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

PLAINT NO. 1/2012

BETWEEN **LITTLE & MATYSIK P.C.**
a incorporated company having its registered office at Rarotonga and carrying on business as Barristers and Solicitors

Plaintiff

AND **NORMAN GEORGE**
of Vaimaanga, Titikaveka, Rarotonga, Barrister and Solicitor

Defendant

Hearing: On the papers

Counsel: Ms J Wi-Kaitaia for the Plaintiff
Mr N George in person, Defendant

Judgment: 22 July 2013

JUDGMENT OF HUGH WILLIAMS J

INTRODUCTION

[1] The Plaintiff, Little & Matysik, is a firm of Cook Islands lawyers. Having been awarded Judgment on its claim for unpaid legal fees in the sum of $12,175.88 plus interest in a Reserved Judgment delivered on 28 March 2013, it now seeks an Order against the Defendant, not just for costs but costs on an indemnity basis, of $29,066.18 plus disbursements of $864.43.

[2] The Defendant is a Cook Islands lawyer and Member of Parliament of longstanding. But those facts are almost wholly irrelevant to the Plaintiff firm's application for costs; if firms of solicitors in the Cook Islands, acting for themselves, are entitled to Orders for costs on claims for unpaid fees and other litigation to which they are parties, the status of the other parties is almost entirely irrelevant.

[3] As far as the researches of counsel went, this appears to be the first time in the Cook Islands where Plaintiff solicitors suing for unpaid fees have sought costs against their former clients.

BACKGROUND

[4] The Defendant's vicissitudes in relation to the criminal and civil law have persisted for a number of years, but it is only necessary to sketch the background to provide the basis for the present application and to show that the litigation in which the Defendant has been engaged has had its unusual aspects.

[5] Drawing the background from Nicholson J's Reserved Judgment of 10 December 2010 (NZ time) Mr George and two others were charged in March and April 2008 with fraud and secret commission offences. Mr George faced 14 counts.

[6] The indictment resulted in the longest criminal trial ever held in the Cook Islands. It proceeded Judge alone and commenced on 13 October 2008. The Crown closed its case, after calling 63 witnesses, on 2 October 2009. All three accused then applied for discharge and, in Judgment (No.4) delivered on 4 February 2010, Nicholson J granted the applications in part.

[7] The trial then recommenced on 24 March 2010 with Mr Arnold representing Mr George[1]. He called the Defendant and certain other witnesses.

[8] In the week beginning 26 April 2010 Nicholson J heard final submissions and on 30 April 2010 delivered Judgment (No.5) in which he acquitted Mr George (and his fellow Defendants) on all the remaining counts against him (and them).

[9] All accused having forecast their intention to apply for costs in the event of acquittal, following completion of the trial Nicholson J made timetable orders for the filing of submissions in that regard.

[10] By a contract of retainer which the Judgment of 28 March 2013 held was entered into between the present parties on or about 27 April 2010, Mr George retained Little & Matysik to assist him in preparing his submissions for costs.

[11] The application was difficult: the trial circumstances were unprecedented in the Cook Islands and applications by successful defendants for costs against the prosecution are always rigorously scrutinised and usually result, if successful at all, in relatively modest sums being awarded.

[1] Paul Davison QC had earlier represented Mr George

[12] In addition, the costs to Mr George of defending himself in the criminal proceeding were so considerable and the circumstances so unusual that, in order to prepare the costs submissions, the Plaintiff firm was required to undertake significant research, consider the whole of the trial transcript and undertake innovative interlocutory proceedings. It exercised significant expertise in putting Mr George's submissions together.

[13] Those submissions originally sought recovery of Mr George's costs on an indemnity basis ($547,754.16) but, in a Reserved Judgment (No.6) delivered on 10 December 2010, Nicholson J allowed Mr George two-thirds of what the Judge regarded as reasonable namely $126,206.81 being two-thirds of $189,329.

[14] The quantum of the costs awarded to Mr George and his fellow defendants was, however, so sizeable that the Cook Islands government first had to decide whether to appeal and then, when they decided against that course, find the money to pay. That took time – at least from December 2010 until about May 2011 – despite efforts being made by the present Plaintiff, Mr Arnold and the solicitors acting for the other defendants to expedite matters.

