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

Plaint No. 105/08

BETWEEN	**HILL COSMOS INTERNATIONAL LIMITED**
	Plaintiff
AND	**OCEAN FISHERY COOK ISLANDS 1 LIMITED**
	First Defendant
AND	**HANNOVER COOK ISLANDS LIMITED**
	Second Defendant
AND	**SUNNUBERG COOK ISLANDS LIMITED**
	Third Defendant
AND	**JONC OVERSEAS CORPORATION**
	Fourth Defendant

JUDGMENT ON MITIGATION COSTS
Dated the 15th day of June 2010

Hearings:	1 September 2009 and 30 March 2010 In Auckland, New Zealand
Counsel:	W Akel and B J Upton for Plaintiff P Dawson and P Dale (at latter hearing) for Defendants
Solicitors:	Tim Arnold P.C, PO Box 486, Ararua, Rarotonga, Cook Islands for Plaintiff (Phone: +682 23565, Fax: +682 23568) Anthony Manarangi, 1st Floor, Brownes Building, Main Road, Avarua, Rarotonga, Cook Islands for Defendants (Phone: +682 23852; Facsimile: +682 23848)

INTRODUCTION

1. The Court's judgment of 22 April 2010 gives some of the background to this matter but did not determine the plaintiff's (Hill Cosmos') claim for costs under clause 7.1 of the settlement deed (mitigation costs).

2. Judgment was not give on the mitigation costs because further submissions were requested from the parties. These submissions have now been received.

3. Counsel for defendants raises a procedural matter which needs to be determined.

PROCEDURAL MATTER

4. The parties substantially settled their dispute by a deed of settlement dated 18 August 2009 (the settlement deed). That deed reserved three matters for determination by this Court. Two of those matters were determined in the judgment of 22 April 2010. The third matter, namely mitigation costs, were Hill Cosmos' claim for costs of "storage, transport and statutory charges". Counsel made submissions on these matters at a hearing on 1 September 2009.

5. The defendants' counsel raised in a memo of 28 April 2010, for the first time, the procedural matter. It is that in referring the mitigation costs matter to the Court, the parties did not address as a matter of procedure how this claim was to be resolved.

6. Mr Dale, who was not the defendants' counsel at the hearing on 1 September 2009, accepted that at that hearing there had been a discussion on how the hearing was to proceed, and that counsel agreed that it should proceed on the basis of the affidavits filed. It was submitted that this concession only

related to the production of invoices in support of the claim for costs. It was not appropriate to determine the mitigation costs on this basis because the costs issue involves contested matters of fact.

7. The defendants have requested a further hearing on the mitigation costs' issue. They submit that none of the causes of action in Hill Cosmos' statement of claim were proven but acknowledge that the Court can assume that the defendants recognised a legal obligation to repay the monies claimed.

8. Of particular concern to the defendants is that an affidavit sworn on behalf of the plaintiff on 28 August 2009 was served the evening before the hearing of 1 September 2009. Adequate time was not given to the defendants to take proper instructions on that affidavit.

9. Subsequently, an affidavit sworn on behalf of the defendants has been filed in this hearing. It challenges some of the matters in the affidavit sworn on 28 August 2009. It is submitted it shows that there are contested issues of fact which must be determined before judgment can be given on the mitigation costs.

10. The defendants' position is that this is not a case where the defendants raised the issue of mitigation but where the plaintiff is claiming costs for taking steps to mitigate. The onus is therefore on the plaintiff to establish that those steps were appropriate in the circumstances.

11. In summary, the defendants' position is that the Court can not determine whether Hill Cosmos is entitled to the mitigation costs without a hearing which will permit the deponents to be cross-examined.

