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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 25 of 2019**

BETWEEN:

KISIONE FAKAFANUA Plaintiff

-and-

NISHI TRADING LIMITED Defendant

PLAINTIFF'S OBJECTION TO HOURLY RATE CLAIMED BY DEFENDANT'S COUNSEL ON TAXATION OF INDEMNITY COSTS ORDER MADE ON 19 MARCH 2020

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr V. Mo'ale for the Plaintiff
Mrs D. Stephenson for the Defendant
Date of ruling: 8 May 2020 (on the papers)

The issue

1. On 19 March 2020, I ordered the Plaintiff to pay the Defendant's costs of and incidental to the appearance that day, on an indemnity basis, to be taxed in default of agreement.

2. On 24 April 2020, Mrs Stephenson filed an amended bill of costs detailing fees and disbursements totaling $1,093.50. Those costs were based on an hourly rate of $400, which was described as Mrs Stephenson's "normal client charge out rate".

3. On 30 April 2020, Mr Mo'ale objected, solely, to that rate, on the grounds that, in summary:

   (a) indemnity costs are not a higher scale of costs than the normal scale and even indemnity costs do not purport to cover all the costs of a party;

   (b) the rate exceeds that permitted by Practice Direction 1 of 2009; and

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(c) the Defendant has not previously applied for certification of costs at a higher rate than that those provided for by the said Practice Direction as required by Order 47 rule 5 of the Supreme Court Rules.

4. Order 46 rule 8 permits a party to request that a bill of costs be taxed by a Judge. Mr Mo'ale requested that this issue be referred to me for determination.

5. Neither party has requested an oral hearing.

6. On 6 May 2020, I directed that Mrs Stephenson file a copy of any fee agreement between her/her firm and the Defendant, redacted where necessary for any sensitive or commercial in confidence information, but otherwise evidencing the agreed hourly rates for various work to be charged during the course of this proceeding.

Legislative background

7. Section 15 of the *Supreme Court Act* provides, relevantly, that costs shall be in the discretion of the Court as regards the person by whom they shall be paid.

8. In *Jurangpathy v Tonga Communications Corporation* [2019] TOSC 50 at [46] to [66], I explained, in obiter, the bases upon which the Supreme Court is empowered to order indemnity costs.

9. Order 46 of the Rules is concerned with taxation of costs. It is silent on the issue of indemnity costs.

10. Order 47 is concerned with assessment of costs. Rule 2 provides for allowance of all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party. Otherwise, Order 47, too, is silent on the issue of indemnity costs or how they are to be taxed.

First ground – indemnity costs are not higher than scale and do not cover all costs?

11. Mr Mo'ale relies on the following statement by Webster CJ in *Taione v Pohiva* [2006] TOSC 23:

> *"But, notwithstanding that reduction, due to the overall nature of this case and its great significance to the people of Tonga as a whole, I find persuasive the view of the New Zealand Court of Appeal in Udompun and consider that, for a proper vindication of the Plaintiffs' rights,* ***the correct measure for the costs I am awarding is indemnity costs (i.e. costs between the lawyer and his client), although it must be borne in mind that, as referred to in Cachia v Hanes, even indemnity costs do not purport to cover all the costs of a party.***"
>
> [emphasis added]

12. With all due respect to His Honour, *Cachia v Hanes* (1994) 179 CLR 403 was concerned with the taxation of a costs award in favour of an unrepresented litigant, in particular, the disallowance of the appellant's claim for compensation for the loss of his time spent in the preparation and conduct of his case and for out of pocket expenses, being travelling expenses, associated with the preparation and conduct of his case.