[15] Then, in June 2011, when payment was about to be made, the Ministry of Finance and Economic Management recouped something in excess of $80,000 of the costs award for tax unpaid by Mr George plus penalties and interest. The balance was not used to pay the Plaintiff firm[2] but Mr George said he utilised almost all of the balance in staving off a mortgagee sale of his family home. He personally received only what was suggested to have been about $5,000.

PRESENT CLAIM

[16] On 7 February 2012 Little & Matysik issued the present proceedings for recovery of their unpaid fees in the sum for which they ultimately received Judgment. On 21 February 2012 Mr George filed a Notice of Intention to the firm and followed that with a Statement of Defence on 16 April 2012. The Plaintiffs amended their claim on 13 July 2012 and Mr George, following orders for a Statement of Defence, filed what he called a "Response" on 10 August 2012.

[2] or, it is understood, Mr Arnold

[17] The Plaintiff firm was diligent in advancing the litigation. It sought timetabling Orders on 16 May 2012, obtained an Order for a fixture on 2 October 2012, filed its witness statements on 24 October 2012 and defended an unsuccessful application for Grice J to recuse herself on 1 November 2012 when the case was scheduled to be heard on a defended basis. Mr George failed to meet an Order requiring the filing of his witness statements by 5 December 2012.

[18] The case came on for hearing on a defended basis on 21 March 2013 with the Reserved Judgment being delivered a week later. As it turned out, the defences raised by Mr George were found to be of little weight, particularly given he called and gave no evidence.

[19] Unfortunately, the somewhat tangled history of the criminal proceedings and this case did not end at that point.

[20] The Judgment of 28 March 2012 awarded the Plaintiff disbursements but made no timetable relating to costs. However, on 5 April 2013, Ms Wi-Kaitaia, an employee of the Plaintiff who appeared as counsel on its behalf at the hearing, filed a full memorandum on costs. The detail is later reviewed. The memorandum was not referred to the trial Judge, Hugh Williams J, or, perhaps, to the Defendant, and on 2 May 2013 Ms Wi-Kaitaia filed a further memorandum enquiring when a decision on costs might be delivered.

[21] The 2 May 2013 memorandum was not referred to Hugh Williams J until 15 June 2013 (NZ time) and the memorandum of 3 April 2013 was only forwarded on 19 June 2013 (NZ time) at the Judge's request.

[22] Because there was no proof of service of either memorandum on the Defendant, on 21 June 2013 (NZ time) the Court directed service on Mr George and made a timetable for the filing of further submissions, directing that the file be referred to him for a decision during the sessions of this Court commencing on 15 July 2013. That resulted in Mr George filing a "response" to the Plaintiff's claim on 2 July 2013 and Ms Wi-Kaitaia replying with a memorandum dated 8 July 2013.

SUBMISSIONS AND AUTHORITIES

[23] Relying on the New Zealand Court of Appeal decision in *Brownie Wills v Shrimpton*[3] Ms Wi-Kaitaia submitted that solicitors, when advancing or defending proceedings in person or by a partner or employee, were entitled to the same costs as when acting successfully on behalf of other clients. She accordingly submitted that the usual principles of costs applied to this matter and the Plaintiff firm should be reimbursed to an appropriate level, starting at a two-thirds recovery.

[24] She submitted the Plaintiff acted reasonably in pursuing its claim, particularly in agreeing not to be paid on monthly invoice and particularly given the Defendant's statements that he was willing to compromise, statements which were not honoured. She acknowledged the hearing was relatively brief (3 hours) and the amount claimed was comparatively modest alongside amounts claimed in most civil litigation. She made the point that preparation had to be duplicated because of the Defendant's late recusal application.

[25] Ms Wi-Kaitaia submitted that Defendants' conduct can be a factor to be taken into account in assessing what amounts to reasonable costs. She pointed out that he gave and called no evidence at the hearing and suggested the Judgment could have gone by default or on formal proof[4]. She submitted the Defendant "concealed" the way in which he had dealt with the criminal costs payment and made the point that its distribution would never have come to light in this case except for questioning from the Bench. In those circumstances Ms Wi-Kaitaia said Mr George's conduct was in breach of his duty not to mislead the Court and was "reprehensible" to the extent that an award of 80-100% of professional costs was not unreasonable. That led to the application for recovery on an indemnity basis of costs of $29,066.18 plus disbursements of $864.43.

