

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: 540 of 2007

BETWEEN: **DIANA GIESBRECHT**

Plaintiff

AND: **ROWENA GRACE CROSS** (also known as **Grace Bamlett**)
and **DOUGLAS BAMLETT**

Defendants

Coram: **Hickie J**

Counsel: **Mr Barnes for the Applicant Defendants**
 Mr Leweniquila for the Respondent Plaintiff

Date of Hearing: **2 March 2009**

Date of Ruling: **17 March 2009**

**RULING ON COSTS OF
SUMMONS GRANTED TO SET ASIDE DEFAULT JUDGMENT**

A. BACKGROUND

[1] The Plaintiff, **DIANA GIESBRECHT**, had issued a Writ of Summons and Statement of Claim on 22 November 2007 seeking USD\$66,877.80 together with interest, damages and costs against the Defendants and as no Defence had been filed by 24 December 2007, the Plaintiff entered a Default Judgment against the Defendants which was sealed on 27 December 2007 and served on the Defendants Solicitors on 4 January 2008.

[2] The Defendants then filed on 10 January 2008 a “Summons to Set Aside Default Judgment” which was heard on 1 September 2008 and a Ruling handed down on 21 November 2008.

- [3] This further ruling is as to the question of costs arising from the Applicant Defendants being successful in their Summons to Set Aside Default Judgment.
- [4] On the question of costs, I noted in my previous Ruling that the Court had not been pointed to any “reprehensible conduct” on the part of the Respondent Plaintiff in relation to the present proceedings and thus there was no basis for an award of indemnity costs.
- [5] I the ordered on the question of costs that the Respondent Plaintiff was to pay the costs of the Application on a party-party basis which if not agreed between the parties would be as determined by the Court. As the parties have not been able to agree, the matter was put over until 2 March 2009 for submissions in relation to that issue.
- [6] In the meantime, a “Notice of Change of Solicitors” for the Respondent Plaintiff was filed on 3 December 2008, followed by a copy of the Applicant Defendants’ Bill of Costs filed on 6 February 2008 in the amount of \$19,811.25 and a similar statement of Costs for the Respondent Plaintiff in the amount of \$1475.00.

B. SUBMISSIONS

1. Applicant’s Submissions

- [7] At the hearing on the question of Costs, Counsel for the Applicant Defendants tendered to the Court copies of the following:
- (a) ***Yanuca Island Ltd v Markham*** (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 92 of 2004S, 11 November 2005, Ward P, Wood and Ford JJA); Paclii: [2005] FJCA 67, <http://www.paclii.org/fj/cases/FJCA/2005/67.html>);
 - (b) A copy of the *White Book* at paragraph 62/7/14 on Order 62 rule 7(4)(b) as to the awarding of a gross sum on costs;
 - (c) An excerpt on “Costs – Jurisdiction and Discretion”.
- [8] Counsel for the Applicant Defendants’ argument was, in summary, thus:

(a) That his firm had written to the Solicitors for the Respondent Plaintiff in January 2008 pointing out that the default judgment had been obtained irregularly and to save costs they should agree to it being set aside. This was not accepted and as a result the Applicant Defendants were put to the expense of having to issue and argue a “Summons to Set Aside Default Judgment”;

(b) That his firm has filed a 11-12 page schedule of costs as although costs are to be fixed summarily by the Court and not by way of taxation, he believed it was important to set out the actual costs incurred by Applicant Defendants in relation to filing and arguing the Summons. He noted that there were 13 entries not directly related and was prepared to concede a reduction of \$2,000 in the account but noted that this still left his clients seeking \$17,911.25 which includes \$500 for disbursements which he presumed were not disputed;

(c) That has the Respondent Plaintiff had rejected their invitation to withdraw, the issuing and outcome of the Summons to set aside the Default Judgment was the inevitable result. In relation to the gross sum sought, Counsel for the Applicant Defendants cited paragraph 62/7/14 of the White Book wherein it said:

*“... The defendants had been warned that their obduracy was causing increased costs but had allowed them to mount. Furthermore the plaintiffs’ counsel had made it clear to the defendants that an order for a lump sum would be sought. The draft bill of costs provided by the plaintiffs’ solicitors was conservative, the plaintiffs should be put as soon as possible in the position it would have been in had there not been a contempt motion, an order was therefore made for payment of lump sum costs (**Taylor-made Golf Co. Inc. v Rata & Rata** [19996] FSR 528, Laddie J).”*

(d) That the Applicant Defendants have no real obligation to reduce what they are seeking and although the Court has in its Ruling rejected an award of indemnity costs, there should be an award of a gross sum in the vicinity of at least 60-70% of their costs as some resemblance to the reality of what took place, that it was almost inevitable that the Applicant Defendants would be successful and it would be unjust if the Plaintiff did not suffer some financial consequence and that two thirds of the costs should be the minimum gross sum awarded.

