

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 313 OF 2005

BETWEEN : **NATALIE KATZMANN** formerly of Harvester Road, Vitogo, Lautoka, but now of 74 Adelaide Street, Oxley Park NSW 2760, Australia, Assistant Manager.

PLAINTIFF

AND : **BARSTOCK INVESTMENTS (FIJI) LIMITED** a limited liability company having its registered office at Vuda Point, Lautoka.

DEFENDANT

Appearances : Ms V. Lidise for the plaintiff
Mr R. Singh with Ms A. Harikishan for the defendant

Date of Hearing: 06 August 2020

Date of Ruling : 06 August 2020

R U L I N G

[on assessment of costs]

Introduction

[01] The application before the court is an application by the defendant for assessment of costs. On 7 May of this year, the court delivered a judgment dismissing the plaintiff's claim with costs to the defendant to be assessed by the court.

[02] On 22 May of this year, the defendant filed a summons supported by an affidavit in support to determine costs awarded by the court to the defendant ("*Application*"). The application seeks the following orders:

1. *The costs be assessed on a summary basis and a gross sum of \$100,000 (or such other sum) be awarded in lieu of taxation of costs.*
2. *Alternatively, if the cost is to be taxed:*
 - a. *cost be assessed on an indemnity basis or*
 - b. *the Court increases the scale of costs stated in appendix 4 schedule of the High Court Rules 1988 as stated in the schedule attached to this summons or*
 - c. *costs be determined on a higher scale.*
3. *The security for costs paid by the plaintiff into Court to be released to the defendant.*
4. *The plaintiff pay the cost of this application on an indemnity basis.*
5. *Any other order that this Court seems just and fair.*

[03] The application is made on the grounds:

[Order 1]

- (a) To avoid the expense, delay and aggravation involved in a protracted litigation.
- (b) The plaintiff has not attempted to amicably resolve the issue of costs.

[Order 2]

- (a) The basis of the assessment has not been determined by the Court.
- (b) The defendant invoked 'Çalderbank principles' attempting to resolve the matter.
- (c) The cost indicated in the schedule of costs is not fair and just of the costs incurred by the defendant in this matter.
- (d) The plaintiff was found, as a matter of fact, an unbelievable witness.
- (e) The questions before the Court involved difficulty questions and research was required (including research on Fijian and Australian law).

[Order 3]

- (a) On 6 February 2018, the High Court confirmed that plaintiff has paid the security for costs in the sum of \$6,500.00.

(b) As costs had been awarded against the plaintiff, the sum of \$6,500.00 ought to be released to the defendant.

[Order 4 and 5]

(a) To save further costs, the defendant attempted to resolve the costs issue but received no response from the plaintiff.

Documents

[04] The documents relied upon by the parties include:

- a) Affidavit of Kamlesh Narayan in support of defendant's application sworn on 21 May, 2020 and filed on 22 May, 2020 (*Narayan Affidavit*); and
- b) Affidavit of Natalie Katzmann in opposition to the application (*Katzmann affidavit*). This affidavit was filed outside the time limit. It was due to be filed on 29 June 2020, however, it was filed on 7 July 2020, after a delay of 9 days.

[05] At the hearing, both parties orally made submission and only the defendant tendered written submission.

Background

[06] On 26 October 2005, the plaintiff filed a writ and statement of claim alleging that on 18 January 2005, she swallowed several mouthfuls of a cleaning liquid/agent while she was a guest at the defendant's resort.

[07] After around 14 years of delay and several adjournments of trial dates, the matter was heard on 11 March 2019, (which was adjourned due to the plaintiff's late application) and continued from 20 November 2019 to 26 November 2019.

[08] On 7 May 2020, the court delivered the judgment dismissing the plaintiff's claim with costs, which is to be assessed, to the defendant.

Law

[09] O 62, Rule 12 (1) of the High Court Rules 1988, as amended ("*HCR*") provides for taxation of costs on the standard basis. It states:

“Basis of taxation (O 62, R 12)

12 (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules the term “the standard basis” in relation to the taxation of costs shall be construed accordingly.

