IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-008091
CIV 2012-404-000321
[2012] NZHC 2250

UNDER	the Arbitration Act 1996
IN THE MATTER OF	the Arbitration Award dated 1 November 2011
BETWEEN	THOMAS RAINER LIPP AND KAREN WENDY LIPP Plaintiffs
AND	STEPHEN JOHN CHANEY AND EDITH MARGUERITE CHANEY Defendants

Hearing: On the papers

Judgment: 3 September 2012

COSTS JUDGMENT OF GILBERT J

This judgment was delivered by me on 3 September 2012 at 12.30 pm
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:……

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[1] In a judgment delivered on 20 July 2012 I dismissed the plaintiffs' application to set aside an arbitral award. I also dismissed the plaintiffs' appeal against the award. However, I found that one of the directions made by the arbitrator exceeded his jurisdiction.

[2] The defendants seek costs on a category 2B basis. The plaintiffs oppose the defendants' costs application for the following reasons:

(a) The plaintiffs achieved some success, as noted above.

(b) The relief granted by the arbitrator had not been sought by the defendants in their pleadings.

(c) Costs should not be allowed in respect of the plaintiffs' application to prevent the arbitrator from fixing costs pending the outcome of the appeal and the application to set aside the award. The plaintiffs say that this was a reasonable step taken to avoid the prospect of having to make separate challenges to the substantive award and to the costs award.

(d) The defendants' claim for costs for steps taken prior to 14 June 2012 is inappropriately based on the new schedules in the High Court rules which did not come into effect until that date.

(e) The plaintiffs claim that .75 of a day should be allowed for the hearing, not a full day.

[3] While costs are discretionary, they normally follow the event and are intended to be predictable. In appropriate cases, costs to a successful party may be reduced where that party has been only partially successful. In this case, the plaintiffs succeeded in showing that one of the arbitrator's directions was beyond his jurisdiction. This direction was important because it purported to require the plaintiffs to prepare and deposit a new plan incorporating alterations to the defendants' house that the plaintiffs have not consented to. The plaintiffs were

entitled to challenge this aspect of the award. In my view, their success on this issue justifies a 25 percent reduction in the costs that would otherwise have been payable to the defendants.

[4] The plaintiffs are correct that the defendants were fortunate to succeed at the arbitration in obtaining relief in relation to equitable estoppel which they did not specifically plead. They raised estoppel as a defence, not as a cause of action. However, no issue was taken about this at the arbitration and no jurisdictional challenge to this aspect of the award was made at the hearing before me. This was no doubt because the parties had proceeded in an informal manner having broadly described their dispute in the arbitration agreement. In these circumstances I do not consider that I should take this factor into account in assessing costs.

[5] The plaintiffs applied to prevent the arbitrator from issuing his costs award pending the determination of their appeal and their application to set aside the award. Courtney J declined the application but reserved costs. The defendants are entitled to costs on this application. Costs should follow the event.

[6] The defendants now accept that the new costs schedules should apply only to steps taken after they came into force on 14 June 2012. The defendants are entitled to costs for all relevant steps assessed on a category 2B basis in accordance with the applicable schedules. Scale cost of one day should be allowed for the hearing. All costs, other than the costs of the unsuccessful stay application, are subject to the 25 percent reduction referred to above.

[7] I anticipate that the parties will now be able to agree the quantum of costs to give effect to this judgment. If there are any residual issues, they should be dealt with by the parties filing a joint memorandum setting out any disagreement and the reasons for it.

M A Gilbert J