

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

CIVIL ACTION NO. HBC 190 OF 2016

BETWEEN : **MOHAMMED SHAHEEM KHAIRATI** formerly of Yalalevu, Ba, Fiji but presently of 181 Kaniere Road, Hokitika 7811, Westcoast, South Island, New Zealand, Businessman and the Trustee of the **ESTATE OF MOHAMMED IBRAHIM** of Yalalevu, Ba, Fiji, Businessman.

PLAINTIFF

AND : **MOHAMMED AIYUB** of 6262 Prince Albert Street, Vancouver BC, Canada, in his personal capacity and as the Trustee of the Estate of Khairati, Hotel Worker.

FIRST DEFENDANT

AND : **MOHAMMED HASSAN** a.k.a **MAHMUD HASSAN** of 15347 66 Avenue Surrey BC, Canada, V3W 2B6, Driver.

SECOND DEFENDANT

AND : **MOHAMMED FAREED KHAIRATI** of 14582 85A Avenue, Surrey BC, Canada, V3S 5T6, Businessman.

THIRD DEFENDANT

AND : **MOHAMMED ABDUL GAFFAR KHAIRATI** of 14333 84th Avenue, Surrey BC, Canada, V3W 0W3, Cleaner.

FOURTH DEFENDANT

AND : **FAIZAL HUSSEIN KHAIRATI** of Malolo, Nadi, Fiji, Project Manager and Trustee of the Estate of Khairati.

RESPONDENT

Appearances : Mr V. M. Mishra for first plaintiff/applicant
Mr S.F. Koya for the first defendant/respondent
Date of Hearing : 12 September 2019
Date of Ruling : 26 February 2020

R U L I N G

[on assessment of costs and rental]

ASSESSMENT OF COSTS

Introduction

- [01] This is an application by the plaintiff/applicant (*“the plaintiff”*) for assessment of costs (*“the application”*).
- [02] The application is supported by an affidavit sworn by Reema Devi, assisting counsel in this matter.
- [03] It is indicated in the application that the application is made under Orders 37, 38, 43, 44 and 45 of the High Court Rules.
- [04] The substantive matter was settled after recording evidence of the plaintiff and his witnesses including an expert witness and in mid-way of the first defendant’s evidence. The matter was settled subject to costs to be assessed by the Court.
- [05] At the hearing, both counsel made oral submissions.

Background

- [06] In September 2016, the plaintiff brought the action against the first defendant who was the Trustee of the Estate of Khairati for among other things for removal of first defendant as Trustee and appointment of a new trustee of the Estate of Khairati and for distribution of the Estate of Khairati assets. The action was based on breach of trust by the defendant. The defendant filed the statement of defence and denied the allegation in the

statement of claim and put the plaintiff on the strict proof thereof. However, the defendant had admitted allegations in the statement of claim.

- [07] The trial of the matter was taken up on 22 October 2018, when the plaintiff closed his case by adducing evidence of 8 witnesses, including the plaintiff and tendering some 18 documents. An adjournment was sought for the defence case. The Court then adjourned the matter to 14 February 2019, for defence case. On 14 February 2019, the first defendant gave evidence. After completion of the first defendant's evidence, the parties talked settlement and the matter was adjourned to the following day 15 February 2019.
- [08] On 15 February 2019, the parties informed the Court that they have settled the matter whilst tendering the terms of settlement signed by the parties. However, the parties could not agree on the issue of costs on these proceedings. As such, the matter was settled subject to costs to the plaintiff, which is to be assessed by the Court.
- [09] The plaintiff now applies for assessment of costs.

The law

- [10] The High Court Rules 1988, as amended ('HCR'), O 62, R 12 states:

"Basis of taxation (O 62, R 12)

12 (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.

(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.

(3) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis".

[11] As to the matters to be taken into account in exercising discretion, O 62, R 9 HCR says:

“Matters to be taken into account in exercising discretion (O 62, R 9)

9 (1) The Court in exercising its discretion as to costs shall take into account-
(a) any offer of contribution brought to its attention in accordance with Order 16, Rule 10;
(b) any payment of money into court and the amount of such payment;
(c) any written offer made under Order 33, Rule 5(2)“.

Discussion

[12] In this application, the Court is required to exercise some form of taxation exercise. The plaintiff is asking to assess the cost of the proceedings he would be entitled to recover from the defendant.

