

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

**PLAINT NO. 19/18**

**BETWEEN DENNIS REGINALD WALKER**

Plaintiff

**AND PACIFIC MARITIME HOLDINGS  
INC.**

Defendant

Hearing dates: 22 March 2019; and 30-31 May 2019

Counsel: Mr W Rasmussen for Plaintiff  
Mr B Mason for Defendant

Date of Minute: 18 February 2020

Judgment (No.1): 16 December 2019

Judgment (No.2): 23 March 2020

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**JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ  
(Re. Costs)**

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[0764.dss]

**Introduction**

[1] By judgment in this claim delivered on 16 December 2019 the plaintiff, Mr Walker's, claim against the defendant, Pacific Maritime Holdings Inc<sup>1</sup>, for \$149,041.12 was dismissed.

[2] As to costs, the substantive judgment ruled<sup>2</sup>:

[130] In the result:

A. ....

B. PMH is entitled to costs which are to be decided on memoranda, that from Mr Mason within 20 working days of delivery of this judgment, that from Mr Rasmussen within a further 20 working days, and any final submissions Mr Mason may care to make within 10 working

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<sup>1</sup> "PMH".

<sup>2</sup> At [130].

days of receipt of Mr Rasmussen's submissions. Those time limits are to exclude Court holidays.

[3] Mr Mason, counsel for PMH, filed his costs submissions on 9 January 2020<sup>3</sup>, Mr Rasmussen, counsel for the plaintiff, filed his submissions on 23 January 2020<sup>4</sup> and Mr Mason filed submissions in reply dated 16 March 2020.

[4] Mr Rasmussen's submissions were received following the delivery of a costs minute dated 18 February 2020<sup>5</sup> which commented on certain aspects of PMH's claim for costs.

[5] The costs minute recounted the costs sought by PMH as follows<sup>6</sup>:

[4] Mr Mason's submissions advised that the cost of this litigation to the defendant was:

- (a) Mr Mason (\$12,887 inclusive of VAT and disbursements)
- (b) Mr Marheine (\$A11,000)
- (c) Mr Morgan (\$A8,250)
- (d) Hannay Law Pty Ltd (\$A12,700)
- (e) Nimrod Services Europe Limited (£13,273 translated to \$A25,290)

## Law

[6] The Court has a wide discretion in relation to the setting of awards for costs<sup>7</sup>. The exercise of that discretion is marginally narrowed by the Code of Civil Procedure saying costs normally abide the event of the proceeding, the amount claimed by a defendant must take into account to quantum of the claim and an award for costs is to include Court fees and witnesses expenses<sup>8</sup> with the High Court Fees, Costs and Allowances Regulations 2016<sup>9</sup> prescribing that awards of costs must be "fair and reasonable in the circumstances of each case"<sup>10</sup>.

[7] Schedule 4 to the Fees Regulations sets a scale of solicitors costs<sup>11</sup> which, so far as is relevant to a claim of this size allows 24 hours at \$180 per hour for preparing a statement of defence and the same hourly rate, measured in half hours, for the appearance in Court to

<sup>3</sup> Received by Chief Justice on 25 January 2020 (NZT).

<sup>4</sup> Received by Chief Justice on 28 February 2020 (NZT).

<sup>5</sup> Received by counsel on 26 February 2020.

<sup>6</sup> At [4].

<sup>7</sup> S 92 of the Judicature Act 1980-81.

<sup>8</sup> Rules 300 and 303 of the Code of Civil Procedure of the High Court 1981.

<sup>9</sup> The "Fees Regulations".

<sup>10</sup> Regulations 9 and 11.

<sup>11</sup> Inclusive of VAT.

conduct the hearing. Under the Regulations the allowance to PMH for preparing the statement of defence would be \$4320 and that for the approximately two and a half day hearing \$2700.

[8] While the figures allowed in the Fees Regulations are not fixed, it must immediately be observed that, while the allowance for the statement of defence in this case seems not unreasonable, the allowance for the hearing seems well below what would be regarded as reasonable. Despite the Fees Regulations having only been in force for four years, the rate allowed for appearances in Court seems seriously understated, particularly when compared with the statistics provided by Mr Mason of the hourly rates charged by senior solicitors in Rarotonga and himself.

[9] That observation is reinforced by the decision in *Tini v. Cook Islands Investment Corporation* and *Papera v. Papera Hosking*<sup>12</sup> where the general starting point for a costs award of a contribution of about two-thirds of the costs incurred by the successful party was broadened to establish the unhelpfully wide range of between 20-80% with the actual percentage chosen being influenced by the factors set out in *Holden v. Architectural Finishes Limited*<sup>13</sup>. These include hearing length, amount involved, importance of the issues, legal and factual complexity, maintenance of a position which lacks substance or is unrealistic or is an abuse of process, or the taking of technical or unmeritorious points and interlocutory or other measures taken to which result in lengthening or shortening the time occupied by the case.