[26] Mr George in reply acknowledged that Section 92 of the Judicature Act 1980-81 confers discretionary power on the Court "to make such orders it thinks just for the payment of the costs of any proceeding by or to any party thereto". He pointed to the amount claimed for costs very considerably exceeding the amount of the Judgment

[3] [1998] 2 NZLR 320, 327

[4] not actually correct as the way in which the case proceeded, unlike formal proof, gave the Defendant the right to cross-examine, a right he pursued

such that the claim was "harsh and reprehensible" and said it was only the hours charged for repeated "reviews" of the file that were in contest. Much of the paperwork, he submitted, was unnecessary. He said he had no obligation to disclose the disbursement of the costs award and suggested animosity between the parties lay behind the costs sought.

[27] As regards *Brownie Wills v Shrimpton*, Mr George submitted Ms Wi-Kaitaia was a "junior lawyer learning her skills and should not demand costs as she was employed by the Plaintiff" and concluded:

> "I am already suffering financially and awarding any of this claim for costs other than the $864.43 for disbursements will be impossible for me to pay as I have a huge mortgage repayment, $30 000 in fines for tax offences and the Plaintiff's Judgment to be serviced".

[28] Ms Wi-Kaitaia's response suggested the Plaintiff initially claimed full indemnity costs, despite it far exceeding the Judgment, in order that the total could be taken into account, even though "it was submitted that 80-100% of professional costs were awarded, however unlikely". She repeated her submission that the Defendant's actions in relation to the claim were "reprehensible" and suggested the Defendant was "dishonest in not making [the distribution of the costs award] known to the Plaintiff." She rejected the other matters raised by Mr George.

DISCUSSION AND DECISION

[29] The law in New Zealand is certainly now as enunciated by the majority of the Court of Appeal in *Brownie Wills v Shrimpton*. There Blanchard J[5], relatively briefly (it not being in contest in the case), dealt with the entitlement to costs by solicitors who are parties in litigation. He held:

> Brownie Wills was represented in the High Court and in this Court by an associate of the firm, Mr Hair. The long-established rule is that, as an exception to the general rule denying costs to a litigant in person, a practising barrister and solicitor who brings or defends a proceeding in person or by a partner or employee of the firm is entitled to the same costs as when acting on behalf of a client. So the lawyer litigant may have the same costs as if another lawyer had

[5] for himself and Gault J; Tipping J, writing separately but not dissenting, did not discuss costs but concurred with the orders proposed by the majority

> been instructed but cannot, of course, charge for consulting, instructing, or attending upon him or herself: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872. In New Zealand the exception is discussed or referred to in *Hanna v Ranger* (1912) 31 NZLR 159, *Lysnar v National Bank of New Zealand Ltd (No.2)* [1935] NZLR 557 and *Re Collier (A Bankrupt)* [1996] 2NZLR 438.
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> The High Court of Australia has cast some doubt on this exception (*Cachia v Haynes* (1994) 179 CLR 403 at p 412) but, not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant.

[30] Most Cook Island lawyers and all its High Court judges having been New Zealand trained, there is a natural tendency to defer to New Zealand decisions on a topic where there is no Cook Islands precedent, but it remains the case that New Zealand decisions, however elevated, are of persuasive, not binding, authority in the Cook Islands. The question in this case is, therefore, whether the Cook Islands should follow the principle enunciated for New Zealand by *Brownie Wills v Shrimpton* or whether it should look to principle and to other jurisdictions as a guide. In effect, there apparently being no precedent in the Cook Islands on the topic, it is a matter for the Court to decide afresh.

[31] The law on the topic as enunciated in *Brownie Wills v Shrimpton* appears to have been the law in New Zealand for the best part of the century, since *London Scottish Benefit Society v Chorley*[6] was adopted in *Hanna v Ranger*[7]. However, in the latter, the point was again dealt with briefly.

[32] The Plaintiff was a practising solicitor who, having been successful in litigation[8] sought costs. The Judge granted the application citing texts on costs which adopted *London Scottish Benefit Society v Chorley*. The texts[9] read:

> "a solicitor who brings or defends an action in person is entitled to the same costs as if he had employed a solicitor, except in respect of costs which are really unnecessary; he cannot charge for consulting himself, instructing himself, or attending himself. The same principle holds good where a solicitor litigant acts through the firm of which he is a member."

