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

PLAINT NO. 20/03

BETWEEN **TUAO MESSINE** of Aitutaki, Planter

Plaintiff

AND **TERRY MITCHELL** of New Zealand, Planter

First Defendant

AND **DANIEL MITCHELL** of New Zealand, Occupation Unknown

Second Defendant

JUDGMENT OF DAVID WILLIAMS J AS TO INTEREST AND COSTS

Date of Judgment: 11 February 2004

Solicitor for the Plaintiff:
Ms C A McCarthy
Solicitor
Browne Gibson Harvey PC
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No appearance for First Defendant

Appearance in person at trial for Second Defendant:
Mr Daniel Mitchell

Introduction

[1] This matter came before me for hearing on 14 November 2003 and in the reserved judgment given on 18 December 2003, I held that:

> "[68] On the basis of the finding of unjust enrichment referred to in paragraphs [56] – [66] the plaintiff is entitled to judgment in the sum of $3,000.00. Pursuant to the Judicature Act 1980-81, the plaintiff is awarded interest on the said sum of $3,000.00 at 8% per annum from the period of 10 March 2003 until the date of payment of the principal sum of $3,000.00.
>
> **Costs**
>
> [70] The plaintiff is entitled to recover all reasonable costs and disbursements from the unsuccessful second defendant. ..."

Interest

[2] It will be noted that the interest award was at the rate of 8% per annum. In written submissions as to costs dated 3 February 2004 counsel for the plaintiff has drawn my attention to Rule 206 of the Code of Civil Procedure of the High Court which provides as follows:

> "206. Judgment debt to carry interest – Every judgment debt in excess of $200.00 shall carry interest at the rate of ten per centum per annum from the time of judgment being given until the same is satisfied, and such interest may be levied under any writ of execution upon such judgment".

She therefore submitted that the interest rate should be 10% and not 8% per annum. I uphold this submission and pursuant to Rule 158 of the Code of Civil procedure of the High Court my earlier judgment is corrected so as to make the interest rate 10% and not 8% per annum.

Costs

[3] In my judgment at paragraph 70 I held that the plaintiff was entitled to recover all reasonable costs and disbursements from the unsuccessful second defendant. I ordered as follows:

> "The plaintiff is entitled to recover all reasonable costs and disbursements from the unsuccessful second defendant. If the parties cannot agree the amount of costs and disbursements they must file memoranda on costs and disbursements within 21 days from the date of this judgment."

[4] Pursuant to leave reserved, counsel for the plaintiff filed a memorandum dated 18 January 2004 claiming inter alia legal costs in the sum of $9,340.00. The Court did not receive any submissions on costs from the second defendant. No reasons were given in the plaintiff's memorandum on costs as to why the plaintiff was seeking to claim more

than the amount provided for in the scale of solicitor's costs. The Court therefore issued a minute dated 21 January 2004 which stated:

> "I have received the Memorandum of Counsel for the Plaintiff as to costs and disbursements dated 18 January 2004. I note that legal costs claimed are $9,340.00 on the basis of a solicitor/client hourly rate. My understanding is that there is a scale of costs which applies to the assessment and award of solicitor's costs in the Cook Islands. Accordingly, the Plaintiff should either make further submissions as to why the scale should not be applied or, if it is accepted that the scale does apply, file a Memorandum with legal fees calculated according to the scale."

The Registrar forwarded by facsimile to Mr Joseph Ka in Auckland a copy of this Minute.

[5] By way of further written submission on 2 February 2004, counsel for the plaintiff pointed out that under the scale the plaintiff would be entitled to costs on a claim for $3,000 of the following:

(a)	Preparing statement of claim	$50
(b)	Appearing in Court to conduct hearing	$20
		$70

Counsel went on to submit that a costs award in the sum of $70 in accordance with the scale would be unreasonable and unrealistic.

[6] The Code of Civil Procedure sets out at Rule 300 the jurisdiction of the Court to grant costs in any proceedings. It states:

> "300. Costs – (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."

[7] The Rules then go on to provide for scales of costs. It is not necessary to discuss the detailed provisions of those rules and the accompanying scales.

