

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

CIVIL ACTION No. HBC 225/2007

BETWEEN : **FOLLIES INTERNATIONAL LIMITED** a limited liability company
having its registered office at c/o BDO Accountants, 8th Floor,
Dominion House, Thompson St. Suva

PLAINTIFF

AND : **HONEYMOON ISLAND (FIJI) LIMITED** a limited liability
company having its registered office c/o Young & Associates,
Solicitors, 2 Saku Lane, Lautoka

FIRST DEFENDANT

AND : **OCEANIC SCHOONER COMPANY (FIJI) LIMITED** a limited
liability company having its registered office at Cromptons,
Solicitors, Office 10, Queensland Insurance, Victoria Parade,
Suva

SECOND DEFENDANT

AND : **ITAUKEI LAND TRUST BOARD** a body corporate established
under the iTaukei Lands Trust Act 1940

INTERESTED PARTY

CIVIL ACTION No. HBC 257/2007

BETWEEN : **HONEYMOON ISLAND (FIJI) LIMITED** (see above)

PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD** (see above)

DEFENDANT

APPEARANCES : Mr CB Young for Honeymoon Island (Fiji) Ltd (first defendant in
HBC 225/07 and plaintiff in HBC 257/07)
Ms E Raitamata & Mr Cati for the iTaukei Land Trust Board
(interested party in HBC 225/07 and defendant in HBC 257/07)

DATE OF HEARING : 14 October, 2020

DATE OF JUDGMENT : 26 March, 2021

DECISION

1. In my decision of 30 April 2020 deciding these consolidated claims, I made – for the reasons set out therein – an order for costs against the iTaukei Land Trust Board

(*ILTB*) (interested party in one proceeding and defendant in the other) in favour of the plaintiff, Follies International Limited (*Follies*), and the first defendant Honeymoon Island (Fiji) Limited. Unfortunately, as I now acknowledge, rather than fix the amount of costs, or direct a process for determining the amount of costs, I ordered *ILTB* to pay these parties *costs in the cause*. Honeymoon Island now seeks to determine those costs, and the matter now before me is the summons of Honeymoon Island dated 1st July 2020 seeking an order that *ILTB* pay costs as assessed. There has been no application for costs by *Follies*, and I assume either that it has been able to resolve the issue in discussions with *ILTB*, or does not seek costs against the *ILTB*.

2. I say ‘unfortunately’ because I did not fully appreciate, at the time I made the orders, the uncertainty, complexity and additional work and effort required not only from the parties, but also of the Court, as a result of me directing costs to be paid in the manner that I did. It is clear, on reflection, and on reviewing in some detail the provisions of Order 62 High Court Rules dealing with all matters concerning costs, that any award of costs *in the cause* (or the variations of that expression) really only makes sense where the award is made in the course of proceedings (e.g. in interlocutory applications), rather than in the concluding judgment. The purpose of the order is effectively to defer the fixing of costs until the final outcome of the proceedings is known, when costs can be awarded to the appropriate party depending on that outcome. To make an award of costs *in the cause* in the final judgement does not make much sense. I apologise to the parties for the resulting confusion. The fact that I now have to write this decision is a punishment perhaps fitting the crime – I will be more careful in future.
3. The first issue that needs to be determined is whether the Rules require costs awarded ‘in the cause’ to be taxed, or whether the court’s wide discretion to set the amount of costs allows the court to set an amount for costs that does not involve the extremely cumbersome and pedantic process of taxation. If I was to conclude that the costs must be taxed, the next question to be answered is whether a High Court judge has jurisdiction to undertake the taxation process, or whether this must be undertaken by a Taxation Officer (a role defined in the High Court Rules that does not expressly include a judge). Even if I were to conclude that a judge does have jurisdiction to undertake taxation, ought I to do so?
4. Taking into account these issues it is now obvious that if that course is still available to me, it is much easier, less time-consuming, less expensive and ultimately probably fairer to parties to litigation to simply invite them to make submissions on and provide evidence as to costs incurred, and then set a figure for costs based on the information provided, experience and my perception of what a fair outcome on this issue would be. Subject of course to any exercise of rights of appeal, the parties would at least then know where they stood, and be able to start the process of moving on from the proceedings (which in the present case have already taken far too long) without having to relitigate aspects of it, and incur yet more expense, in the process of obtaining or opposing a determination as to costs by taxation.