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[6] (1884) 13 QBD 872
[7] (1912) 31 NZLR 159
[8] He sued on a Promissory Note but the report is silent as to whether the Promissory Note was for unpaid fees
[9] cited at 160

[33] *Hanna v Ranger*[10] was approved by the New Zealand Court of Appeal in *Lysnar v National Bank of New Zealand Ltd (No.2)*[11] Mr Lysnar was a qualified lawyer but held no practicing certificate and, having successfully overturned the Court of Appeal's decision in the Privy Council[12], sought costs in the Court of Appeal. Approaching the case as one devolving from whether a litigant in person should receive an order for costs, the Court of Appeal, after citing from *London Scottish Benefit Society v Chorley*, held:

> The most that can be said of the English cases as applied to our scale is that they can be looked at as indicating that the Court will provide to a successful layman litigant: (a) An indemnity for his Court disbursements; (b) a possible partial indemnity for any fees he pays by way of professional assistance; and (c) nothing for his own time and trouble.

[34] The third decision on which *Brownie Wills v Shrimpton* relied was *Re Collier (A Bankrupt)*[13] where the New Zealand Court of Appeal declined an application for costs by a lay litigant[14] relying on *London Scottish Benefit Society v Chorley* and *Lysnar*. It noted the doubts expressed in relation to the principle (or exception) by the High Court of Australia in *Cachia v Haynes*[15].

[35] *Cachia v Haynes* dealt with an application by a successful lay litigant – not a solicitor – for costs under a discretionary provision of the Supreme Court Act 1970 (NSW) which is similar to s 92 of the Judicature Act 1980-81[16]. The decision of the majority of the High Court proceeded[17]:

> A somewhat anomalous exception was introduced by *London Scottish Benefit Society v Chorley*[18] in which a solicitor successfully acted for himself in litigation. It was held that he was entitled to the same costs as if he had employed a solicitor, except for items such as obtaining instructions or attendances, which were unnecessary because he was his own client. The justification given for the privileged position afforded to a solicitor acting for himself is somewhat dubious, but it serves to emphasize the general rule.

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[10] and *London Scottish Benefit Society v Chorley*
[11] [1935] NZLR 557 at 561-2
[12] with the help of counsel before their Lordships
[13] [1996] 2 NZLR 438
[14] who was later declared a vexatious litigant
[15] (1994) 179 CLR 403
[16] while the New South Wales statute expressly provided for taxation, a feature regarded as important in some of the precedent cases but absent from s 92
[17] at pp 413-414
[18] (32)

Both the general principle and the exception have been accepted in this Court. In *Guss v Veenhuizen [No.2]*[19], Gibbs ACJ, Jacobs and Aickin JJ, after citing *London Scottish Benefit Society v Chorley* and *H Tolputt & Co Ltd v Mole*[20], said of a solicitor who acts for himself:

> "Those authorities establish that the litigant in person does not recover such costs in such circumstances in the capacity of a solicitor, but because, he happening to be a solicitor, his costs are able to be quantified by the Court and its officers."

[36] After further reference to *Chorley* the majority decision then held[21]:

If the explanations for allowing the costs of a solicitor acting for himself are unconvincing, the logical answer may be to abandon the exception in favour of the general principle rather than the other way round. However, it is not necessary to go so far for the purposes of the present case. It suffices to say that the existence of a limited and questionable exception provides no proper basis for overturning a general principle which has, as we have said, never been doubted and which has been affirmed in recent times.

Nevertheless, at first instance in *Buckland v Watts*[22] Donaldson J, whilst feeling constrained by authority to hold that a litigant in person was not entitled to claim costs for time spent in preparing his case, expressed the view that "the reasoning which supports the reported decisions that solicitor litigants in person should recover more than their out-of-pocket expenses seems to me to support a similar decision in favour of lay litigants in person"....

Rather too much emphasis may have been given in the cases to costs which are awarded to a solicitor acting for himself. They are awarded upon an exceptional basis and not upon the basis upon which costs are ordinarily awarded, namely, as an indemnity for legal costs actually incurred. It is, we think, not possible to reason by way of the exception that litigants in person are treated unequally and then to conclude that the very basis upon which costs are ordinarily awarded should be abandoned so that the exception becomes the rule.