(2)...

(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on basis other than standard basis or indemnity basis, the costs shall be taxed on the standard basis.”

[10] Order 62 Rule 13 of HCR provides:

“Standard Costs (O 62, R 13)

13 (1) In determining the scale of standard costs to be awarded as provided by Order 1 R 9(3)(a) the taxing officer shall have regard to be complexity of the proceedings in respect of which costs are taxed and in particular to-

- (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;*
- (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;*
- (c) the number and importance of the documents (however brief) prepared or perused;*
- (d) the place and circumstances in which the business involved is transacted;*
- (e) the importance of the cause or matter to the client;*
- (f) where money or property is involved, its amount or value;*
- (g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.*

[11] Appendix 4 to the HCR in item 38 states:

“Increasing Costs

38 In any case a Judge of the High Court either at the trial or on notice if made within 14 days after the judgment is pronounced may certify an increase in any of the above charges to such amount as he thinks having regard to all the circumstances of the case.”

[12] In *Gilmore v Kubs* [2014] FJHC 450, Amaratunga J, on standard basis of assessment of costs he said [at para 14]:

“14. The approach is two prone. First the court needs to consider each claim whether it is reasonable or not and then if it is a reasonable claim the court needs to assess the reasonable amount the two prone process is made easier by the schedule found in the appendix 4 as the amounts and steps stated there can be considered as reasonable claims and then the court has to decide whether it should be allowed lower or higher scale...”

[13] On the question of ‘reasonable’ costs, in *Sen v Vandhana* [2011] FJHC 800, the High Court said [at paras 6 and 7]:

“6. In Vitiana Timber (Fiji) Limited v Danzas AEI Limited HBC 327 of 2007, the court has considered what “reasonable” meant. It was cited the case of Francis v Francis and Dickinson [1955] 3 All ER 836 “a reasonable step is that of a sensible solicitor considering in his knowledge what was reasonable for his client”. The test is what the court thinks reasonable and not the actual costs as in the indemnity cost.

7. Further the phrase “necessarily incurred” was considered by the High Court in Shah v Fiji Island Revenue and Customs Authority and anr HBJ 42 of 2001, 11 May 2006 where he cited Smith v Buller [1875] EQ 473, Sir Malins VG at 475: I think he ought not to bear more than the necessary costs. I adhere to the rule, which has already been laid down, that the costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the

Litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them. The plaintiff, is the attacking party and has failed, and he must therefore pay all charges which are necessary to the litigation.” (Emphasis original)

Discussion

[14] When ordering costs in favour of the defendant, the court did not indicate the basis of taxation. Therefore, the assessment of costs has to be on standard basis because where the court makes an order for costs without indicating the basis of taxation, the costs shall be taxed on the standard basis (see O 62, R 12 (3)).

[15] I intend to assess the costs on the standard basis, however the defendant seeks that the costs should be assessed on the increased higher scale.

Increased higher scale

[16] In any case a Judge of the High Court either at the trial or on notice if made within 14 days after the judgment is pronounced may certify an increase in any of the above charges to such amount as he thinks having regard to all the circumstances of the case (see Appendix 4/38 to the HCR).

[17] It was not in dispute that the application has been made within 14 days after the judgment was pronounced.

[18] The plaintiff filed her personal injury claim in October 2005 and brought to conclusion in November 2019. The plaintiff made a number of interlocutory applications even in the middle of the trial on the basis that damage was continuing.

[19] The defendant was correct in submitting that the complexity of the matter and the delay in this matter (largely attributed to the plaintiff) justifies that the costs should be increased.

[20] The complexity of the proceedings included: establishing the facts of the case, reviewing and analysing various documents in preparation of the trial, questions pertaining to PTSD which was alleged after 6 years from the incident, questions

relating to Australian law because the plaintiff called expert witness (Psychiatrist) based in Australia and witnesses belonging to different professions and questions pertaining to Medicine. All these point to the complexity of the matter.