The law

5. Order 62 of the High Court Rules deals with the issue of costs. The index in the Rules as it applies to Rule 62 illustrates the scope and detail of the rules dealing with costs is as follows:

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Rules relevant to the present situation are as follows (I have omitted those rules, or parts of the rules, including definitions, that do not appear to apply here):

Interpretation (O.62, r.1)

- 1(1) Except where it is otherwise expressly provided, or the context otherwise requires, the following provisions of this rule shall apply for the interpretation of this Order.
- (2) ...
“contentious business” means business done as a legal practitioner in or for the purposes of proceedings begun before a court, tribunal or arbitrator;
“non-contentious business” means any business done as a legal practitioner, other than contentious business;
“legal representative” means a legal practitioner or a barrister or a solicitor;
“party”, in relation to a cause or matter, includes a party who is treated as being a party to that cause or matter by virtue of Order 1, rule 2;
...
“registrar” means the registrar of the High Court; 360 High Court Rules Cap 13A
“the standard basis” and “the indemnity basis” have the meanings assigned to them by rule 12(1) and (2) respectively;
“solicitor” includes a legal practitioner admitted to practise in Fiji;
“taxed costs” means costs taxed in accordance with this Order;
“taxing officer” means the Registrar or Master or any officer for the time being authorised by the Chief Justice to act as a taxing officer.
- (3) ...
- (4) References to costs shall be construed as including references to fees, charges, disbursements, expenses and remuneration and, in relation to proceedings (including taxation proceedings), also include references to costs of or incidental to those proceedings.

The general principles are set out in Rule 3 of the Order, as follows:

General principles (O.62, r.3)

- 3(1) This rule shall have effect subject only to the following provisions of this Order.
- (2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.
- (3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.
- (4) The amount of costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where-

- | Term | Effect |
|------------------|--|
| “Costs” | (a) Where this order is made in interlocutory proceedings, the party in whose favour it is made shall be entitled to the costs in respect of those proceedings whatever the outcome of the cause or matter in which the proceedings arise; and
(b) where this order is made at the conclusion of a cause or matter, the party in whose favour it is made shall be entitled to have the costs taxed forthwith; |
| “Costs reserved” | ... |

<i>"Costs in any event"</i>	...
<i>"Costs here and below"</i>	...
<i>"Costs in the cause"</i>	<i>The party in whose favour an order for costs is made at the conclusion of the cause or matter in which the proceedings arise shall be entitled to the costs of the proceedings in respect of which such an order is made;</i>
<i>"Plaintiff's costs in the cause" or "Defendant's cost in the cause"</i>	<i>The plaintiff or the defendant, as the case may be, shall be entitled to the costs of the proceedings in respect of which such an order is made if judgment is given in his favour in the cause or matter in which the proceedings arise, but he shall not be liable to pay the costs of any other party in respect of those proceedings if judgment is given in favour of any other party or parties in the cause or matter in question;</i>
<i>"Costs thrown away"</i>	<i>Where proceedings or any part of them have been ineffective or have been subsequently set aside, the party in whose favour this order is made shall be entitled to the costs of those proceedings or that part of the proceedings in respect of which it is made.</i>

Cases where costs do not follow the event (O.62, r.6)