13. The plurality of the Australian High Court canvassed the history of costs orders in the common law since 1278, when the Statute of Gloucester ((4) 6 Edw.I c.1.) introduced the notion that:

> *"... costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant."*

14. In the context of the accepted basis upon which a taxation of party and party costs is conducted, the High Court confirmed that costs are intended:

> *"...to reimburse a litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant."*

15. And, at [20], their Honours held:

> *"Whilst the restricted basis upon which party and party costs are awarded may be debated as a matter of policy, it is to be borne in mind that party and party costs have never been regarded as a total indemnity to a successful litigant for costs incurred, let alone total recompense for work done and time lost. ..."*

16. Another distinguishing feature between *Taione* and the instant case, is that in the former, the main issue before Webster CJ was a claim by the plaintiff for overseas counsel's (Dr Harrison QC of New Zealand) fees at $400 per hour where His Honour had awarded costs on an indemnity basis. That case was decided before Order 47 rule 5 was introduced. There, both the defendant's counsel and the Chief Justice accepted $400 as a proper hourly rate for that 'most important case'. Otherwise, his Honour declined to make any decision as to taxation matters except to say that he did not believe that previous precedents should be departed from. It is not clear from the judgment, or the Plaintiff's submission here, precisely what his Honour meant by "previous precedents". Even though the rate of $400 was accepted for overseas counsel, it should be borne in mind that that case was decided almost 14 years ago.

17. Returning to Mr Mo'ale's submission on this ground, the 'normal scale' is applicable to the 'normal' or ordinary level of costs to be taxed when ordered on a party and party basis. As reflected in Order 47 rule 2(1), party and party costs are those that are necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. And, as reflected in the above statements from *Taione* and *Cachia*, the proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included.[1]

18. Solicitor and client costs are those costs reasonably incurred and of reasonable amount which are likely to be greater in scope than the allowance on a party/party basis.[2] There is a distinction in nomenclature between costs on a solicitor and client basis and those on a solicitor and *own* client basis. The latter involves an approach akin to an indemnity basis of taxation. Some judges assimilate the solicitor and client basis to the indemnity basis even though the latter starts from the position that all costs are allowable on taxation.

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[1] Halsbury's at [745].

[2] Monfort Brothers of St Gabriel v Jaimi Associates [1998] TOSC 1 referring to EMI Records Limited v Ian Cameron Wallace Ltd and Anor. [1982] CH. D. 980.

19. Indemnity costs means all costs incurred except any which have been unreasonably incurred or are of an unreasonable amount. In applying those exceptions, the receiving party will be given the benefit of any doubt.[3]

20. To sum up then to this point: indemnity costs will generally be greater than party party costs which are usually subject to a scale set by legislation or the court prescribing maximum amounts. Unless expressly provided, such scales do not necessarily limit allowances for amounts claimed on an indemnity basis. In a sense, the market for legal professional services does. That is, if a client agrees to pay a certain rate to a lawyer, and that rate is higher than the scale rate, then the client assumes the risk that if he, she or it is successful in the litigation and obtains an award for party and party costs, then on any taxation, the client will bear any excess between that paid or agreed to be paid to their lawyer and the scale allowance. In other words, 'what is accepted by the client as reasonable may not be what is reasonably necessary for party and party taxation': *Polynesian Airlines v Kingdom of Tonga* [2000] Tonga LR 145.

21. On the taxation of indemnity costs, inter partes, the only limitations upon recovery of all costs actually incurred are as stated above: those which are unreasonably incurred or are of an unreasonable amount.

22. The rationale for recovery of that higher level of costs is that in the rare and limited circumstances in which a court will be justified in ordering indemnity costs – here, contumelious disregard for previous directions and a last minute substantial change in the pleaded basis for the substantive clam and application for injunction which resulted in the appearance that day being wasted – the conduct of the paying party is such as to require it to indemnify the receiving party not just on the ordinary party/party basis but for all the costs that party has been required to incur, which, as here, have been wasted by reason of the conduct of the paying party, subject only to the limitations referred to in the preceding paragraph. In other words, the order is aimed at ensuring to the greatest extent possible that the receiving party is not 'out of pocket' as a result of the conduct of the paying party.

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[3] *Singleton v Macquarie Broadcasting Holdings Ltd* (1991) 24 NSWLR 103.

Second ground - Practice Direction No.1 of 2009

23. Mr Mo'ale's second argument effectively seeks to call in aid the second limitation just stated, that is, that the rate claimed of $400 is an unreasonable amount because it is greater than that allowed for by Practice Direction No. 1 of 2009.