Not only is it false reasoning, but it is not a course which is available having regard, not only to the quite clear case law upon the subject, but also, more importantly, to the plain import of the Rules which govern the jurisdiction of the Court to make an order for costs and any subsequent taxation of costs. Taxation is to take place, not at large, but "on a party and party basis". Taxation on a party and party basis is required to be in accordance with the relevant table in Sch. G and that makes no provision for the reimbursement of a litigant for time lost in the preparation or presentation of his case. It does provide for solicitors' costs which have been incurred. That affords some basis (although insufficient

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[19] (1976) 136 CLR 47
[20] [1911] KB 87
[21] at 412-4
[22] [1970] 1QB 27

> in our respectful view) for an award of costs in favour of a solicitor acting for himself and so performing professional duties, but it affords no basis whatsoever for an award by way of recompense to a litigant for time lost in the preparation or presentation of his case.

[37] *London Scottish Benefit Society v Chorley*[23] appears still to be good law in the United Kingdom[24] and New Zealand and, though doubted in Australia, the question is, what did that case decide?

[38] The case before the English Court of Appeal involved an application, successful as it turns out, by Messrs Crawford and Chester, solicitors, for costs, they having successfully defended an action against them. "They claimed to have their costs taxed as if they had been acting for a client, that is, a different person"[25]. In an oral judgment the Master of the Rolls held:

> It was contended for the plaintiffs that there is no difference as regards the right to costs between a solicitor and an ordinary person; and for the defendants it was contended that the costs of a solicitor, who is party to a suit, ought substantially to be taxed as if he had been acting for a different person. I think neither contention correct. I cannot think that any privilege of a solicitor exists. I am wholly unable to agree to any argument standing upon that footing. I should have thought that a person wrongfully brought into litigation ought to be indemnified against the expenses to which he is unjustly put; but there cannot be a perfect indemnity, because it is impossible to determine how much of the costs is incurred through his own over-anxiety. When an ordinary party to a suit appears for himself, he is not indemnified for loss of time; but when he appears by solicitor, he is entitled to recover for the time expended by the solicitor in the conduct of the suit. When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor.
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> If a solicitor does by his clerk that which might be done by another solicitor, it is a loss of money, and not simply a loss of time, because it is work done by a person who is paid for doing it. It is true, however, to say that the costs of a

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[23] correctly *The London Scottish Benefit Society v Chorley Crawford and Chester*
[24] Civil Procedure Volume 1 ("The White Book") 2013 para 48.6.6 p 1540
[25] per Brett MR as 875

> solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances.

[39] Bowen LJ held[26]:

> "Professional skill and labour are recognized and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk."

[40] In deciding that question, it is noteworthy that in *Brownie Wills v Shrimpton* the issue was not argued as the principle was not in contest. In *Hanna v Ranger* the decision depended on citations from textbooks, themselves relying on precedent, and in *Lysnar*, in *Cachia* and in *London Scottish Benefit Society v Chorley*, discussions on the topic were affected by notions of taxation of costs and the applicability of scale costs. Further, throughout the authorities, the rule is addressed as an exception to the rule that successful litigants in person do not receive costs and are reimbursed only for out-of-pocket expenses (including the costs of any professional assistance engaged).

[41] The conclusion to be drawn from all of that is that the suggested rule that solicitor parties who are successful in litigation should receive at least a reduced allowance for costs is, however longstanding, not a rule firmly grounded in principle.

[42] In considering the issue from the viewpoint of principle, since all the other cases discussed in the various jurisdictions adopt *London Scottish Benefit Society v Chorley* it is appropriate to consider whether that decision is soundly based.

[43] In that regard, it is noteworthy that the decision was oral, not reserved and was itself mainly based on textbook treatment of earlier cases not directly in point. It, too, was affected by considerations of taxation of costs.

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[26] at 877

[44] Nonetheless, close analysis of the judgments shows the English Court of Appeal took the view that any litigant "wrongfully brought into litigation ought to be indemnified against the expenses to which he is unjustly put", that partial indemnity, in the case of a lay litigant, resulting in reimbursement for out-of-pocket expenses (including any professional fees) but no reimbursement for loss of the litigant's time. The decision points out how simple evasion of any rule against granting solicitor litigants costs would be; debunks any suggested distinction between work undertaken by partners and by their clerks[27] and limits the costs amounts to solicitors to the "same costs as an ordinary litigant appearing in person" other than those which are "really unnecessary" like the "costs of instructions and attendances". Updating the Victorian language, that means solicitor litigants cannot charge, amongst other things, for "consulting, instructing or attending upon him or herself" as *Brownie Wills v Shrimpton* put it.