12. Hill Cosmos has summarised the position which led to the hearing on 1 September 2009. It is not necessary to set out the summary in detail but the salient points are:

- counsel for the parties sought to agree an "agreed statement of facts" for the hearing of 1 September 2009;
- Hill Cosmos' counsel prepared a draft agreed statement of facts and sent it to the defendants' New Zealand solicitor. No reply was received.
- The Chief Justice had directed, in April 2009, that if witnesses for the trial, which was then scheduled, were required for cross-examination, notice was to be given to the other parties.
- Neither party required any witness for cross-examination on 1 September 2009 and the parties did agree that the issues could be dealt with at a one-day hearing on the papers.
- Counsel for Hill Cosmos sent an email to the Court on 25 August 2009 and copied it to the solicitors for the defendants. This email was sent by consent. It advised of the settlement deed and the matters which the parties had agreed the court would determine. The email stated:

> We consider that these issues can be dealt with in a one day hearing. If convenient by Your Honour, the parties request that a hearing be on next Tuesday 1 September 2009, commencing at 9.30am.

- The draft statement of facts which had been sent to the defendants' solicitor for agreement was incorporated into the Hill Cosmos submissions.

- Counsel for the defendants at the hearing of 1 September 2009, in response to a question from the bench, indicated that he did not dispute the outline of the facts.

- The defendants' counsel did reserve the defendants' right to comment with respect to the affidavit on behalf of Hill Cosmos dated 28 August 2009. It was understood that this updating was in respect of the costs invoices which were introduced by consent at the hearing.

- The hearing then proceeded on the basis without any objection from counsel for the defendants.

  It was noted that no objection to the procedure taken was taken before 28 April 2009, despite there having been a further hearing on 30 March 2010.

13. The Court proceeded on 1 September 2010 on the basis of what it understood to be the procedure agreed by both counsel. It did this after receiving a joint memorandum from counsel requesting a hearing on that date and advising that the matter could be disposed of in a day. There is no record of counsel for the defendants having reserved any position on the mitigation expenses. My notes state:

> No agreed statement of facts – but agreed that affidavits can be used.

It is surprising that the matter was not raised until 28 April 2010.

14. It is necessary to note three points. First, my understanding of the position was that both counsel indicated that the matter, including mitigation expenses, could proceed on the basis of the affidavits. Secondly, there can be no criticism of the defendants

for not giving notice of a desire to cross-examine on an affidavit served on the eve of the hearing when the deponent was overseas. Thirdly, there was no suggestion at the hearing that it might be necessary to cross-examine deponents.

15. However, it is considered necessary to have some of the evidence in the affidavits tested by cross-examination, and there is a possibility that the failure to do so would lead to a breach of natural justice, it would be appropriate to convene a hearing to allow cross-examination of the witnesses. Further evidence might also need to be called. The issue, therefore, is whether I am satisfied that this matter can be resolved without such a hearing.

MITIGATION EXPENSES

16. There is an absence of authority, as far as I can discern, on whether mitigation expenses are recoverable where the causes of action are equitable. This is presumably because until relatively recently equitable compensation was restitutionary and there was no obligation on the plaintiff to mitigate.

17. The position is arguably now different in New Zealand because of the trend in that country to adopt the "basket of remedies" approach. The remedy is to put the plaintiff in the position it would have been but for the breach whether the action be brought in contract, tort or equity. The nature of the duty breached is often the important factor and not the basis of the cause of action: *Day v Mead* [1987] 2 NZLR 443 (CA), *Aquaculture Corp. v NZ Green Mussel Co. Ltd* [1990] 3 NZLR 299 (CA) and *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA). I see no reason to adopt a different standard in this jurisdiction.

18. In this case, both parties accept that the law allows a claim for mitigation expenses. This claim brought by a plaintiff is the corollary to a claim by a defendant that the plaintiff has failed to mitigate.

19. I, therefore, accept that the law allows recovery for losses and expenses reasonably incurred in mitigation, even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. If the mitigation expenses result from the breach by the defendant and the defendant is unable to establish that the plaintiff acted unreasonably, the plaintiff is entitled to such expenses. This principle allows the plaintiff to recover for loss incurred in taking reasonable steps to avoid loss.

20. Hill Cosmos claims mitigation costs, the particulars of which are:

(a) Storage at Klaipeda and ocean freight/insurance for six driers from Klaipeda to Peru at a cost of €270,397. The account was paid in US dollars and the claim is for US$364,198.32.

(b) Storage insurance for the driers at Klaipeda of €2,680. This was also paid in US dollars totalling US$3,689.59.