### **Discussion and decision**

[10] Applied to this case, those criteria indicate:

- (a) The hearing occupied something over two days spread across two fixtures;
- (b) During the course of the litigation Mr Walker reduced his claim by \$20,000 to the sum in issue at the trial, \$149,041.12;

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<sup>12</sup> *Papera v. Papera Hosking* [2012] CKHC Isaac J, at [19].

<sup>13</sup> *Holden v. Architectural Finishes Limited* (1984), 2 NZLR 629 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 620.

- (c) There were significant issues of credibility involved in the hearing but, as the substantive judgment found, ultimately the factual issues were relatively straightforward and there were no legal issues of particular complexity;
- (d) The plaintiff's denials, first of receiving the \$20,000 by which his claim was ultimately reduced and, secondly, relating to the letter of 27 October 2016 discussed in the judgment justified PMH in retaining Messrs Marheine and Morgan as expert witnesses;
- (e) As disclosed in the costs submissions, there had been settlement negotiations on a "without prejudice except as to costs" basis, negotiations which proved unsuccessful. PMH submitted Mr Walker's obdurate attitude contributed both to the factual complexity and the length of the hearing coupled with the necessity to retain expert witnesses;
- (f) Interlocutory applications by PMH included two applications for security for costs.
- (g) PMH was wholly successful.

[11] Factors (a) and (b) listed above moderate the amount which should be allowed for costs but the remaining factors assist PMH in its costs claim.

[12] Turning to the individual components of PMH's costs claim categorised in paragraph [5] above, Mr Mason's fees of \$12,650.00 plus disbursements seem very modest and his charge out rate is reasonable. Mr Rasmussen said Mr Walker accepts Mr Mason's claim is a reasonable one.

[13] Having regard to the comments about the rates in the Fees Regulations, the reasonableness of Mr Mason's charges as a proportion of the sum in issue and the fact that PMH's disbursements are necessarily sizeable, the claim for Mr Mason's fees of \$12,650 inclusive of VAT is therefore wholly allowed, rather than no more than a proportion being awarded.

[14] To that allowance will be added Mr Mason's disbursements of court fees (\$100), printing costs (\$120.75) and research costs (\$16.26).

[15] As far as the witnesses, Messrs Marheine and Morgan, are concerned, Schedule 5 of the Fees Regulations allows \$70 per hour for expert witnesses outside the Cook Islands plus qualifying fees for drawing up reports and other work undertaken in preparation of their evidence.

[16] As it transpired, the evidence of Messrs Marheine and Morgan – especially the former – was of critical importance to the defendant in meeting Mr Walker’s evidence. Both witnesses were highly qualified – again particularly Mr Marheine – and, although in context the fees are large, the Court’s view is that their accounts should be allowed in full.

[17] As expert witnesses fees, there will therefore be an award in favour of PMH for the fees of Mr Marheine (\$A11,000 GST inclusive) and Mr Morgan (\$A8,250 GST inclusive) translated, for the reasons later set out, into Cook Islands currency in the manner and at the date and rate appearing later in this judgment.

[18] The claims for recovery of Hannay Law Pty Limited’s fees (\$A12,700) and Nimrod Services Europe Limited (£13,273 translated to \$A25,290) pose more of a difficulty.

[19] As to the claim for Hannay Law, because, as noted in the costs minute, Mr Mason was solicitor on the record and counsel for PMH and was nowhere noted as acting as agent for Hannay Law, their claim should properly be regarded as a PMH disbursement, not a claim for solicitor’s fees.

[20] That said, with Mr Duffy, Director of PMH, in poor health and residing in Australia, it was not unreasonable for PMH to engage Australian solicitors to assist in the management of the claim, play a part in the preparation of Mr Duffy’s voluminous affidavit and charge for making their facilities available for the hearing of evidence. Had Hannay Law not undertaken those roles, PMH may have claimed witnesses expenses for Mr Duffy with the resultant claim, perhaps including significant travel and accommodation costs potentially exceeding the allowable proportion of Hannay Law’s charges.

[21] Caution needs to be exercised, however, in that regard to avoid double counting so, analysing Hannay Law’s account, it is reasonable to allow the charges relating to instructing the handwriting and other experts in Australia and assisting in settling Mr Duffy’s affidavit (\$A3,375), plus \$A500 for the arrangements concerning Skype and half, \$A750, for their

conferences with Mr Duffy, again with that award being translated into Cook Islands currency in the manner and at the date and rate later appearing.

