2000.

AND

Island Hotels
Limited [" the
Respondents"]

On the 6th June 2000 at Rarotonga, after hearing the parties on an application for Relief against Forfeiture the Court found in favour of Island Hotels Limited. On delivering the decision, because no specific relief had been sought, the Court directed the parties to file submissions as to the relief to be awarded, and on the question of costs

The Appellants now seek leave to appeal the decision of the Court upon the grounds :

- [i] That the question involved in the appeal is of a value in excess of \$400.00 and
- [ii] That the matter before the Court is one which by reason of it's general or public importance or of the magnitude of the interest affected, and therefore Leave to appeal is as of right.

In support of their application, the Appellants claim that they are entitled to appeal as of right in terms of Article 60[2] of the Cook Islands Constitution Act 1964, as amended by the Constitutional Amendment Act [No. 9] 1980-81.

Counsel for the Respondents through her written submissions argues that the subject matter of the original application before the Court was, "Relief against Forfeiture ", and that no specific amount was sought by way of damages, nor did the Court quantify the claim in any way, and therefore the \$400.00 rule does not apply.

Counsel for the Respondent also argued that the matter does not fall within the ambit of Article 60[2] [e] of the Constitution since the rights of the parties arise, and to an extent are governed, pursuant to a deed of lease entered into by the parties.

By way of response, Counsel for the Appellants insists upon an entitlement to appeal as of right. In submitting this, Counsel maintains that the real measure of the value of the action is the value of the land, the subject of the lease. He informs the Court that the land "has been at various times valued at up to \$700,000.00."

The Appellants through their Counsel insist that there is a matter of public or general importance at issue, and in support of this and to indicate the extent of public interest in the matter, has produced extracts from the Cook Islands News of the 30th May 2000, and the Cook Islands Star of the 23rd June 2000.

The Court notes that the first article, which predated the date of the hearing by some 6 days, refers to the land owners putting a stop to work being carried out by the lessees on the land. This appears to have little public interest particularly in light of the fact that an injunction was issued against them to stop interfering with the work of the lessees, and also, despite the fact that the Court found in favour of the Lessees, yet following the issue of the Court's decision of the 6th June, no further interest was shown by the Cook Islands News.

The second article was headed, "Call for immediate changes to Land Laws in the Cooks." This article, although referring to Island Hotels Limited, is a call to make changes to put a stop to speculators selling land. This cannot have any real relationship to the application brought before the Court for determination, and the decision of which the Appellants seek leave to appeal, since Island Hotels Limited are not land owners, and only have a title to this land as Lessees. It follows therefore that any sale effected by Island Hotels Limited can only be of its interest in leasehold, or part thereof, and even then the use of the interest purchased can only be for residential purposes as contained in the lease held by the Respondent.

Further, it is noted that the memorandum submitted by the Counsel for the Appellants is dated the 20th July 2000, four weeks after the appearance of the article in the Cook Islands Star, and almost 2 months after the Cook Island News printed its article, yet there has been no follow up by either paper to indicate a continuation of interest or importance on the part of the papers or the public

Since the Constitution Act has been raised, it is appropriate to look at the Article relied upon by the Appellants.

Article 60 of the Constitution Act provides as follows ;

" 60 [1] Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine any appeal from a

judgement of the High Court.

[2] Subject to the provisions of this Constitution, and except where under any Act a judgement of the High Court is declared to be final, an appeal shall lie to the Court of Appeal from a judgement of the High Court-

- [a] As of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution.
- [b] As of right, from any conviction.....[not of any relevance in this matter.]
- [c] As of right, when the matter in dispute on appeal is of the value of \$400.00 or upwards.
- [d] As of right from any judgement of the High Court.....of any provision of Part IVA of the Constitution.
- [e] With leave of the High Court in any other case, if in the opinion of the Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision."

[3] This subsection refers to the right of the Court of Appeal to grant special leave to appeal, and is not a matter for consideration here.

[4] This subsection defines the term "judgement" to include "determination".

It is necessary to consider the weight, if any to be attributed to the submissions of the Counsel for the Appellants.

On the effect of Article 60[2][c], this Court cannot perceive how an action for relief against forfeiture particularly where no specified sum by way of damages has been claimed or awarded, can be quantified as being of a value of \$400.00 or more. The reference by Counsel for the Appellants to the Value of the land is of no relevance to the matter, nor of any assistance to the Court, since the Applicant, Island Hotels Limited's only interest in the land is as lessee.