(c) The sum of US$500,592, being Customs clearance (VAT) Peru.

(d) Discharge and Customs services of US$75,097.10.

(e) Internal transport costs of driers in Peru of US$47,147.87.

(f) Transport/storage insurance in Peru of US$2,573.

(g) Storage charges in Peru for the period from 13 March 2009 to 30 June 2009 of US$45,932.25. These charges continue to accrue.

(h) Cable charges of US$7,040.34 for sending bank remissions, letters of credit, etc. This is claimed as an expense but not a mitigation expense.

21. For contextual purposes, the following is a summary of the relevant background:

- The dispute arises from a proposed joint venture between the China Fishery Group Limited (CFG) and Ocean Fishery Holding NV (OFH).

- Those parties entered into a written memorandum of understanding on 27 June 2008 (the MOU). Hill Cosmos is a subsidiary of CFG, while the first three defendants, and possibly the fourth defendant, are subsidiaries of OFH.

- The joint venture did not proceed but before the MOU was terminate don 28 September 2008 and in accordance with the terms of the MOU, CFG advanced €3,885,000 to OFH and/or its subsidiaries.

- The amount of €3,885,000 was paid to Atlas-Stord as part payment for fish meal driers which were to be used in the parties' joint venture.

- Hill Cosmos, and not CFC, instituted proceedings against the defendants, and not OFH, to recover this advance. The causes of action pleaded relied upon a constructive trust (knowing receipt), constructive trust (dishonest

assistance – dishonest accessory liability) and unjust enrichment.

- The driers were built by Atlas-Stord in Denmark and shipped to Klaipeda – a Baltic sea port.

- The contract for the supply of the driers was entered into between Atlas-Stord and the first defendant (OFCI). That contract provided for the delivery of the manufactured driers to "designated shipyard in Baltic area". Klaipeda was so designated.

- By an addendum to the contract, OFCI agreed to open a Letter of Credit (LOC) for an amount of €3,885,000.

- The applicant for the LOC was Hill Cosmos and the beneficiary Atlas-Stord. Hill Cosmos or CFC was providing the funds. The LOC provided for the bills of lading to be consigned to Hill Cosmos.

- The driers were delivered to Klaipeda into the custody of Hill-Cosmos pursuant to the bill of lading.

The above facts seem to be undisputed.

22. Atlas-Stord drew on the LOC in late 2008, as it was entitled to do, even though the MOU had been terminated. Hill Cosmos then attempted to obtain repayment of the sum of €3,885,000 from OFH. Hill Cosmos retained possession of the driers in Klaipeda.

23. At no time has Hill Cosmos sought to establish ownership of the driers. In an affidavit filed on its behalf, an executive member of Hill Cosmos stated:

> 24. I should add that although Hill Cosmos was made the consignee of the driers in the Bills of Lading for the driers, this was not intended to give Hill Cosmos any ownership rights over the driers and the driers were never intended for Hill Cosmos' use or consumption. Being the consignee simply provided a right to hold onto the driers until payment was received from OFH or the first defendant.
>
> 25. THE first defendant remains the owner of the driers. As stated the first defendant contracted to purchase the driers from Atlas-Stord Denmark A/S under the Contract Agreement...

26. Hill Cosmos applied to this court and obtained a Mareva injunction. That injunction restrained the defendants from removing from the Cook Islands or elsewhere or otherwise removing from the jurisdiction of this court two vessels and the driers and other assets. The vessels were the *HANNOVER* and *SUNNUBERG.*

27. Hill Cosmos retained, and still retains, possession of the driers. It moved them from Klaipeda to Peru and the mitigation expenses it seeks are for storage in Klaipeda, the costs of moving the driers to Peru, including insurance, VAT in Peru, discharging Customs service fees, internal transport in Peru and transport and storage in Peru.

HILL COSMOS' POSITION

28. Hill Cosmos' pleading is that after the driers were shipped to Klaipeda, the LOC drawn on by Atlas-Stord and the non-repayment of the funds, it "took possession of the Driers to mitigate its losses". The pleading noted that the driers were presently in safe storage in Peru; it wished to sell the driers on the open market as it had no use for them; and the driers could still be installed in the *HANNOVER* and *SUNNUBERG.* It had given notice to the defendants that it had taken possession to

mitigate its losses and requested the defendants to take the driers and reimburse the plaintiffs for their losses. The defendants had not responded and Hill Cosmos had incurred, and continued to incur, costs in respect of transport, tax, storage, insurance and other incidentals in relation to the said mitigation steps.