[8] In the leading New Zealand case of *Morton v Douglas Homes Limited (No. 2)* 1984 2 NZLR 620 it was held that the purpose of an award of party and party costs was to impose on the unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party. With reference to the similar scale of costs then included in the New Zealand Code of Civil Procedure it was held that the scale was a legislative direction as to what was to be regarded as a reasonable contribution in the ordinary kind of case. If in the circumstances of a particular case compliance with that direction in the scale would not

achieve a purpose an award of costs the Court in its discretion was entitled to award more. The nature and course of the proceedings would always be the dominant consideration but there was room for recognising the amount of solicitor and client costs actually and reasonably incurred in the particular case. On the basis of those principles it is therefore necessary to examine the particular circumstances of this case to decide whether the application of the scale would achieve the true purpose of an award of costs.

[9] The Plaintiff initially issued proceedings against the first defendant and Elizabeth Tapora for an interim injunction preventing Ms Tapora from selling the tractor to a third party. As a result of a Notice of Opposition to that application being filed by Mr Joseph Ka on behalf of Ms Tapora, and as a result of affidavits filed by Mr Ka and Mr Daniel Mitchell, the pleadings were amended to withdraw any claim against Ms Tapora and proceed against Daniel Mitchell – the second defendant. The second defendant denied all liability and asserted that his brother the first defendant was solely liable. The first defendant filed a confession and did not appear at the hearing.

[10] Counsel for the plaintiff submitted that the plaintiff had incurred substantial costs in having the proceedings set down and heard. The matter was to have been dealt with by three Justices of the Peace on 26 September 2003. Mr Messine travelled to Rarotonga from Aitutaki for that hearing. By letter dated 26 September 2003, Mr Ka, who was acting as agent for the second defendant, requested an adjournment of the matter. The adjournment although opposed, was granted, although the grounds for adjournment were not given. Preparation for hearing had taken place in the expectation that the matter would proceed.

[11] It was further submitted that two previous trips to Rarotonga by the plaintiff had been necessary – one to attend at court for a telephone hearing with the Chief Justice Greig regarding the interim injunction proceedings, and the other to seek assistance from Browne Gibson Harvey solicitors regarding the return of the plaintiff's tractor or money. In my view both trips can be regarded as a necessary expense in pursuing the claim.

[12] Counsel contended that the solicitor's costs claimed in respect of work undertaken on this matter were reasonable notwithstanding that the amount of claim was fairly small. Preparation for hearing included preparation of cross-examination for five witnesses, researching the law of agency, unjust enrichment and the Sale of Goods Act 1908.

Legal arguments at trial were lengthy and required a level of expertise commensurate with that of a senior solicitor. The case required a two day hearing in part due to the number of witnesses subpoenaed by the second defendant.

[13] In addition to this, lengthy written submissions were made at the Court's request, following the hearing. Judgment was granted in favour of the plaintiff.

[14] Counsel emphasised that the second defendant had delayed the hearing of the proceedings which should have taken place on 26 September 2003 before three Justices of the Peace as was anticipated. The claim fell within their jurisdiction. Through no fault of the plaintiff, the proceedings were adjourned and a further delay occurred until such time as it was brought before me. It was asserted that it is always the case that Counsel needs to refresh themselves for a hearing where there has been a delay of proceedings adjourned part heard.

[15] Bearing in mind all of these factors an order for costs was sought by the plaintiff on a solicitor/client indemnity basis. It was submitted that the Court had an inherent jurisdiction to award such costs and that this was a situation where the application of scale costs would result in an unfair result to the plaintiff.

[16] Applying the principles outlined in the Morton case, I consider that the plaintiff has made out a case for costs in excess of the scale but not to a full indemnity. I hold that the plaintiff is entitled to recover in addition to the judgment sum of $3,000.00 and interest the air fares claimed of $1,016.00 and the disbursements of $293.85. This leaves only the question of whether full indemnity costs should be awarded i.e. the full amount of actual legal fees billed to the plaintiff of $12,160.00. I do not think that would be reasonable or appropriate especially since the defences raised could not be regarded as hopelessly untenable or unarguable. In all the circumstances, the plaintiff will be awarded two-thirds of the amount of actual legal costs incurred, namely $8,106.67.

SIGNED at Auckland on the 11th day of February 2004 at 11.00 am.

David Williams J

David Williams J