[13] The matter was settled at the end of the trial, where both parties had given their evidence with costs to the plaintiff to be assessed by the Court.

[14] The cost order does not specify the basis of taxation. In that case HCR O 62, R 12, applies. R 12 states that:

“Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis“.

[15] In this case, I will assess the costs on standard basis. If the court is assessing costs on the standard basis, the test to be applied is deciding the amount of costs is:

(i) proportionately and reasonably incurred; or (ii) proportionate or reasonable in amount.

[16] The plaintiff asks the court to assess the amount of costs by detailed assessment on indemnity basis. According to the detailed assessment submitted by the plaintiff the amount of costs is \$44,045.75.

- [17] Since I have decided to assess the amount of costs on standard basis. I will ask myself whether the amount of costs the plaintiff is seeking against the defendant is proportionate and reasonable in amount.
- [18] The parties were able to settle their issues at the very late stage of the trial, i.e. after the completion of the plaintiff's evidence and in mid-way of the first defendant.
- [19] When assessing the amount of costs the court must also have regard to:
- a) the conduct of the parties, including in particular:
 - i. Conduct before as well as during the proceedings; and
 - ii. The efforts made, if any, before and during the proceedings in order to try to resolve the dispute.
 - b) the amount or value of any money or property involved;
 - c) the importance of the matter to all the parties;
 - d) the particular complexity of the matter or the difficulty or novelty of the question raised;
 - e) the skill, effort, specialized knowledge and responsibility involved;
 - f) the time spent on the case.
- [20] The action was instituted in September 2016 and the parties were able to settle the dispute, although at the late stage of the proceedings. The time spent on the case was approximately 2 years and 4 months but I will not consider the time spent on the case. This is because the parties had settled the matter.
- [21] There were no efforts made before and during the proceedings in order to try to resolve the dispute.
- [22] The dispute between the parties were revolved around the estate property of the late Khairati. The plaintiff as the beneficiary of that property brought the action for the distribution of the estate property and removal of the first defendant as the trustee of that estate.
- [23] The matter could have been of importance to all parties. However, there was no complexity in the matter and it did not raise the difficulty or novelty of the question.

- [24] The settlement was eventuated at the late stage of the proceedings particularly after the plaintiff had lead all of his witnesses.
- [25] The first defendant could have informed the plaintiff of his intention of settling the matter before the commencement of the trial so that the plaintiff could have stopped their witnesses coming to court.
- [26] Before the settlement, the plaintiff had called and led evidence of some 8 witnesses including an expert from New Zealand.
- [27] The new trustee was able to sell the main or major estate property for the sum of \$525,000.00.
- [28] The amount of costs sought by the plaintiff in my opinion is not proportionate and reasonable particularly in the case where the parties had settled the dispute.
- [29] The first defendant says he did not dispute any document even though the plaintiff had called expert witness, Mr Mike Maran, he further says Mohammed Hussein and Ali Ahmed were managing the Estate from 2006 with him and none of the shareholders requested him for the distribution of the Estate. It was his submissions that costs should be paid out from the Estate of Khairati account before it is distributed.
- [30] The plaintiff on the other hand submits that it is the duty of the trustee to distribute the estate property among the beneficiaries and that the trustee must fulfill his duty whether requested or not.
- [31] The settlement entered between the parties was full and final except for the costs.
- [32] Initially, the plaintiff filed the detailed particulars of total costs for \$61,972.07 and subsequently the bill of costs for \$44,045.75. The detailed breakdown of costs and the bill of costs would be of assistance to Court when assessing the amount of costs on indemnity basis. In this instance, I am assessing the amount costs on the standard basis and not on indemnity basis.

[33] Since the first defendant had the opportunity to communicate his intention of settling the matter prior to the trial date, I would allow costs incurred for the preparation of the trial and costs incurred for getting the witnesses including the expert witness to court.

[34] The plaintiff is a party to the proceedings. He has to be present in court to give evidence in support of his claim wherever he resides. He is not entitled to claim costs of air ticket for travelling to Fiji from New New Zealand to attend the trial. However, he is entitled to claim the costs associated in calling his witnesses to court for his trial.

Conclusion

[35] The court has unfettered discretion in allowing in awarding of costs and assessment of costs. I take all the factors into my account including the factor that the dispute was settled by the parties amicably, although late in the proceedings and assess the amount of costs at \$9,500.00 which is, in my opinion, proportionate and reasonable in all circumstances of the case. I accordingly order that the first defendant must personally pay the plaintiff the sum of \$9,500.00 as costs.