This argument by Counsel is nebulous and of little relevance to this Court since, if perchance the value of the action falls within the "\$400.00 or upwards" bracket, as provided in Article 60[2] [c], then there is a right of appeal as of right, and application to this Court is not required. For the record, this Court prefers the argument of Counsel for the Respondents, and agrees that the value is not sufficient to permit an appeal as of right.

In his submissions, Counsel for the Appellants also relies upon Article 60[2] [e] and the question of public importance of the subject matter of the appeal, and the magnitude of the interest affected. With respect, this Court believes that Counsel is taking the words "public importance" and "interest" to mean much the same. It is clear to this Court that there are in fact two arms to this portion of the Constitution. First, the question of general or public importance. Secondly, the "magnitude", or in other words, the extent, or the enormity, of the "interest affected", or the subject matter, of the action.

As stated above, the extracts from the newspapers do little to advance the claim of the appellants that the matter is of any real public importance, nor has Counsel advanced any argument to satisfy this Court that the issues are of sufficient magnitude to warrant the granting of leave to appeal,

Leave to appeal is refused.

It is now necessary to deal with the question of costs.

It is the custom in the Cook Islands, when it is necessary to bring a member of the Judiciary to The Islands for a special fixture requiring an urgent hearing, that the party seeking the hearing shall pay the costs involved.

In this present matter, a special fixture had been arranged to determine an unrelated application, and since time was available this present application was brought on for hearing at the same time. The costs of that hearing amounted to \$3389.60. The original application for which the fixture was made took the morning, and the hearing of this application by Island Hotels Limited occupied the whole of the afternoon. Counsel for the morning application has quite rightly argued that the total cost should be apportioned on an hourly basis between the two applications, and has paid to the Registrar, the sum of \$2358.00, leaving a balance of \$1,031.80. The question remains as to who should pay this amount.

Counsel for Island Hotels Limited, on filing the application for relief against forfeiture, advised Counsel for the Landowners that she wished to have the matter disposed of by way of a telephone conference hearing, because the Court was not scheduled to sit in Rarotonga until October. Counsel for the Landowners insisted however, that the application should be heard in Rarotonga.

Because a telephone conference would not prove as expensive as a special fixture, Counsel for the applicant now argues that the Landowners, who would not agree to a telephone conference should meet the outstanding costs of \$1,031.80.

This Court agrees, and the defendants, the instructing landowners are hereby ordered to pay the sum of \$1,031.80 to the Registrar forthwith.

Turning now to the matter of costs between the parties, this Court has perused the submissions made by both Counsel. Counsel for Island Hotels Limited, the successful litigant, seeks an order for the amount of 1,756.26.

Counsel for the Landowners argues that all costs should lie where they fall.

This Court is mindful of the fact, so graphically depicted in the Cook Islands News of the 30th May 2000 under the headline, "Landowners stop work on Ngatangia property.", that the application by Island Hotels Limited was filed in the Court to protect the interests of the applicant, who held the land under a

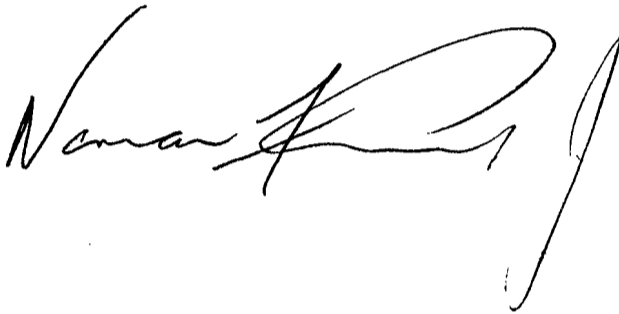
lease which guaranteed to the lessee, quiet and uninterrupted enjoyment of the property. Under those circumstances, it is only appropriate that the applicant should be reimbursed the costs of defending its rights.

The Court is aware of the order above relating to the costs of the special fixture, and is taking that figure into account in determining the quantum of party costs to be awarded.

There is an order directing the defendants, the instructing landowners, to pay to Counsel for Island Hotels Limited, the sum of \$1000.00 towards the costs of bringing the originating application.

Costs in relation to this application for leave to appeal shall lie where they fall, and the Court does not propose to make any award of costs in respect to this application.

This decision was delivered in Tauranga in New Zealand this 22nd July 2000.

A handwritten signature in black ink, appearing to read "Norman F. R. J.", with a long, sweeping flourish extending downwards and to the right.