[21] The conduct of the plaintiff in proceeding the matter is relevant in assessing the costs. The plaintiff had ample opportunity to settle the matter. The defendant appears to be willing to settle the matter. The defendant had offered \$222,000.00 for settlement which the plaintiff had refused without any counter offer. Even the court at the beginning of the trial encouraged the parties to settle the matter amicably considering the age of the matter. This was not taken seriously by the plaintiff. The delay in the proceedings was largely attributed to the plaintiff. The plaintiff brought applications upon applications even in the middle of the trial.

[22] Having regard to all the circumstances of the case and in exercising my discretion, I see fit to increase the higher scale of costs. I would accordingly assess the costs on the increased higher scale of costs.

Costs reasonably incurred

[23] The defendant has provided the bill of costs based on Appendix 4 to the HCR. The bill of costs consists of such items specified in Appendix 4, set out in chronological order. It was not in dispute that items specified in the bill of costs were reasonably incurred. I would, therefore, allow each item specified in the bill of costs as reasonably incurred.

Reasonable in amount

[24] I now proceed to determine as to whether the costs were reasonable in amount in each item claimed. I propose to determine it on the increased higher scale of cost basis.

[25] The plaintiff objects to the amount of costs in each item on the ground of excessiveness.

[26] The plaintiff submitted that the increased amount given in each item is reasonable and justified in the circumstances of the case and the delay. The defendant seeks increased bill of costs in the sum of \$73,250.00.

[27] Having regard to the application filed by the defendant with affidavit in support, the responding affidavit filed by the plaintiff and their submissions advanced by both counsel, I have reviewed the increased amount given by the defendant against each item and assess and allow the increased costs in each item as assessed by the court. In doing so, I have exercised my discretion, and have also considered the circumstances of the case and the complexity and the delay in the mater. The amount assessed and allowed in each item, in my judgement, is reasonable and justified in the circumstances of the case. The amount of costs in each item as assessed and allowed by the court appears as follows:

No.		Higher scale (\$)	Increased amount (\$)	Plaintiff's position	Defendant's replies	Amount assessed by court (\$)
4(a)	Instructions to defend inclusive of preparation, filing and service of appearance in respect of one defendant	125	500	Excessive. Costs of \$75 on the lower scale reasonable as the substantive of the defence was a bald denial.	The mount claimed is reasonable. This step involved initial discussions with the client, brief review of the writ and statement of claim, conducting necessary company search of the defendant named in the Writ, preparing, filing and service of an intention to defend.	350
7	Instructions for Statement of defence or Counterclaim or Defence and Counterclaim inclusive of preparation, filing and service	250	1,000	Excessive. Cost of \$75 on the lower scale reasonable as the substance of the defence was bald denial.	The amount claimed is reasonable. This step involved correspondence with the defendant regarding responses to the allegations/claims in the Statement of Claim, drafting a statement of defence, filing and service of the statement of defence on the	650

					plaintiff. The plaintiff's lawyer is based in Lautoka as a result, we were required to instruct our city agent in Lautoka to serve the statement of defence on the plaintiff.	
10(a)	Instructions for and preparation of list of documents and service thereof.	150	500	Excessive. Costs of \$75 on the lower scale reasonable as the list only contained 9 documents.	The mount claimed is reasonable. This step involved requesting for all the documents pertaining to the incident from the defendant, analysing those documents and preparing a list of documents. The list of documents listed 11 documents (refer AVLD filed on 24 October 2008) and not 9 as claimed by the plaintiff.	300
10(b)	Affidavit verifying list if required.	30	500	Cost on higher scale of 30 accepted. Increased amount excessive as the affidavit in a standard document.	The mount claimed is reasonable. This step involved correspondence with the defendant regarding list of documents, preparations of the affidavit verifying list of documents, further correspondence with the defendant for finalizing the affidavit, instructions to city agent in Lautoka for filing and service of the affidavit on the plaintiff and updating the defendant.	250
19	Instructions for and preparing	300	20,000	Costs of \$300 accepted as	The amount claimed is reasonable. This is a	11,000

