

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

OA 4/01

IN THE MATTER

of the Declaratory
Judgments Act 1994

BETWEEN

COOK ISLANDS SHIPPING
CORPORATION (IN LIQUID-
ATION)
Plaintiff

AND

COOK ISLANDS NATIONAL
LINE AGENCY LIMITED (IN
LIQUIDATION)
First Defendant

AND

NATIONAL SHIPPING &
CHARTERING
LIMITED (IN LIQUIDATION)
Second Defendant

AND

TRIAD MARITIME (1988) LTD
(IN LIQUIDATION)
Third Defendant

AND

TRIAD PACIFIC PETROLEUM
LIMITED.
Fourth Defendant

AND

TRIAD ENTERPRISES LTD
(IN LIQUIDATION)
Fifth Defendant

Mr K P Sullivan for Plaintiffs

Mr R Fardell QC for First, Second and Third Defendants

Mr P T Finnigan for Fourth and Fifth Defendants

DECISION OF GREIG CJ

Dated the 18th day of June 2003.

1. By the judgment of 17 December 2002 costs were awarded to the Plaintiff. The Plaintiff by memorandum of Counsel seeks an award of solicitor costs amounting to \$39,780.00 and disbursements and witness expenses amounting to \$60,939.64. Counsel for the Defendants oppose this application and the quantum. Memorandums have been filed by Mr Fardell and Mr Finnigan. Mr Sullivan filed a memorandum in reply.

2. Mr Fardell's main submission is that, in his words, any order of costs against the first to third defendants is "an entirely sleeveless exercise". His reasons are the insolvency of those defendants, all but the fourth defendant are in liquidation, the lack of any liquid assets to meet payment and the fact that in the event of an appeal decision in favour of the plaintiff it will receive the assets of the first three defendants. Whether the defendants are without any liquid or other valuable assets is not known for sure. That has not been a subject of examination in this court. And there might be some possibility of pursuing an award against others. In any event the fourth defendant is not in liquidation and may have assets to meet such costs. I will deal later with the argument that any award should not attach equally to all defendants. In the end the plaintiff is entitled to an award. It pursues that. It is not for the court in this case to deny that right on grounds of economic theory or appearance of a vain award.
3. The plaintiff seeks costs on the basis of the recently introduced scale of costs in the New Zealand High Court. The grounds for that are that the Cook Islands scale is out of date. In fact the Cook Islands scale dates from June 1997: High Court Fees, Costs and Allowances Regulations 1997 (1997/10). That revoked the scale and fees fixed in 1981. It is true that the scale is modest in terms of actions for a sum of money only but it is difficult to say that a scale that is only 6 years old is out of date. I am aware that a new scale and fees regulation has been drafted but not promulgated.
4. The new New Zealand scale marks a departure from the form and substance of previous scales. It is not such as the Cook Islands scale at present or anticipated. It is inappropriate to apply such a different scale. It would be tantamount to making a new law and policy about costs by judicial decision when it is clearly a matter for the government and the lawmakers.
5. In any event this is not a case for the scale applicable to money only claims. There is no applicable scale, as such, in the fourth schedule to the regulations for such a claim as this. There are amounts for preparing a statement of claim and for all other appearances but paragraph 10 gives the Court a discretion to fix costs "as reasonable taking account the circumstances of each party and the nature of the proceedings". Regulation 8(2) may be noted as giving a discretion to fix additional costs "as is fair and reasonable in the circumstances of each case". Furthermore s.92 of the Judicature Act 1980-81 gives the Court an overriding discretion in respect to costs.
6. The underlying basis on which costs are to be awarded is to provide a reasonable and fair amount calculated on a party and party basis. It is not a complete recovery or indemnity of costs but is a fair proportion having regard to the circumstances of the case and the parties.
7. This is a proceeding in a company liquidation to ascertain the assets subject to the jurisdiction of the liquidator. It started off as an application for directions but I ruled that some other vehicle was required to bring the dispute to a proper conclusion. The declaratory proceedings meant that there was no oral hearing about the facts. The facts were dealt with by affidavit. There was a

relatively short hearing to present submissions. In the end the substantial facts were not in dispute. There were a number of interlocutory matters and hearings, by telephone conference, and a substantial discovery. It was inevitable and necessary that senior Counsel be engaged in New Zealand. The plaintiff and the principal parties are of the Cook Islands. This is not a case like the China Aeronautical Technology Fund case which was in substance about foreign parties and property. A number of defences were raised and pursued.