[45] Looking at the matter more abstractedly, the reasons for holding that a firm of solicitors as a party to litigation and successful in it should be allowed costs on a carefully scrutinized basis, are the following matters:

(a) The same principle should apply irrespective of whether the firm is bringing or defending the proceedings. There is less difficulty in principle in holding that a firm successfully defending itself against, say, an action for professional negligence, should be the denied costs of so doing than if it brings the proceedings. But, if the principle is sound, as it is, it should apply to all litigation in which solicitors are successful parties, including litigation to recover unpaid fees.

(b) There has never been doubt that a firm of solicitors is entitled to recover the costs of briefing counsel or solicitors outside the firm[28], so why should there be an issue of principle raised against it receiving an order for costs when it acts in the litigation for itself? That applies equally to whether the representation is by a partner or a qualified employee of the firm. Instituting the claim or the defence and managing it for themselves means firms of solicitors are addressing the litigation in what is, to them, the most efficient way, both from the point of view of

[27] who, in the English system, may not have been qualified solicitors

the law and the facts and is therefore managing the litigation in the most cost efficient way.

(c) There is no basis for holding that firms of solicitors suing to recover unpaid fees should be placed in a less advantageous position as regards costs than involvement of solicitors' firms in other types of litigation. Any entity is entitled to sue for debts it claims are owed to it, and solicitors firms should not be in a disadvantaged position in that regard.

(d) The cost of bringing or defending normal litigation involves two factors: the party and the lawyer representing the party. That is recognised in orders for costs where the former is represented by witnesses expenses[29] and the latter by any order for costs itself. Though there is, obviously, a hint of artificiality in regarding a solicitor or firm of solicitors as a party distinct from a partner or an employee representing it, as the authorities indicate, solicitors bringing or defending proceedings for themselves do not do so without cost: they devote time and resources to the litigation which would otherwise be devoted to remunerative work for clients.

(e) That shows that comparing the questions of whether costs should be allowed to solicitors as litigants compared with whether costs should be allowed to litigants in person can be misleading. The latter receive no legal costs because they do not employ lawyers. They receive allowances for their out-of-pocket expenses as disbursements. The former are entitled to both costs and disbursements as a party to the litigation because they retain lawyers to represent them, even if it is a member of the firm or an employee.

(f) It would be anomalous to formulate a rule debarring solicitor litigants from costs when all other successful litigants who are represented are entitled to costs since the rule would be easily evaded by solicitors who are parties to litigation employing outside solicitors to act for them.

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[28] though as disbursements
[29] including for the party himself or herself

[46] What then should be the position in the Cook Islands in relation to costs in litigation in which the solicitor or the firm is a party?

[47] Despite those misgivings, in the Court's view, there is no principled basis on which a firm of solicitors, which is a successful party to litigation, should be denied orders for costs simply because it acts for the firm itself. That applies to whether the litigation is instituted and managed by a partner or a qualified employee who represents the firm in Court.

[48] That said, any allowance for costs in favour of a firm of solicitors as a successful party in litigation – whether for unpaid costs or otherwise – requires to be even more rigorously scrutinised than normal applications for costs by successful litigants in order to ensure that any allowance for costs reflects only the costs to the firm of issuing and managing the litigation to judgment and the firm does not profit from acting for itself. In particular, as the authorities make it clear, costs allowed to firms of solicitors acting for themselves should never include amounts for such things as consulting with clients or the other matters to which the cases refer.

[49] The Court accordingly concludes that there is no principle which debars the Plaintiff in this litigation from being entitled to an order for costs following its successful prosecution of the action. It accordingly turns to quantum.

[50] Orders for costs are intended to provide reimbursement to a successful litigant of the costs incurred in waging the litigation. Orders for costs must, of course, be reasonable in amount and it has often been held that a baseline figure, to be adjusted by the circumstances of the claim, of something of the order of two-thirds of the costs incurred is a useful starting point. On that basis alone the starting point for any award of costs against Mr George in this litigation would fall to a maximum of approximately $20,000.