29. A fundamental difference between the parties is whether the action of Hill Cosmos in moving the driers to Peru were expenses reasonably incurred in mitigation. An executive of Hill Cosmos, in an affidavit, confirmed "that Hill Cosmos had taken possession of the six Driers in order to mitigate the storage costs that had been incurred in Klaipeda, Lithuania, which was the port of discharge." Hill Cosmos' solicitors, in a letter to the defendants' solicitors, dated 16 January 2009, advised:

> As your clients will be aware, large storage costs were being incurred in Klaipeda, Lithuania for the six Driers. With a view to avoiding further unnecessary costs in mitigating loss, our client will arrange for the Driers to be relocated. Our client has advised your client of this direct, it of course reserves all its rights.

30. The evidence is that there was no direct response to the solicitors' letter of 16 January 2009. There was further direct correspondence between the parties under which OFH, while denying that Hill Cosmos had the right to sell the driers, demanded it pay €2,220,000 plus costs, so that it could do so. This amount was the deposit paid by OFH. Hill Cosmos replied that it would not make such payment and confirmed it had taken possession of the driers as consignee in accordance with the LOC and to mitigate its loss.

31. In the affidavit referred to in paragraph 23 above, the Hill Cosmos executive also stated:

> 23. As stated Hill Cosmos took possession of the six driers at Klaipeda in Lithuania. This was to ensure the safekeeping of the driers as we were not familiar with port regulations and had no control over storage costs in Klaipeda. The driers have been transferred to a warehouse in Peru, the port regulations of which we are more familiar with. The driers have been properly stored in Peru, and Hill Cosmos incurs storage costs on a daily basis.

32. The facts can be set in their chronological sequence. The MOU was terminated on 28 September 2008. The first two driers arrived in Klaipeda on 24 November 2008 and the other four on 18 December 2008. The driers left Klaipeda for Peru on or about 11 January 2009. It appears as though they had already left Klaipeda when Hill Cosmos' solicitors wrote on 16 January 2009 advising that the driers would be relocated in order to avoid further unnecessary costs.

33. Hill Cosmos' position is that the steps which it took in relocating the driers to Peru were reasonable in the circumstances. It relied upon authority for the proposition that reasonableness must be judged in the circumstances as they appeared at the time. Those circumstances were that the MOU had been terminated and there was a duty on OFH to repay the advance made through the LOC. It did not do this, nor did it dispute that it had an obligation to do so. It did not offer security. There was silence with regard to repayment. Hill Cosmos justifiably assumed that the OFH Group had no money to repay. In these circumstances, the only tangible security to mitigate the loss was the driers and two vessels. If it had not taken the action which it took, it would not have received any recovery whatsoever. At that time, the two vessels were in Panama; OFH was claiming the vessels had been sold to the fourth defendant as a *bona fide* purchaser without notice; the total value of the two vessels was arguably less than the amount due; the value

of the Access Agreement remained unknown; and various misrepresentations had been made by OFH in the course of negotiations of the MOU and prior to the advance being made. The submission was that Hill Cosmos took the only steps available to it to mitigate its loss.

DEFENDANTS' POSITION

34. At the hearing, the defendants made several responses to the mitigation claim. First, the MOU as the founding document, states it is not legally binding. Therefore, the mitigation claim is not in contract but in equity. Secondly, the driers were delivered to Hill Cosmos in accordance with the terms of the Letter of Credit and the Bills of Lading and not specifically to "mitigate its losses". Thirdly, the steps taken by Hill Cosmos were not reasonable. In moving the driers to Peru, Hill Cosmos was placing them in a position that would be more accessible to Hill Cosmos if it obtained judgment against the defendants. Fourthly, and related to the third reason, Klaipeda is a well known commercial port and if the defendants had been consulted, secure premises for the storage of the driers could have been sourced at a reasonable cost. The defendants were prepared to pay for the costs of such storage. It was therefore unreasonable to transport the driers to Peru.