- 6(1) The provisions of this rule shall apply in the circumstances mentioned in this rule unless the Court orders otherwise.
- (2) *Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property, as the case may be, and the Court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund.*
- (3) *Where any person claiming to be a creditor-*
 (a) *seeks to establish any claim to a debt under any judgment or order in accordance with Order 44, or*
 (b) *comes in to prove his title, debt or claim in relation to a company in pursuance of any such notice,*
he shall, if his claim succeeds, be entitled to his costs incurred in establishing it: and, if his claim or any part of it fails, he may be ordered to pay the costs of any person incurred in opposing it.
- (4) *Where a claimant (other than a person claiming to be a creditor) has established a claim to be entitled under a judgment or order in accordance with Order 44 and has been served with notice of the judgment or order pursuant to rule 2 of that Order, he shall, if he acknowledges service of the notice, be entitled as part of his costs of action (if allowed) to costs incurred in establishing his claim; and where such a claimant fails to establish his claim or any part of it he may be ordered to pay the costs of any person incurred in opposing it.*
- (5) *The costs of any amendment made without leave in the writ or any pleadings shall be borne by the party making the amendment.*
- (6) *The costs of any application to extend the time fixed by these rules or by any direction or order thereunder shall be borne by the party making the application.*
- (7) *If a party on whom a notice to admit facts is served under Order 27, rule 2, refuses or neglects to admit the facts within 14 days after the service on him of the notice or such longer time as may be allowed by the Court, the costs of proving the facts and the costs occasioned by and thrown away as a result of his failure to admit the facts shall be borne by him.*
- (8) *If a party-*
 (a) *on whom a list of documents is served in pursuance of Order 24, or*
 (b) *on whom a notice to admit documents is served under Order 27, rule 5,*

gives notice of non-admission of any of the documents in accordance with Order 27, rule 4(2) or 5(2), as the case may be, the costs of proving that document and the costs 370 High Court Rules Cap 13A occasioned by and thrown away as a result of his non-admission shall be borne by him.

Special circumstances in which costs shall not or may not be taxed (O.62, r.7)

- 7(1) *The provisions of this rule shall apply in the circumstances mentioned in this rule.*
- (2) *Costs which by or under any direction of the Court are to be paid to a receiver appointed by the High Court, in respect of his remuneration, disbursements or expenses, shall be allowed in accordance with Order 30, rule 3 and shall not be taxed.*
- (3) *Where a writ in an action is indorsed in accordance with Order 6, rule 2(1)(b), and judgment is entered on failure to give notice of intention to defend or in default of defence for the amount claimed for costs (whether alone or together with any other amount claimed), the plaintiff is not entitled to tax his costs; but if the amount claimed for costs as aforesaid is paid in accordance with the indorsement (or is accepted by the plaintiff as if so paid) the defendant shall be entitled to have those costs taxed.*
- (4) *In awarding costs to any person the Court may order that, instead of his taxed costs, that person shall be entitled-*
 - (a) *to a proportion (specified in the order) of those costs from or up to a stage of the proceedings so specified; or*
 - (b) *to a gross sum so specified in lieu of those costs; but where the person entitled to such a gross sum is a litigant in person, rule 18 shall apply with the necessary modifications to the assessment of the gross sum as it applies to the taxation of the costs of a litigant in person.*
- (5) *Where a claimant is entitled to costs under rule 6(3) the amount of the costs shall be assessed by the Court unless it thinks fit to order taxation and the amount so assessed or taxed shall be added to the debt due to the claimant.*
- (6) *Subject to paragraph (7), where a party is entitled to costs under rule 6(7) or (8) the amount of those costs may be assessed by the Court and be ordered to be paid forthwith. Cap 13A High Court Rules 371*
- (7) *No order may be made under paragraph (6) in a case where the person against whom the order is made is an assisted person within the meaning of the statutory provisions relating to legal aid.*

6. A review of these provisions, and the commentary on them, confirms what I have always understood to be the over-riding principle, that costs awards are at the discretion of the court, both as to imposition of costs, and as to the amount. Without eroding that primary principle, the rules set out in Order 62 provide guidelines upon how that discretion might be appropriately exercised in a number of given situations. The court decisions that are referred to provide a further framework of reference, again not to limit the discretion, but as an indication of what has occurred in previous cases, which may provide a guide to what is appropriate in the immediate case to be decided. The commentary in the High Court Rules to Rule 7(4) above states:

This rule appears to empower the Court to order a gross sum in lieu of taxed costs but not to make arbitrary awards. No doubt it saves further cost and time by not having to provide the minutest detail in a bill of costs and to appear before a taxing master to argue the matter out.