24. There has not been any further practice direction to update any scales of costs on taxation or to provide otherwise in respect of legal costs in civil proceedings now for more than 10 years.

25. The Practice Direction does not have the full force of a statute, but it does have authority. It was issued by the Court pursuant to its inherit jurisdiction to regulate and control its own process: *Polynesian Airlines v Kingdom of Tonga*, ibid. Order 47 rule 4 provides for the Lord Chief Justice to issue further practice directions from time to time.

26. Part two deals with costs upon taxation. It commences with a note that the object of the direction was to increase the approved scale of fees (last reviewed in August 2004) and to reaffirm the principles applicable on the taxation of costs, namely:

    (a) unless the Court has ordered otherwise, costs are awarded on a party/party basis; and

    (b) in carrying out any taxation of costs pursuant to Order 47 of the Supreme Court Rules 2007 the maximum amount allowable by the Registrar shall be as set out therein.

27. Relevantly,[4] the Practice Direction provides the following hourly rates for legal work not covered by attendances that can be charged under the daily rates:

    (a) Senior Counsel: $300

    (b) Counsel: $200

    (c) Locally qualified lawyer: $130

[4] The hearing the subject of the costs order took less than 3 hours, and therefore, pursuant to paragraph 3 of the Part, the rate allowed is to be calculated at the relevant hourly rate with any final part of our to be counted as an hour.

28. Whilst not stated in his submissions, I infer that Mr Mo'ale contends that Mrs Stephenson's rate should be limited to that of counsel at $200 per hour. As such, the differential between the relevant work claimed for (and not objected to by the Plaintiff) at $400/hour and Counsel's rate of $200/hour is therefore less than $600.

29. The Practice Direction is silent in relation to costs orders on an indemnity or solicitor/client basis. That may be contrasted with Practice Note 2 of 1992 which, at paragraph 2 thereof, specified that in respect of any bill of costs taxed in the Supreme Court, the amounts allowable (a) as between party and party or (b) as between agent and client where no charging arrangement has been entered into in writing, were to be in accordance with the rates set out in paragraph 4 thereof. The second scenario, which I understand to mean as between solicitor (or lawyer) and client, clearly contemplated that where there was no fee agreement as between solicitor and client, the maximum amount recoverable by the solicitor would effectively be "scale costs" otherwise applicable to a taxation of costs on a party and party basis. That practice note did not, by its terms, apply to costs allowable as between solicitor and client where there is a written charging arrangement or fee agreement in place which specifies the hourly and daily rates for various categories of work agreed as between relevant practitioner or his or her firm and the client.

30. In my view, for the reasons which follow, the maximum amounts prescribed by the Practice Direction are intended solely for taxations of costs on a party/party basis:

    (a) the note reminds that unless the Court has ordered otherwise, costs are awarded on a party/party basis;

    (b) there is no reference in the Practice Direction to it applying to costs on a solicitor/client or indemnity basis;

    (c) the maximum amounts allowable are expressly applicable to 'any taxation of costs pursuant to Order 47'.

    (d) as noted above, Order 47 rule 2, which provides:

    0.47 Rule 2. Allowance for costs

> (1) There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party.
>
> (2) Unless there are exceptional circumstances there shall not be allowed –
>
> (a) any costs in respect of work done prematurely and not subsequently proving of use;
>
> (b) any costs incurred or increased as a result of negligence, mistake, or over caution;
>
> (c) any unusual expense.

essentially reflects the common law definition of party/party costs;

(e) in contradistinction to rule 2, which deals with party/party costs, order 47 rule 3 provides, relevantly, that on a taxation as between lawyer and client, all costs, charges and expenses shall be allowed if incurred with the express or implied approval of the client;

(f) a taxation in accordance with rule 3, by its very terms therefore, could not be subject to any maximum rates in the Practice Direction if the client had agreed to legal costs and charges at a higher rate;