[22] Hannay Law's other charges appear to go beyond their role in assisting Mr Mason in the conduct of the case on PMH's behalf and are therefore not allowed as PMH disbursements in this matter.

[23] The claim by Nimrod Services is even more problematic.

[24] The costs minute sought additional information concerning that claim in saying:

[10] Similar issues appear to arise in relation to the claim for an allowance in costs for the fees of Nimrod Services. The firm's letterhead describes its business as "international litigation support" but the firm appears to be domiciled in England and, in litigation which affected mainly the Cook Islands and Australia, (with occasional references to Fiji and New Caldeonia), it is difficult to see PMH's decision to retain Nimrod Services as anything other than a choice it made, rather than action necessitated by the circumstances of the case.

[11] Before considering whether a costs allowance should be made for Hannay Law and Nimrod Services, further explanation and justification needs to be furnished in respect of the retention and actions of those firms.

[25] Mr Mason's initial submissions in relation to the claim for Nimrod Services was that it was a claim for their "assistance and support" to Mr Duffy, given his health, with that support being provided by Nimrod Services' lawyer, Rob Reichelt, who "was on a retainer for the period of the litigation".

[26] While Mr Reichelt's name appeared in some of the documents put in evidence, they were historic, rather than contemporary, documents in the sense of directly providing assistance and support to Mr Duffy – not to PMH – in the conduct of the litigation. Mr Reichelt's name or role did not feature to any greater extent than that. There was no evidence in the case that he was "on a retainer".

[27] In those circumstances, it appears that employing Nimrod Services for Mr Reichelt to assist him was Mr Duffy's choice, there was no evidence of any substance that Mr Reichelt's assistance and support contributed to PMH's success in the litigation and accordingly the Court is not prepared to allow any part of the claim by Nimrod Services Europe Limited as a PMH disbursement in the costs award.

[28] In the event, the defendant is awarded Mr Maon's solicitors costs of \$12,650 (inclusive of VAT) plus his disbursements of \$237.01 and further disbursements for Mr Marheine (\$A11,000), Mr Morgan (\$A8250) and Hannay Law Pty Limited (\$A5,125), all of those at the figures translated into Cook Islands currency at the relevant rate of exchange at the date of delivery of this judgment. Although there are likely to be differences in the rate of exchange between that date and the date of payment, they will probably be comparatively small. The date of delivery has been chosen to give the parties certainty as to the extent of Mr Walker's liability for costs and disbursements and to assist, if necessary, in the sealing and enforcement of this judgment.

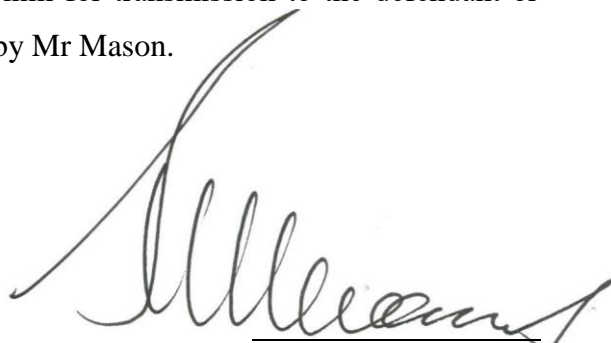
[29] As recounted in the substantive judgment<sup>14</sup> following the sale of Tranquility and conclusion of the litigation in *Pacific Maritime Holdings Inc v. Registrar of International and Foreign Companies*<sup>15</sup> and the judgment of Potter J in that case, the sum of \$169,195.57 remained. At the conclusion of her judgment<sup>16</sup> Potter J ordered:

The registrar is to forthwith pay the proceeds to the trust account of Henry Law PC. Mr Mason is to ensure the proceeds so paid are placed on interest bearing deposits. They are to be held as to the proceeds and interest therefore the persons entitled thereto as finally determined.

[30] The substantive judgment observed<sup>17</sup>:

Although, perhaps, not strictly raised by the issues in the case, it would appear appropriate, unless counsel make submissions to the contrary, to make a declaration that if there is no appeal PMH is entitled to the \$169,195.57 held in Ms Henry's Trust Account, being the net proceeds of the sale of Tranquility, together with the interest which it has earned since its deposit.

[31] With the concurrence of Potter J, there will be an order that the \$169,195.57 plus interest be paid at Mr Mason's direction either to him for transmission to the defendant or directly to the defendant in a manner to be advised by Mr Mason.



**Hugh Williams, CJ**

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<sup>14</sup> At [9]-[12].

<sup>15</sup> *Plaint 2/2018*.

<sup>16</sup> At [22](a).

<sup>17</sup> At [130](c).