In the Court of Appeal in **Yanuca Island Ltd v Markham** [2006] FJCA 67 (perhaps the most thorough examination in the Courts of Fiji on the issue of costs) the judgment notes at paragraph 41 and following:

*Although a Judge does have an unlimited discretion in making a gross sum award of costs under O.62 r.7(4)(b), it is well recognised that the discretion must be exercised in a judicial manner. Referring to the English equivalent of the rule in question, Purchas LJ, delivering the judgment of the English Court of Appeal in **Leary v Leary** [1987] 1 All ER 261, 265 said: "The unlimited discretion given by Ord 62., r.9 must be exercised in a judicial manner. How the powers are to be used varies widely from case to case and each case must be considered on its own merits. It is easy to envisage cases where a Judge could be said to have acted unjudicially: e.g. by clutching a figure out of the air without having any indication as to the estimated costs; receiving such an estimate without the details being made available to the other side; or refusing a request to hear submissions on such a schedule if the party against whom the order is to be made makes, on reasonable grounds, an application to be heard."*

7. Taking into account this strong affirmation of the underlying principles, and in the absence of anything that I can see in the rules that directs otherwise, I am pleased to conclude that the order I made in the course of giving my decision of 30 April 2020 to award *costs in the cause* to the first defendant against the ILTB, does not in any way limit the court's discretion as to the amount of those costs. In particular I see nothing in the rules that directs that where costs 'in the cause' are awarded, the court is obliged, when it comes to decide on costs, to follow the rules relating to taxation of costs, rather than follow the much easier, quicker and less expensive route of fixing the amount of costs by some other means. Perhaps more important, it is hard to imagine a persuasive argument in favour of such a proposition. If – as I have suggested – awarding 'costs in the cause' is merely a convenient method of deferring the decision on costs to be determined by the court that makes the final substantive decision on the claim, it would be a very inconvenient restriction on that decision if, the order for costs 'in the cause' having been made, any final costs order that followed must involve taxation. Furthermore, in practice it is clear that this is not what happens. There are numerous decisions in which orders for costs 'in the cause' have been made at some stage in the proceedings, where the courts finally deciding the cases have made untaxed orders for costs.
8. Had I decided that the costs must or should be taxed, I would certainly have directed that the taxation itself should be conducted before a Taxing Officer as defined in O.62., r.1. This is not to say that a judge of the High Court does not have jurisdiction to tax costs. I am sure a judge has. But given the detailed rules that prescribe the taxing process (Parts III, IV, V & VI of Order 62) and in particular taking into account the provisions in Rules 33-35 (see the index for Order 62 above) it is clear that an orderly approach to setting costs by taxation requires first an examination of costs by the Taxing Officer, followed by a review by the same Taxing Officer, and finally review by a judge. Leaving aside the issue of a proper and efficient use of resources, if a judge is to carry out the role of Taxing Officer, who is then to review his/her decision? Counsel for ILTB made the submission, which I accept, that the application for costs made by the first defendant does not contain the detail necessary for taxation. If I had decided that the costs must be taxed the first defendant would certainly have had to start again with the provision of information in the necessary

detail. But then at least some of the costs of that tedious and expensive exercise would be claimable by the first defendant from ILTB.