	for trial inclusive of instructions for and preparations of brief.			reasonable. Increased costs wholly excessive.	crucial litigation step which involved reviewing/analysing documentation, conducting research, meeting witnesses, preparing briefs, discussions with overseas based psychiatrist Dr Smith regarding the psychiatric reports and evaluation, travel dates and trial dates, arranging for Dr Smith's travel.	
20	<p>Attendance at trial of an action or proceeding per day (\$600 per day on higher scale).</p> <ul style="list-style-type: none"> • 23 November 2018 • 11 March 2019 • 20, 21, 22, 25 and 26 November 2019 	4,200	20,000	Excessive. The claim for 23 November is not justified as this trial date was vacated. Costs of \$400 per day reasonable for the 6 days of trial. Total of \$2,400 proposed.	The amount claimed is reasonable. Trial was at Lautoka High Court and the defendant's lawyers Suva. As a result, the defendant's lawyers were required to travel to Suva for the trial. The November 2018, is justified. This trial date was vacated not because of the defendant but the plaintiff. 2 days before the 23 November 2018 trial, the plaintiff served the defendant with plaintiff's 2 nd supplementary list of documents. Copies of those documents were made available to the defendant a day before the 23 November 2018. If the 23 November 2018 trial were to proceed given the late disclosure of documents, it would	5,950

	<p>Appearance at court mentions and hearings –</p> <ul style="list-style-type: none"> • 12 March 2008 		10,250		<p>have been a trial by ambush. This issue was raised in Court on the 23 November 2018, trial date. defendant's lawyers asked the plaintiff to file a formal application to disclose the supplementary documents in a proper manner. On this date, the issue of Jonathan Adams giving evidence by Skype was also brought up. The defendant's lawyers objected as no formal application to adduce Adams evidence was filed. Consequently, the plaintiff's lawyers asked for an adjournment solely because they had not followed proper procedures thus the trial of 2018 was vacated.</p> <p>There are no objections by the plaintiff on the amount claimed for appearance at court mentions and hearing. We respectfully submit that these costs should be allowed.</p>	10,250
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<ul style="list-style-type: none"> • 18 June 2008 • 11 September 2008 • 10 November 2008 • 11 February 2009 • 13 March 2009 • 21 September 2009 • 15 October 2009 • 30 October 2009 • 8 December 2009 • 22 November 2010 • 22 March 2011 • 21 July 2011 • 8 December 2011 • 24 January 2012 • 27 January 2012 • 14 February 2012 • 19 September 2012 • 31 October 2012 • 6 December 2012 • 20 February 2013 • 6 December 2017 • 6 February 2018 • 22 February 					
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	<ul style="list-style-type: none"> 2018 • 7 March 2018 • 16 March 2018 • 17 April 2018 • 26 April 2018 • 30 April 2018 • 3 May 2018 • 18 May 2018 • 31 July 2018 • 7 December 2018 • 5 March 2019 • 6 March 2019 • 12 March 2019 • 15 March 2019 • 24 April 2019 • 3 June 2019 • 22 August 2019 • 26 August 2019 (\$250 for appearance)					
21	<p>Brief fee to extra barrister or solicitor in respect of any proceeding is certified for per day (\$600 per day on higher scale)</p> <ul style="list-style-type: none"> • 11 March 2019 • 20, 21, 22, 25 and 26 November 2019 	3,600	15,000	<p>Excessive. Sum of \$200 per day will be accepted as barrister was a junior associate. Total proposed \$1,200.</p>	<p>The amount claimed is reasonable. The extra solicitor attended the trial on 11 March 2019, 20, 21, 22 25 and 26 November 2019. The extra solicitor took notes of the entire proceedings and assisted in the trial preparations. The lawyer also actively participated in the Court proceedings by conducting an examination in chief.</p>	5,600

