

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

PLAINT NO. 25/2010

BETWEEN	TEPAKI NOOAPII TEPAKI	Plaintiff
AND	RAROTONGA RESORTS MANAGEMENT LIMITED	First Defendant
AND	ROBIN EGGLETON	Second Defendant
AND	KIM EGGLETON	Third Defendant
AND	ANNE MARY BOYS	Fourth Defendant
AND	MICHAEL INNES JONES	Fifth Defendant
AND	STRATEGIC FINANCE LIMITED (In Receivership and Liquidation)	Sixth Defendant
AND	DAVID SOMERFIELD	Seventh Defendant

Counsel: Plaintiff in person
Mr Arnold for First, Second, Third and Fourth Defendants
Mr Akel and Mr Upton for Fourth, Sixth and Seventh Defendants

21 April 2011 (NZ Time)

JUDGMENT OF THE COURT
(Costs)

1. The plaintiff, Mr Tepaki, made various claims against the defendants. He is a litigant in person. The statement of claim was difficult to follow and included facts, evidence, comment, and conjecture. Wide ranging claims were made against the defendants including allegations of fraud and conspiracy. Damages of \$66,000,000.00 were sought. In essence, Mr Tepaki asked the Court to investigate matters leading up to the receivership of his hotel resort development companies and compensate him for the losses resulting from the receiverships. The sixth defendant, Strategic Finance Limited (In receivership and liquidation) had appointed the receivers.
2. The defendants made applications for striking out. These applications were successful in relation to all the defendants except the first defendant. The proceedings against the first defendant were stayed for Mr Tepaki to redraft file and serve the statement of claim in a proper form. The defendants now seek costs against Mr Tepaki following the successful striking out applications.
3. The applications by the fifth, sixth and seventh defendants was heard over one day to accommodate an early return to New Zealand for counsel. The applications in relation to the first, second, third and fourth defendants for whom local counsel appeared were heard on a subsequent day. I will deal with the applications for costs for each set of defendants separately.

Legal Principles

4. Section 92 of the Judicature Act 1980-81 gives the Court the discretion to make such order as it thinks fit for the payment of costs. Regulation 8 of the High Court Fees, Costs and Allowances Regulations 2005 allows the Court on making an order, to fix such additional costs to those prescribed as is fair and reasonable in the circumstances in each case. The fourth schedule to these Regulations which prescribes a scale of fees does not apply to this application.
5. The Court's discretion to award costs must be exercised judicially having regard to pertinent earlier decisions and what is fair and reasonable in the circumstances. The award should provide for a reasonable contribution to costs reasonably incurred (Morton v Douglas Homes Limited (No 2) (1984) 2NZLR 620).
6. Counsel for the fifth, sixth and seventh defendants submitted that the normal practise in the Cook Islands is to award two thirds of solicitor client costs (Chilwell v Ioaba (CA 8/2009) 18 June 2010 at paragraph 57). Counsel also noted that the Cook

Islands Court of Appeal has commented that costs will be allowed to reflect the high cost of New Zealand counsel where the counsel are appropriately involved (citing Tupangia v Taakoka Island Villas Limited (CA O2/2006), 27 April 2007 at paragraphs 47-50). In recent cases in the Cook Islands substantial awards have been granted. The example of Hill Cosmos International Limited v Ocean Fishery Cook Islands 1 Limited and Others Plt No. 105/2008, Justice Paterson, 22 April 2010. was cited. In that case, an award of \$240,000.00 was made which was 60% of actual costs of New Zealand counsel involved.

7. The practise of awarding two thirds of actual costs is not a guiding principle. McGechan J in the New Zealand case Holden v Architectural Finishes Limited (1997) NZLR 143, noted that the adoption of any percentages as a norm is erroneous, but a costs award in the range of 40-70% of actual costs provided some comfort. McGechan J in that case was applying the previous New Zealand cost provisions which are similar to the present Cook Island provisions. In that case, His Honour referred to various "shopping lists" of factors to be taken to account on assessing costs. These include the length of time of the hearing, the amount of money involved, complexity of the case, the time required to preparation and whether the arguments lacked substance.
8. The defendants set out the following summary in support of their claim for indemnity costs:
 - a. The serious nature of the allegations made;
 - b. The amount of damages sought, which 'raised the stakes' considerably;
 - c. The extent of work required due to the difficulty in piecing this together from the pleadings, evidence and opposition documents;
 - d. The wide ranging nature of the allegations;
 - e. The delay in Mr Tepaki filing his evidence and opposition documents;
 - f. The serious nature of the allegations made;

