**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV-2014-044-001505**
**[2016] NZDC 3862**

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| BETWEEN | POST PROPERTIES LIMITED<br>Plaintiff |
| AND | SPROAT SOLUTIONS LIMITED<br>Defendant |

Hearing: 21 July 2015

Appearances: S Houliston for Plaintiff
D Nicholson for Defendant

Judgment: 10 March 2016

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**COSTS DECISION OF JUDGE NICOLA MATHERS**

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[1] As is so often the case, costs have generated almost more heat than the substantive hearing. At the conclusion of my reserved decision on liability I reserved the issue of costs and said I would receive memoranda if necessary. I have now received substantial submissions from both counsel.

[2] I note that I commented:

> Because SSL accepted liability but disputed quantum I consider it is entitled to costs at least for matters relating to the hearing before me.

[3] Nevertheless I have approached costs afresh, and particularly after considering the submissions I have received.

[4] The plaintiff relies on Clause 6.1 of the lease to support its claim for indemnity costs. It says further that it is inequitable for a defaulting tenant to force a landlord to trial by disputing quantum but making no offer, or even a Calderbank offer. However, I recall from the evidence at trial that the tenant did attempt to engage with the landlord, but was not well received.

[5] Most of the cases cited to me are forfeiture cases but nevertheless I have found the case of *Roses Are Red Limited v Board of Administration of the Methodist Church of New Zealand*, 21/2/08, Lang J, HC Auckland, CIV-2007-404-8040, and the Court of Appeal [2009] NZCA 237, to be most helpful in approaching this question on a principled basis. Also a contractual clause such as 6.1 in this case would normally require close attention.

[6] Of course costs normally follow the event and of course the "winner" usually is awarded costs, although the concept of "winner" must be approached with some caution.

[7] I have carefully considered *Shirley v Wairarapa DHB* [2006] 3 NZLR 523 in the Supreme Court and the elegant test there referred to of Bowen LJ in *Forster v Farquhar* [1893] 1 QB 56A where he held:

> We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

[8] Lang J, in *Roses Are Red* simply said that he was not prepared to apply a Clause 6.1 situation. Despite it being a forfeiture case, I consider that the Court of Appeal saw nothing wrong with that approach and referred to "some broader policy considerations" and while referring to an indemnity clause such as 6.1 that they "may be a relevant consideration".

[9] There are also the cases where a landlord is seeking to obtain a commercial advantage as in *Ponsonby Mall Trust Limited v NZ Food Industries Limited*, 8/3/06, Asher J, HC Auckland, CIV-2005-404-3631. While not precisely the case here, nevertheless I found as a fact that the landlord was more interested in upholding a capital value than being realistic as to a rent which might have attracted a new tenant. So, like Lang J, I do not propose to accept indemnity costs as per Clause 6.1. Nevertheless, the landlord succeeded in the award of damages, and the tenant succeeded to some extent in its defence of failure to mitigate.

[10] Taking into account all the matters I have raised above, and attempting a principled approach whereby some exceptions can be made in special situations to

override the normal rule that costs follow the event I consider, in the exercise of my discretion and despite some success by the defendant, and although indemnity costs have been refused, the landlord should nevertheless be entitled to costs on a standard 2B basis. Standing back and viewing this matter overall, as Eichelbaum CJ used to comment, I consider the award to be fair as between the parties.

[11] Costs are to be approved by the Registrar on a 2B basis along with disbursements.

Nicola Mathers
District Court Judge