[51] Precise analysis of the Plaintiff's firms fee accounts exhibited to Ms Wi-Kaitaia's first memorandum is unnecessary but it is clear they omit no possible fee-charging event. They include a number of items such as preparing and swearing witness statements and "email to client" the costs for which is clearly not recoverable in accordance the dictum in *Brownie Wills v Shrimpton*. More particularly, while Mr George did not challenge the qualified staff's separate charge out rate of $250 per

hour, the Plaintiff's firms fee accounts additionally and separately charge for the time expended by legal executives and secretaries on this file. The income earned by firms of solicitors is derived from the firm's fee earnings, the hourly rate charged for which is customarily at a level which meets all the firm's expenses including secretarial wages and provides a profit for partners. When the charges for other than fee earners are deducted from the accounts in this case and when other non-chargeable items are deducted[30], deducting those items would take upwards of $1000 out of the Plaintiff's claim.

[52] Turning to the application for increased or indemnity costs rather than usual costs, a useful categorisation of the factors commonly taken into account by Courts in any country in deciding whether increased or indemnity costs should be awarded is to be found in the New Zealand High Court Rules 14.6 (3) (4). Of those the only factors relevant to the present case are whether Mr George contributed unnecessarily to the time involved in the proceeding by failing to comply with Rules or taking unnecessary steps or arguments or failing without reasonable justification to admit facts evidence or documents. Of the indemnity costs Rules, Mr Wi-Kaitaia submitted Mr George had acted improperly in defending the proceeding, ignored orders and directions and there were other reasons which "justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious".

[53] Having regard to the principles in the New Zealand Rules, it certainly seems to be the case that the Defendant, in the face of active pursuit of this proceeding by the Plaintiff, delayed the substantive hearing to the point where the Judgment against him was probably postponed by 3 or 4 months. Given the way in which he conducted the hearing, it can also be said that, to a point at least, he maintained his opposition beyond what was reasonable. That said, however, any Defendant is entitled to put their Plaintiff to proof (though they may risk an increased cost order as a result).

[54] Any animosity between parties is irrelevant. There is no requirement that litigants like one another. They frequently do not.

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[30] eg. correspondence with Mr Arnold

[55] The principal factor impinging on the quantum of the order for costs in this case is the comparison between the amount of the Judgment and the much larger amount sought for costs. When costs were, some time ago, calculated on a scale basis the amount of any order for costs was directly affected by the quantum of the Judgment. That approach is no longer followed but nonetheless, while it is possible to conceive of an order for costs outstripping the Judgment, Ms Wi-Kaitaia concedes that a result such as that would be highly unusual.

[56] For instigating and managing litigation, in a claim where little was required by way of interrogatory activity, which required (duplicated) preparation and which resulted in Judgment for the full amount claimed, in this case $12,175.88, the normal order for costs in the Cook Islands might be expected to be around $1,500 - $2,000. In this case a reasonable increase in that tentative figure is justified for the way in which the Defendant conducted the action.

[57] In all those circumstances the Court concludes and orders that the Defendant pay the Plaintiff $3,000 by way of costs plus disbursements of $864.43.

[58] The Plaintiff is also entitled to interest on the Judgment for costs from the date of delivery of this decision at the rate of 8% until payment.

[59] Though not germane to the costs issue, it remains to add a word about two matters raised by the parties: the use by the Defendant of the costs award paid to him and his assertions of continuing impecuniosity and inability to meet the Judgments in this case.

[60] As to the former, though precise details must be available, the way in which Mr George utilised the funds paid to him has never, so far as is known, been the subject of sworn evidence. It has always been in response to questions from the Bench. The answers, while no doubt accurate, have never been precise. So the true picture as to the use to which those funds has been put has never been verified.

[61] Further, it might by conjectured that the Ministry of Finance and Economic Management would have recovered from the costs award the full amount of the unpaid tax penalties and interest then owing. If so, it is difficult to understand how Mr George could, as he claims, again owe “$30,000 in fines for tax offences”.

[62] Mr George's assertion of his inability to meet the Judgments along with his other financial obligations are not matters which can affect the quantum of the order for costs in this claim. They are matters which he can, if he considers it appropriate, raise on sworn evidence given in support of any application for stay of execution under s 50 of the Judicature Act 1980-81 or under Part 24 XXIV of the Code of Civil Procedure.

Hugh Williams, J