- j. The fact that claims were being brought against an impecunious defendant in the case of Strategic Finance.
9. Mr Tepaki submitted in response that the payment of legal costs at this time was inappropriate. He says:
- “2. As proceedings against the First Defendant is still afoot, the plaintiff believes the matter of payment of legal costs for the First to Fourth Defendants at this time is inappropriate, as all defendants remain implicated in his case against Defendant 1? Accordingly, **the plaintiff humbly requests the Court to time table the hearing on this matter as soon as possible!**”
10. Mr Tepaki submits that because he is not a lawyer he was ill equipped to defend the applications. The balance of the submissions are not relevant to the costs matter but seek a review of my judgment on the striking out applications.
11. On a number of occasions during the hearing I indicated to Mr Tepaki that he would be wise to seek legal advice on the applications and that the Court will give him time to do this. For various reasons he did not take up that opportunity.
12. There is no basis to reopen or recall my decision on the strike out applications. The defendants succeeded in their applications and are entitled to costs in the normal course.
13. Counsel for the fifth, sixth and seventh defendants reply that Mr Tepaki puts forward no grounds or reasons which would prevent an award of costs being made. Nor does Mr Tepaki attempt to address the level of costs sought.

Quantum

14. The fifth, sixth and seventh defendants seek full indemnity costs. No invoices detailing the time spent or hourly rates were produced. The amount of the claim is as follows:

“Legal fees:

New Zealand Counsel's Fees	\$44,377.80
(Simpson Grierson – W Akel and B J Upton)	

Local Counsel's fees (Charles Little)	\$9,258.88
Disbursements:	
Travel (NZ Counsel to Cook Islands)	\$2,206.61
Copying (Court bundles)	\$919.71
Courier	\$109.39
Documents production, delivery And telephone calls	\$1,042.36
Total	\$57,914.75

15. These figures include New Zealand Goods and Services Tax (GST). As the GST rate increased from 12.5% to 15% on 1 October 2010, the exact amount of GST involved is not apparent. As the award for costs should be an appropriate portion of the GST exclusive amount. In the absence of evidence I can only assess the adjustment. At the rate of 15%, the GST exclusive amount of the Simpson Grierson fee is \$38,589.39.
16. The fifth, sixth and seventh defendants were justified in engaging New Zealand senior counsel, given the nature of the claim and the factors set out above. The quantum does indicate a "Rolls Royce" approach to the claim. There were three counsel involved for the fifth to seventh defendants, including local counsel. I do not consider the case justified three counsel and again can only assess a downward adjustment of \$5,000.00 for this factor.
17. Taking into account the factors counsel for the defendants point to, as well as noting that the matter was brought to an early hearing and lasted just over a day I do not consider it is a case for indemnity costs. Looking at the matter in the round I consider an award of \$25,500.00 costs favour collectively of the fifth, sixth and seventh defendants is appropriate. This equates to just under 60% of actual costs (GST exclusive and with the deduction for third counsel as set out above). This falls within the range of 40-60% of actual costs referred to by McGechan J and Holden as giving some comfort.

18. Accordingly, I order the plaintiff to pay to the fifth, sixth and seventh defendants jointly:

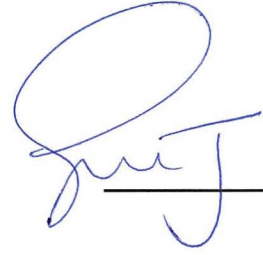
- i. The sum of \$25,500.00 for costs;
- ii. Disbursements as claimed by the defendants subject to production of invoices for those disbursements to the satisfaction of the Registrar.

Claim for costs by first, second, third and fourth defendants

19. In his submissions counsel for the first, second, third and fourth defendants adopts the submissions of the fifth, sixth and seventh defendants in toto.
20. The first, second, third and fourth defendants were separately represented by local counsel. They seek indemnity costs totalling \$12,626.00. This includes \$2,4474.25 rendered by New Zealand lawyers, MDS Law, who assisted the second and third defendants in the preparation of their affidavits filed in support of the strike out application.
21. Mr Tepaki's submission in response to this claim for costs mirrors his submission in relation to the claim by the fifth to seventh defendants. That is, that the payment of legal costs to the defendants at this time is inappropriate as all defendants remain implicated in his case against the first defendant. Mr Tepaki also made various factual allegations concerning emails he sent to Counsel for the first to fourth defendants to which counsel responds in his reply. These latter submissions are of no relevance to the issue of costs.
22. The claim against the first defendant was not wholly successful in that the claim against it has not been struck out, but the proceedings are stayed for the plaintiff to redraft the statement of claim in a proper form following the rules. This will be a substantial exercise. In those circumstances I am of the view that the first defendant is entitled to costs on the strike out application. The second, third and fourth defendants were successful and so are also entitled to costs.
23. No detailed invoices were provided in support of the defendants' claim. However, the actual costs claimed appear reasonable. I allow the costs relating to the attendances of MDS Law who assisted Mr and Mrs Eggleton with the preparation of their affidavits. The preparation of the affidavits in New Zealand was necessary.
24. I propose taking a similar approach in relation to this application for costs to that I took in relation to the costs awarded for the fifth, sixth and seventh defendants. Accordingly, I award the amount of \$7,500.00 being the amount equivalent to approximately 60% of actual costs.

25. I order the plaintiff pay to the first, second, third and fourth defendants jointly:

- i. The sum of \$7,500.00 for costs.



Grice J

21 April 2011