(g) while the Court's inherit jurisdiction to regulate and control its own process may empower it to prescribe maximum amounts for costs recoverable on a party/party basis, that power does not extend to regulating legal costs agreed to be charged and paid as between lawyer and client. That, as stated above, is a matter for the market. The only power conferred on the court to interfere with that bargain is, for example, in respect of any unusual expense, unless the lawyer obtained the express approval of the client to such expense before it was incurred. Similarly, the only power the court has to limit allowances for indemnity costs, inter partes, is, relevantly here, where a fee charged by a lawyer to her client, the receiving party, (which the client might regard as reasonable) is nonetheless considered by the court to be an unreasonable amount to be indemnified by the paying party;

(h) the undoubted principle that 'costs rules are made to ensure fairness to both parties and it is clearly not fair to order higher costs against the losing party simply because his opponent has employed a lawyer who charges at a higher rate',[5] is applicable to orders for party/party costs based on the outcome of a proceeding or application. Here, the order for indemnity costs was unrelated to either. The injunction application was not able to be determined on the day the order was made. Indeed, that was because of the Plaintiff's conduct of the application which unnecessarily disadvantaged the Defendant;

(i) finally, if, as the Plaintiff contends here, taxation of an order for indemnity costs were to be constrained to the same maximum amounts as apply to taxations on a party/party basis, there would likely be no difference, and therefore little if any utility in orders for indemnity costs. Such a result would be antithetical to the court's power, and obligation, to adequately address the circumstances and conduct which give rise to orders for indemnity costs.

31. In the absence then of any other submitted basis for the Plaintiff's contention that $400 per hour is an unreasonable rate, or any other evidence of rates being charged by other lawyers of similar professional calibre and experience to Mrs Stephenson, I do not consider the rate charged as being unreasonable. As a comparative guide:

(a) the hourly rates in the 'current' Practice Direction are over 10 years old; and

(b) some 14 years ago, in *Taione*, the same rate was considered acceptable for overseas counsel.

32. I consider it highly unlikely that Tongan market rates charged as between lawyers and their clients have remained stagnant over those periods.

33. Another checking consideration is that scale rates on a party/party basis generally represent between half and two thirds of solicitor/own client costs incurred. For example, in *'Ameleki v Nai (No 2)* [2000] Tonga LR 258, the amount considered as reasonable and proper

[5] *Polynesian Airlines v Kingdom of Tonga*, ibid.

expenditure for the purposes of a party-party award was 'about 65%' of the allowable solicitor-client charges made in the bill of costs. Here, the scale rate under the Practice Direction for counsel of $200 per hour amounts to 50% of Mrs Stephenson's rate. Therefore, in my view, Mrs Stephenson's rate is within (if not at the upper end of) the range of reasonable rates charged for the purposes of indemnity costs in Tonga in 2020.

Third ground - Order 47 rule 5

34. Order 47 rule 5 provides:

> **0.47 Rule 5. Additional costs to be certified for**
>
> (1) Any party seeking to recover costs at a higher rate than those provided for in the relevant practice direction shall make application to a Judge to have the higher rate certified for.
>
> (2) Application for certification under this rule may be made orally at a directions hearing or informally by letter to the Registrar.
>
> (3) In the absence of exceptional circumstances, application under this rule must be made prior to the hearing in respect of which the costs are to be incurred.
>
> (4) Additional costs may be certified as appropriate under paragraph (1) upon special cause being shown.

35. Mr Mo'ale referred to the decision in *Taxpayer A v Minister of Revenue* [2015] TOSC 21 at [9] in which Paulsen LCJ opined that Order 47 rule 5 has at least two objects:

> *"... First, to ensure that costs awards are limited to what is reasonable and sensible for Tongan conditions and, secondly, to ensure that parties to litigation are forewarned as soon as it is apparent that costs are to be claimed at a higher than normal rate (which is an important factor against which parties assess their risk)..."*

36. I respectfully agree with His Honour's observation. However, insofar as the Plaintiff seeks to invoke those objects as support for his argument that non-compliance with the rule precludes the Defendant here from recovering its indemnity costs at a rate higher than that provided for by the Practice Direction, the submission is not to the point.

37. It is not in dispute that the Defendant has not applied for or obtained an order for certification pursuant to O.47 r.5 for costs at a higher rate than provided for in Practice Direction 1 of 2009. The real question however is whether, for the purposes of taxation of the indemnity costs order presently under consideration, the Defendant was required to make any such application and obtain any such certificate.