24(a)	Instructions for and attendance on summonses, motions and other applications inclusive of all services from instructions to complete not otherwise provided for	300	1,000	Excessive. Sum of \$150 will be accepted.	The amount claimed is reasonable. The defendant's lawyers attended to (either in support or opposition) and prepared for summons and applications from the inception of the matter in 2005 including defendant's summons for security for costs. Plaintiffs summons to amend Statement of claim, defendant's summons to amend the statement of defence, plaintiffs summons to vacate trial date of August 2018, plaintiff's summons for leave to file affidavit verifying 2 nd and 3 rd supplementary list of documents and plaintiff's summons for further directions.	700
24(c)	<p>In addition, if necessary affidavits exceed 3 pages then for each additional page or part thereof - \$10 per extra page on a higher scale.</p> <ul style="list-style-type: none"> • Defendant's summons for security of costs filed on 27/8/12. The 					

	defendant filed an :					
	(i) Affidavit in support which has 25 pages (extra 22 pages by \$10 per extra page)	220	1,000	Excessive. Sum of \$4 per additional page will be accepted. The additional pages were annexures. Total of \$88 proposed.	The amounts claimed for the affidavits are reasonable. This step involved research prior to preparing affidavits in support of the respective applications (see columns of the table – 24 (c), preparing the affidavits, arranging the annexures and compiling the affidavits for each application.	650
	(ii) Affidavit in reply which has 12 pages (extra 9 pages by \$10 per extra page).	90	500	Excessive. Sum \$4 per additional page will be accepted. Total of \$36 proposed.		300
	• Defendant's summons for leave to amend Statement of Defence filed on 21/2/19. Affidavit in support has 11 pages (extra 8 pages by \$10 per extra page).	80	1,000	Excessive. Sum of \$4 per additional page will be accepted. Most of the additional pages were annexures. Total of \$32 proposed.		500
	• Defendant's affidavit in opposition to plaintiff's summons for	490	1,000	Excessive.		700

	<p>leave to file affidavit verifying list 2nd and 3rd supplementary list of documents filed on 14/3/19 has 52 pages (extra 49 pages by \$10 per extra page).</p>			<p>Sum of \$4 per additional page will be accepted. The substantive body of the affidavit was only 6 pages with the remainder being annexures. Total of \$196 proposed.</p>		
37(c)	Service fees: in			No	The amount claimed is	

	<p>addition to the above fees the following fees for service may be added in appropriate cases and where service by post is not authorized.</p> <p>Where in consequence of the distance involved it is necessary to instruct another barrister and solicitor to arrange for service to be affected.</p>	30	1,000	<p>particulars provided. \$30 will be accepted.</p>	<p>reasonable. It is known that this is a Lautoka matter and the defendant's lawyers are based in Suva. each time, the defendant has to file and sere a document, they instruct their city agent in Lautoka to perform the filing and service of court documents. This is a 2005 matter and the defendant has filed a number of documents since then.</p>	350
TOTAL COSTS	\$9,865	\$73,250.00			\$37,550.00	

[29] The total costs as assessed by the court exercising its discretion is \$37,550.00. The defendant is, therefore, entitled to costs in the sum of \$37,550.00 as reasonably incurred in defending the claim. In addition, the defendant will be entitled to summarily assessed costs of \$2,000.00 for this application.

[30] It appears that the plaintiff has deposited a sum of \$6,500.00 into court, as security for costs. This is to be released to the defendant forthwith.

Result

1. The defendant shall be entitled to the assessed costs of \$37,550.00.
2. The defendant shall be also entitled to summarily assessed costs of \$2,000.00 for this application.

3. The security for costs of \$6500.00 deposited into is to be released to the defendant forthwith.

M.H. Mohamed Ajmeer
6/8/20

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
6 August 2020

Solicitors:

For the plaintiff: Young & Associates, Solicitors

For the defendant: Munro Leys, Solicitors