8. The plaintiff's claim is calculated at 30.6 days time spent at \$1300 per day. That includes 6 days for discovery which seems a long time and would, one expects, be undertaken by a clerk. The preparation is also substantial and seems to be an amount based on the hearing time rather than the actual time for preparation. It is said that the actual costs were in excess of \$70,000.00. While it is not disputed that the time was spent it is submitted that a time line approach is not appropriate for this case involving a domestic Cook Islands company and dispute. I agree. The concentration on diaries and time recording is a good discipline for solicitors and Counsel but does not always reflect the real importance of the case or the issues involved. As between solicitor and client it is valuable to have a careful record but as between the parties the overall circumstances will play a considerable part in settling what is fair and reasonable for the losing party to pay. It is in the end a matter of judgment and finding a figure which to the Court seems fair and reasonable. I find in this case an award of solicitor's costs in the sum of \$15,000.00 is such and I make an award accordingly.
9. The disbursements and witness fees amounting to \$60939.64 include a claim for \$54,694.13 described as "witnesses fees and allowances- McCallum Petterson". That is the firm of the accountants which represent the liquidator and of which he is a partner. From the schedules of costings attached to Mr Sullivan's reply this amount is the sum of the various attendances by the liquidator and his staff recorded, again on a time line basis, in and about these proceedings. The schedules omit the attendances on matters of general application in the liquidation. The times are charged at various unit rates.
10. The Regulations provide in regulation 9 as follows:

"The allowances and expenses prescribed in the Fifth Schedule to these regulations shall be payable to any witness or interpreter who is required to attend Court or prepare any evidence or translation for the Court and shall apply in respect of proceedings in the High Court commenced on or after the date of coming into force of these regulations"

The Fifth Schedule sets out in some detail a provision for fees for expert witnesses at \$30.00 per hour for local experts and \$50.00 per hour for those from outside the Cook Islands. Those fees are for "every hour he is required to be present in Court". There are in addition qualifying fees for analysis and preparation as may be allowed by the Court. All other witnesses are dealt with under a subparagraph which baldly states; "Any other witness \$5.00 per hour" There is no reference to attending

or being required to be present in Court. There is no provision for qualifying fees for such other witness. Under the heading General Allowances and Expenses the Court has a discretion to fix such as may be just and reasonable.

11. As has been said there was no oral hearing involving witnesses. There is no claim that the liquidator or especially his staff qualify as expert witnesses. The fees claimed are far in excess of the hourly rates set out in the regulations. It is the fact that evidence from the liquidator was necessary and was given by affidavit. If that had not been the case there would have been a lengthy oral hearing. The regulations provide for the preparation of evidence. That must include the preparation of an affidavit which forms part of evidence. There is in any event a general discretion to fix an allowance for other reasons. There cannot be however a general right to an allowance for time spent by a party in furtherance of the case. It is only in the guise of a witness and for witnessing purposes that an allowance may be made.
12. I think that in this case there is scope, to be just and reasonable, to allow some amount to the liquidator in respect of the evidence and his part in it. It is necessary to have regard to New Zealand rates of remuneration. I believe however that the total must be a relatively modest sum as an allowance rather than an indemnity of the cost. As an allowance on this head I fix the sum of \$2500.00.
12. The disbursements include filing fees \$67.50, courier charges \$102.00, photocopying \$107.25. These are not challenged and are normal and necessary charges. All are allowed.
13. There is a claim for travel expenses and accommodation for Mr McCallum to and from the hearing in Auckland amounting to \$1219.09. He was not required to attend as a witness. He did so presumably as liquidator and to assist if necessary in instructing Counsel. His presence was not necessary and as the case proceeded on pre-exchanged briefs it was unlikely that any matter would arise needing instruction on the spot. Nowadays with instant communication there must be a lessening need for the presence of parties or their representatives at a hearing except as witnesses. This item is disallowed. There is also a claim for travel expenses for Mr Sullivan in the sum of \$1208.02. This is described as "briefing witness (Auckland Joseph Caffery) travel to and from the hearing, accommodation and taxi charges". There is no detail or breakdown between the briefing and the hearing. There is no objection to the hearing aspect but there is to the briefing aspect. It is said that is part of preparation and could have been done by correspondence or other distant communication. Mr Finnigan states that he did that with one of his principal witnesses. I think that in the circumstances it was not unreasonable and may indeed have been necessary that Mr Sullivan attend Mr Caffery in person to brief him. I allow the whole of this item.
14. The last disbursement item is described as "Agency costs of instructing solicitor in Rarotonga, being 75% proportion of fee of \$4722.20"; namely \$3541.61. It was clearly necessary to instruct local solicitors to attend to the Cook Islands end of the proceedings. Whether these solicitors are truly agents

or are principals with Mr Sullivan being Counsel may not matter. The need for New Zealand input into this litigation adds expense and is inevitable and essential. It is only just and fair that the successful plaintiff receives some contribution to that expense. I allow this item as claimed.

- 15.** The final issue is the incidence of the costs allowed. The plaintiff seeks an order against each and every defendant equally. The defendants dispute that. The issue is seen as an economic one in that it may be that the fourth defendant alone will be able to meet the costs. The difference or distinction between the defendants is that, it is said, the last two are involved in a lesser way concentrated on the inter-company debts and set-off. It is the case that all defendants were equally involved in the transaction which was at the root of the liquidator's claim and pursued the same basic defences of invalidity and illegality. It is not the case that any one defendant was only peripherally or slightly involved. Each had the same stake in the proceedings. Indeed the fourth and fifth defendants may be said to have a greater monetary stake. I have no doubt that in this case the order should be made against each and every defendant.
- 16.** In the result there will be an order against each and every defendant equally for costs in the sum of \$15000.00 and witnesses allowances and disbursements in the sum of \$7526.42.

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