38. For the reasons which follow, the answer is "no".

39. Firstly, *Taxpayer A v Minister of Revenue* concerned an appeal from a taxation of an order for costs on an appeal from a decision of the Tax Tribunal. The costs order was not one for indemnity costs for a wasted appearance during the course of an interlocutory application.

40. Secondly, given my finding that the maximum allowances in Practice Direction 1 of 2009 apply to taxations of party/party costs, it follows that applications pursuant to O.47 r.5 also apply in the context of orders for party/party costs. The circumstances and conduct which might attract the rare occasions on which indemnity costs orders are made sit outside the usual regime for ordinary orders of party/party costs for those parties who are successful in civil litigation and the measures by which the quantum of those costs are taxed where not agreed.

41. Thirdly, the evident purpose of O.47 r.5 is to require a party who, if successful in the proceeding and is awarded costs in the ordinary way (i.e. on the basis that costs follow the event and on a party/party basis), wishes to recover specified costs at a higher level than provided for in the Practice Direction, to apply in advance for certification of those higher costs. In the absence of any such certification, and in the ordinary case described above, the losing party has the relative comfort and certainty of knowing that it's costs exposure will be limited to, among other things, the rates set out in the Practice Direction. It must follow that a party (who turns out to be successful) does not avail itself of O.47 r.5, must be taken to accept that, in the absence of any other costs protection measures (such as an effective offer of compromise), it will only be entitled to costs on a party/party or scale basis. To the extent that party's solicitor/client costs exceed scale, that party will bear the excess.

42. Fourthly, Paulsen LCJ's reference to one of the objects of the rule being to "ensure that costs awards are limited to what is reasonable and sensible for Tongan conditions" means nothing more than giving effect to the purpose and understanding for both parties stated immediately above, and that the rates set out in the Practice Direction are 'reasonable and sensible for Tongan conditions' in the context of orders for costs on a party/party basis.

43. Fifthly, to the extent is it necessary to consider it, sub-rule (3) contemplates an order being made even though an application is not made prior to the hearing in respect of which the costs are to be incurred, where there are exceptional circumstances. I pass over the obvious potential anomaly between that rule and the second object described by Paulsen LCJ where, for instance, from the outset of a proceeding, a defendant calculates his defence by reference in part to his costs exposure based on the scale rates for local counsel, only to find that shortly before what might be expected to be a lengthy trial, an application is made for certification for much higher fees of overseas senior counsel for the trial.

44. More relevantly, Paulsen LCJ went on to consider that exceptional circumstances:

> *"... might arise before or at ... the hearing. In the former case, the exceptional circumstances might have caused the failure to apply to a Judge. In the latter case, something totally unforeseen might have arisen at the hearing which resulted in the successful party incurring costs for which recovery at a higher than normal rate is appropriate. ...".*

45. In the instant case, even if O.47 r.5 applied to the issue under consideration, the Plaintiff's conduct which gave rise to the indemnity costs order on 19 March 2020, was so 'totally unforeseeable' as to constitute exceptional circumstances for the purposes of sub-rule (3).

46. Sixthly, and again, if O.47 r.5 applied here, sub-rule (4) permits additional costs to be certified as appropriate upon 'special cause' being shown. Were it necessary for the Defendant to formally apply under rule 5, I would have considered the Plaintiff's conduct on the day in question to have constituted special cause for certifying, as I now do, the Defendant's higher counsel rate of $400 per hour.

Result

47. For the reasons stated, and subject to Mrs Stephenson filing evidence of an agreement between her or her firm and the Defendant that her charge out rate for this proceeding is $400 per hour, the Defendant's claimed rate of $400 per hour for the purposes of taxation of the Defendant's Amended Bill of Costs dated 24 April 2020, on an indemnity basis, is allowed.

48. Given the relative novelty and apparent lack of authority on this issue, there will be no order as to costs in relation to the Plaintiff's objection the subject of this ruling.

NUKU'ALOFA
8 May 2020

M.H. Whitten QC LCJ
PRESIDENT