9. I will conclude this section of the judgment/ruling by quoting the warning of Lord Goddard in the English Court of Appeal in **Cinema Press Ltd v Pictures of Pleasures Ltd** [1945] 1 All ER 440 at 441:

This case is another illustration of the difficulty that often arises where special orders as to costs are made, involving taxation of those relating to particular issues. Considering that the judge only awarded £5 where £25 had been paid into court, it is likely that in making the order that he did he intended the defendant to get some real benefit from it, in consequence of his having made the payment into court. In the view that the master took, he got nothing and, as a consequence of this review, it may still be that he will get very little. These difficulties and complicated taxations can be avoided by awarding to one side or the other what proportion of the costs the judge thinks fair. There is no doubt as to his jurisdiction to do so and anything which works in favour of simplicity in these matters is desirable. It is too much to expect that judges and counsel, to whom questions of taxation are unfamiliar, will always be conversant with the many and by no means easy cases on the subject; nor can solicitors instruct counsel in advance on a matter such as this, as they cannot know how the judge will exercise his discretion or in favour of which party it will be exercised. We may be allowed to conclude this judgment by quoting the closing passage of Lord Blanesburgh's speech in [Medway Oil & Storage Co v Continental Contractors [1929] AC 88], at p 112:

'... this appeal will not be without permanent utility if it brings home to learned judges the necessity, in cases like these, of adjusting critically their orders as to costs if these orders are not sometimes to produce results at once unintentional and unjust.'

We would add that the simplest way is to award costs in such proportions as the judge thinks fair.

It is hardly surprising that counsel, and even judges, are unfamiliar with the complexity and rules that apply to taxation; it is something that parties and their advisers seldom have the time or appetite for. It is in most cases better, and fairer, for the court to make an order reflecting the judge's perception of the complexity and outcome of the case he/she has decided.

Costs sought by the first defendant

10. In pursuit of its application for costs the first defendant has filed two affidavits by a director of the first defendant, Shailend Kumar (4 July 2020 and 11 September 2020), and one by Selina Cheer (27 July 2020), a litigation clerk at Young & Associates, solicitors for the first defendant. These affidavits establish that the first defendant was billed a total of \$156,955.15 by its solicitors for attendances on these proceedings between 2007 and 2020. This amount was billed in the following amounts and dates (the figure in brackets is the fee content (without VAT) of each account):

i.	From commencement of proceedings in 2007 to June 2017	72,000.00 (64,755)
ii.	July 2017 – June 2018	23,187.03 (20,000)
iii.	July 2018 – March 2020	<u>61,768.12 (55,000)</u>
		\$156,955.15

This total seems reasonable, taking into account the length and complexity of the proceedings, including 6 days of trial, 60 other court attendances (over the 13 year course of the proceedings, before seven different judicial officers), listed by counsel for the first defendant in his submissions.

11. Having invited ILTB to agree to pay costs of \$35,000 – an invitation that was not accepted by ILTB – the first defendant has filed a Schedule of Costs listing the steps in the proceedings, and attendances since June 2007. This Schedule lists the costs claimed as follows:

Photocopying costs (@ \$1.00 per page)	7806.00
Court fees	1795.95
Solicitors costs	<u>91491.00</u>
	\$101,092.95