[9] Counsel for the Applicant Defendants’ further short submissions in Reply were:

- (a) That the costs awarded should be those reasonably incurred;
- (b) That they would also be seeking an Order that the Plaintiff not be allowed to proceed with her claim until the costs of the Summons are paid as a commitment from the Plaintiff that she is in a position to proceed with her action.

2. Respondent's Submissions

- [10] Counsel for the Respondent Plaintiff submitted, in summary, in Reply:
- (a) That any sum awarded should be in the range of what the Respondent Plaintiff's previous Solicitors had charged and the Plaintiff should not be prejudiced by a large costs order from prosecuting her claim;
 - (b) That a reasonable award of costs would be in the region of \$1500 in arguing such an interlocutory matter.

C. CONCLUSION

1. The Law

- [11] The question of "reasonable costs" on an interlocutory application was considered by Finnigan J in *Scotfield v Hollows* (Unreported, High Court of Fiji at Lautoka, Civil Action No.HBC 73 of 2005, 30 November 2005), who confirmed that challenges on taxation should be as to reasonableness. In that case, after challenge, he still allowed costs of \$7,480.00 incurred as reasonable.
- [12] The question of reasonableness was considered Byrne J in *Anderson v Salaitoga* [1999] 45 FLR 241; Paclii: [1999] FJHC 104, 3 September 1999, <http://www.paclii.org/fj/cases/FJHC/1999/104.html>) wherein he noted:

"The principles governing party and party costs are set out in the Supreme Court Practice 1976 Vol. 1 Order 62 Rule 28 (note 62/28/3) thus:

*"It is of great importance to litigants who are unsuccessful that **they should not be oppressed by having to pay an excessive amount of costs.** 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.” [My emphasis]

[13] As Counsel for the Applicant Defendants has submitted, although this is not a formal taxation but a summary awarding of costs by the Court, nevertheless, the Court should allow costs on party-party costs upon what it considers to be reasonable.

2. Findings

[14] Having considered the submissions of Counsel, as well as briefly perused the two respective Bills of Costs filed, I note that there is an enormous disparity in fees. On the one hand, the Applicant Defendants have incurred costs in the amount of \$19,811.25, whilst on the other the Respondent Plaintiff’s fees are \$1475.00, a difference of \$18,336.25. Even allowing for the reduction of \$2,000 conceded by Counsel for the Applicant Defendants, this still leaves a large gap between the two accounts of \$16,336.25.

[15] It should be acknowledged that the costs being sought are from the Applicant rather than the Respondent and, as such, one may expect a slightly higher account as they have had to “take the running” in the application as it were. Although I am not being asked to perform a formal taxation, I do note some duplication (on items 5, 9 and 55) which would reduce the account further by \$3,000 to \$13,336.25.

[16] I also note that the Court attendances in this matter have been (the latter not including in the respective Bills of Costs):

- (a) Four appearances before the Master (on 25 January, 11 and 25 March and 8 April 2009);
- (b) Four mentions before me (on 24 April, 26 May, 13 June and 1 August 2009);
- (c) Attendance at the hearing on 1 September 2009;
- (d) A mention for the handing down of the Ruling on 21 November 2009;
- (e) Two subsequent mentions on 23 January and 20 February 2009; and
- (f) Attendance to make submissions on 2 March 2009 on the question of costs.

[17] Thus there have been some 11 mentions, a half-day hearing and an attendance to make short submissions on costs totalling approximately 16 hours in all. In preparing for such a matter (including drafting of documents and submissions), it would be reasonable to allow approximately 10 hours. A reasonable total figure to allow for the Summons would be 26 hours. A reasonable hourly rate would be \$300 per hour x 27 hours would make a total of \$7,800, allowed at two thirds would be \$5,200 plus \$500 disbursements gives a final total sum of \$5,700.00.

3. Orders

[18] **Taking into account the above, the Court orders as follows:**

- 1. That the Respondent Plaintiff is to pay the costs of the Summons summarily fixed on a party-party basis as reasonable in the amount of \$5,700;**
- 2. That in the absence of a formal application filed with the Court and a subsequent hearing, the Court declines making an Order that the Plaintiff not be allowed to proceed with her claim until the costs of the Summons are paid.**

Thomas V Hickie

Judge

Solicitors:

Munro Leys, Solicitors, Suva

Leweniqila, Solicitor, Suva