35. In response to a request for further submissions, the defendants, while accepting that the court does have a jurisdiction to award mitigation expenses, submitted that the obligation or right to mitigate does not allow a plaintiff to exercise rights that it does not have. Hill Cosmos had rights as consignee but not a right to incur the additional expenses in the circumstances of this case. The owner of the driers was OFCI and upon delivery to Klaipeda, Hill Cosmos held the driers as a

bailee for and on behalf of OFCI. The owner did not either tacitly or expressly agree to the driers being moved to Peru. The Bill of Lading did not give Hill Cosmos the right to take possession of the driers and then incur the expenses of the removal to Peru.

DISCUSSION

36. The facts of this case indicate that Hill Cosmos continued in possession of the driers, at least up until the date of the settlement deed, with either the explicit or implicit agreement of the defendants. Counsel for the defendants accepted that the defendants were prepared to pay the costs of the storage. In the affidavit evidence referred to in paragraph 23, the executive of Hill Cosmos claimed it had the right to hold onto the driers until payment was received from OFH or OFCI. At the hearing on 1 September 2009, the defendants' counsel did not challenge Hill Cosmos' right to retain possession of the driers. In recent submissions, counsel for the defendants again acknowledged that Hill Cosmos was entitled to possession of the driers up till the time of the settlement agreement.

37. It follows, in my view, that Hill Cosmos was entitled to the reasonable costs of storage and associated transport and insurance costs from the date the driers arrived in Klaipeda to the date of the settlement agreement. The issues are, therefore, firstly, whether Hill Cosmos is entitled to recover the costs of transporting the driers to Peru, and secondly, whether it is entitled to recover what appear to be higher storage costs in Peru.

38. Hill Cosmos obtained possession of the driers pursuant to the conditions of the Bill of Lading. This did not give Hill Cosmos

ownership of the driers and, indeed, its own witness acknowledges that OFCI remained the owner of the driers and Hill Cosmos' right was to hold them until payment was received from OFH or OFCI.

39. I accept that Hill Cosmos' rights were akin to those of a bailee. In the circumstances of this case, its obligation was to either deliver or allow OFCI to take possession of the driers once it had repaid the monies advanced under the LOC.

40. It is not, in my view, possible to imply into the factual circumstances any condition which would allow Hill Cosmos to transport the driers to Peru. It appears correct that the defendants did not engage with Hill Cosmos over the repayment of the funds in late 2008. Silence in this case can not be taken as agreement to an implied condition to incur considerable costs to move the driers to Peru. It is noted that the driers were actually on their way to Peru before Hill Cosmos' solicitors, in their letter of 16 January 2009, advised that the driers would be relocated.

41. In coming to this conclusion, it is noted that Hill Cosmos alleges that there were large storage costs in Klaipeda and that the transfer was to avoid further unnecessary costs and mitigate the loss. Further, it gives as a reason for the transfer its unfamiliarity with port regulations in Klaipeda and that it had no control over storage costs.

42. It is difficult to accept the storage costs reason. On my interpretation of the invoices, the storage costs in Peru were far higher than those in Klaipeda. A bold assertion that the reason for moving was unfamiliarity with the port regulations is not particularly convincing when no details were given of what those

regulations contained and what the uncertainty was. There is no evidence that there was ever an enquiry as to what the regulations contained. The LOC required delivery to a Baltic port. Notwithstanding the onus on the defendants, the absence of evidence of potential or actual problems in obtaining secure storage at reasonable cost in Klaipeda is, in my view, telling.

43. There is no credible evidence to support Hill Cosmos' submission that if the driers had not been taken to Peru, it would not have recovered its money.

44. It is accepted that the onus of establishing the unreasonableness of the transfer is on the defendants. However, the defendants can, in my view, discharge that onus by making submissions on the evidence provided by Hill Cosmos. I am satisfied that the onus has been discharged.