12. Evidence in support of the photocopying charges of \$1.00 per page is provided in the form of a quote dated 10 July 2020 from Mega Paper Supplies (Fiji) Ltd. This quote does not differentiate between monochrome (black & white), and colour photocopying, nor is there any change in the rate for photocopying in 2007, as opposed to that in 2020, although I would have expected the rate would have changed over that period. Furthermore, the material supplied by the first defendant does not make it clear what the photocopying is for, or why it is claimable at the quoted rate. In the Schedule of Costs there is reference to photocopying claimed for the whole period of 2007-2020, but for the period from July 2017 to March 2020 (the period covered by the second and third invoices issued to the first defendant by its solicitors (see paragraph 10 above)) the photocopying costs claimed are \$2984.00 (i.e. 2984 copies @ \$1.00 per page). For the same period the second and third invoices already include photocopying charges of \$750 and \$850 respectively, a total of \$1600.00. This suggests to me that the photocopying costs charged by the solicitors, presumably using their own photocopier, are – as I would expect - much less than \$1.00 per page. I do not see why a party entitled to costs should receive reimbursement for disbursements (including photocopying costs) at a higher rate than it actually paid. What the first defendant actually paid in the nearly three years to March 2020 (which included the time of the trial which I expect would be the time of highest requirement for photocopying) was \$1600, which is 0.53c per page for the 2984 copies claimed for over that period. Over the previous 10 years the first schedule shows 3844 photocopies, and applying the same rate this would come to \$2,061. Accordingly I am prepared to allow \$3661.00 for photocopying charges.
13. The claim for costs seeks reimbursement of Court filing, hearing and trial fees of \$1739.70, details of which are set out in the Schedule. The affidavits do not say, but I assume that the amounts shown reflect actual amounts paid out to the Court in filing and hearing fees by the first defendant's solicitor. In the absence of any contest from ILTB, and given that the amounts are in the range I would expect, I am willing to allow this aspect of the claim in full.

14. The amount of solicitors costs now claimed by the first defendant (\$91,491.00) represents approximately 63% of the amount actually paid by the first defendant to its solicitors for fees and VAT. This is 'in the ballpark' for party and party costs (i.e. costs awarded other than on an indemnity basis). The New Zealand High Court Rules, after stating in clause 14.1 the primary principle that costs are at the discretion of the court, set out at clause 14.2 the principles applying to the determination of costs as follows:

14.2 Principles applying to determination of costs

(1) *The following general principles apply to the determination of costs:*

- (a) *the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;*
- (b) *an award of costs should reflect the complexity and significance of the proceeding;*
- (c) *costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application;*
- (d) *an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application;*
- (e) *what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs;*
- (f) *an award of costs should not exceed the costs incurred by the party claiming costs;*
- (g) *so far as possible the determination of costs should be predictable and expeditious.*

and these principles (some of which are not dissimilar to the principles prescribed in O.62., r13 to guide the Taxing Officer in taxing a bill of costs) operate as guidelines in the judicial exercise of the court's discretion. It is clear from the Schedule of Costs filed by the first defendant that the costs have been calculated on the basis of an hourly rate of \$300.00, and although there has been no evidence as to the reasonableness or otherwise of this rate, there has been no evidence put forward by ILTB to the effect that the rate is not reasonable.

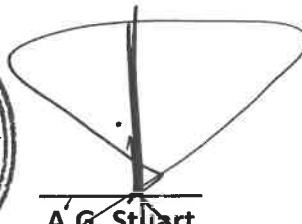
15. In an affidavit in opposition to the application for costs that reads more like a submission, Kirisitiana Volivoli of the ILTB argues that the order for costs made in my decision of 30 April 2020 means that the first defendant is not entitled to costs at all. Given what is set out in the judgment as the reasons for making the order for costs, this submission is quite unrealistic. I may have been mistaken in my reference to 'costs in the cause', but there is no mistaking my view that the ILTB was responsible, through its conduct, for the first defendant's situation, and although I found that the first defendant was not entitled to damages, I did make it clear that the ILTB should be liable for costs, because of that conduct.

Conclusion

16. Taking all this into account, I make an order under O.62., r7(4) that the first defendant is entitled to be paid by ILTB, in lieu of taxation of its costs, a gross amount of:

Solicitors/counsel costs	85000.00
photocopying costs	3661.00
court fees	1739.70
costs on this application	<u>2000.00</u>
	\$92400.70




A.G. Stuart
Judge

At Lautoka this 26th day of March, 2021

SOLICITORS:

Young & Associates of Lautoka, for Honeymoon Island (Fiji) Limited (Plaintiff in HBC 257/2007 and First Defendant in HBC 225/2007)

iTaukei Land Trust Board for ILTB (interested party in HBC 225/2007 and defendant in HBC 257/2007)