45. It is my view that possession of the driers by Hill Cosmos did not give it a right to move those driers to Peru. Even if I am wrong in that conclusion and removal of the driers was permissible, I am of the view that the removal to Peru was in the circumstances of this case not reasonable. The fact that the driers left Klaipeda before the solicitors' letter of 16 January 2009 does not assist Hill Cosmos. Notwithstanding the silence from the defendants, the incurring of what were always going to be considerable expenses in moving the driers was incurred without giving the defendants the right to object and assist in assuring Hill Cosmos that the storage facilities were adequate or finding alternative facilities at far less expense than was incurred.

COSTS ALLOWED

46. As already stated, it is my view that Hill Cosmos is entitled to reasonable costs of storage and associated costs such as insurance from the time the driers arrived in Klaipeda to the date of the settlement agreement. The issue of costs after that date will need to be determined in another hearing.

47. Hill Cosmos is entitled to recover storage costs from the date the driers were delivered up until the date of the settlement agreement. The evidence is that the storage costs while in Klaipeda were €15 per day per unit. The sum of €2,580 was incurred for storage during that period. Hill Cosmos is entitled to judgment for this amount.

48. In the absence of evidence as to the storage costs in Klaipeda from 11 January 2009 to 18 August 2009, it is not appropriate to compensate Hill Cosmos on the basis of the subsequent storage costs in Peru. If the driers had been left in Klaipeda, there is no evidence to suggest that the daily storage rate would have altered. In these circumstances, I award storage costs from 12 January 2009 to 18 August 2009 at €90 per day for 219 days. There will be judgment for the resulting amount of €19,710. It is noted that the daily storage cost in Peru was €50 per drier as against the €15 per drier in Klaipeda.

49. Hill Cosmos is also entitled to be reimbursed for what the insurance premium would have been for insuring the driers if they had remained in Klaipeda. I have insufficient details to calculate this amount and will make an order that the defendants compensate Hill Cosmos for this amount with leave to come back to the court if the parties are unable to agree the amount. For the avoidance of doubt, the amount which the court will order if required to assess the sum is what the

appropriate premium would have been if the driers had remained in Klaipeda from 12 January 2009 to 18 August 2009.

50. The remaining mitigation costs claimed are not recoverable. They all relate to the transfer of the driers to Peru.

51. Hill Cosmos is entitled to be reimbursed for the total charges of US$70,040.34 and this claim is allowed on a restitution basis.

COSTS AFTER 18 AUGUST 2009

52. At this stage, I reserve leave for Hill Cosmos to apply for further storage and insurance expenses from 18 August 2009. I am not prepared to determine this matter at this stage because the driers are still in Hill Cosmos' possession. The defendants allege they should not be. There is an issue relating to that and if the defendants' allegations are correct, Hill Cosmos has been obstructive in holding onto the driers. This is presumably because of the misrepresentation claim which it now brings. There is also an issue of non-production of certain certificates relating to VAT. I cannot determine those issues on the information currently before me.

FURTHER HEARING

53. At a time convenient to counsel, I will convene a telephone hearing to determine the procedures and date for a further hearing. This hearing will address:

    (a) Hill Cosmos' misrepresentation claim relating to the obligation of Atlas-Stord.

    (b) If not resolved by the parties, the amount to be paid by the defendants to Hill Cosmos for insurance between 12 January 2009 and 18 August 2009.

(c) The ongoing liability (if any) of the defendants for storage and insurance costs after 18 August 2009.

(d) Whether the orders below should also be made against the fourth defendant.

ORDERS

54. There will be judgment for the plaintiff against the first, second and third defendants for the following amounts:

(a) the sum of €22,290 for storage and insurance in accordance with paragraphs 47 and 48 above;

(b) the sum of US$7,040.34 for cable costs.

55. The first, second and third defendants will pay to the plaintiff the amount which would have been paid to insure the driers if they had remained in Klaipeda from 12 January 2009 to 18 August 2009. If the parties are unable to agree that amount, leave is given to make an application to the court to settle the amount.

56. The plaintiff's remaining claims for mitigation expenses are dismissed.

COSTS

57. Costs on the issues resolved in this judgment and that of 22 April 2010 are reserved.

Dated the 15th day of June 2010

.....
B J Paterson J