The results

1. The first defendant shall personally pay the assessed costs of \$9,500.00 to the plaintiff.
2. There shall be no order as to costs of the application for assessment of costs.

ASSESSMENT OF RENTAL DUE TO ESTATE

[36] This is an application to assess the amount of rental due to the estate of Mohammed Ibrahim.

[37] By his application filed along with a supporting affidavit of Mohammed Shameem Khairati, the plaintiff on 21 August 2019, the plaintiff seeks the following orders:

1. *That the court do assess the amount of rental due to the Estate of Mohammed Ibrahim as its one seventh share of the Estate of Khairati for the renting of Certificate of Title No. 6225 and the premises situated thereon from 1 January 2008 to the 15 February 2019 when the first defendant was removed as trustees of the estate of Khairati.*
2. *Whether there should be interest paid thereon and whether the plaintiff is entitled to damages for either the first defendant or the first to fourth defendants.*
3. *The parties be at liberty to call witnesses to give evidence on this issue on a date given by the Court.*
4. *The first defendant and/or the first to fourth defendants do pay the costs of this assessment on an indemnity basis so that his travelling, solicitors costs incurred by him be fully met.*

[38] The application states that it is filed under O 37, 38, 43, 44 and 45 of the High Court Rules, 1988 as amendment (“HCR”) and the judgment of this court made on 15 February 2019 and pursuant to inherent jurisdiction of the court. However, it does not state the sub rule which it is made under.

[39] The HCR, O 37 R 1 provides:

“Assessment of damages (O 37, R 1)

1 (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the Registrar and, at least 7 days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is given, proceed accordingly.” [Emphasis provided]

[40] O 37 has no application to this application as it does not arise out of a judgment given for damages. This rule become relevant where a judgment

is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed.

[41] The substantive matter was settled by the parties and a judgment by consent was entered. In the consent judgment, there is no direction or order for damages/rental due in respect of the Estate has to be assessed.

[42] Dealing with evidence, the HCR, O 38, R 1 and 2 (1) set out:

“General rule: witnesses to be examined orally (O 38, R 1)

1 Subject to the provisions of these Rules and the Evidence Act 1944 and any other enactment relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.”

“Evidence by affidavit (O 38, R 2)

2 (1) The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.

(2) An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his or her affidavit shall not be used as evidence without the leave of the Court”.

[43] Sub rules 2 (1) and (2) of O 38 are relevant to the trial of an action begun by writ, where the court may allow evidence by affidavit subject to the production of the deponents for cross-examination. These rules have no application to the present application. Evidence may be given by affidavit

in any matter begun by application whether by summons or motion. Since this is an application, the court ordered to file affidavit evidence.

[44] The HCR, O 44 deals with proceedings under judgments and orders R 3 and 4 of the Rule says:

“Directions by the Court (O 44, R 3)

3 (1) Where a judgment given in a cause or matter contains directions which make it necessary to proceed in chambers under the judgment the Court may, when giving the judgment or at any time during proceedings under the judgment, give further directions for the conduct of those proceedings, including, in particular, directions with respect to-

- (a) the manner in which any account or inquiry is to be prosecuted;*
- (b) the evidence to be adduced in support thereof;*
- (c) the preparation and service on the parties to be bound thereby of the draft of any deed or other instrument which is directed by the judgment to be settled by the Court and the service of any objections to the draft;*
- (d) the parties required to attend all or any part of the proceedings;*
- (e) the representation by the same barristers and solicitors of parties who constitute a class and by different barristers and solicitors of parties who ought to be separately represented; and*
- (f) the time within which each proceeding is to be taken, and may fix a day or days for the further attendance of the parties.*

(2) The Court may revoke or vary any directions given under this Rule”.

“Application of Rules 5 to 8 (O 44, R 4)

4. Rules 5 to 8 apply–

- (a) where in proceedings for the administration under the direction of the Court of the estate of a deceased person the judgment directs any account of debts or other liabilities of the deceased’s estate to be taken or any inquiry for next of kin or other ascertained claimants to be made; and*
- (b) where in proceedings for the execution under the direction of the court of a trust the judgment directs any such inquiry to be made, and those rules shall, with the necessary modifications, apply where in any other proceedings the judgment directs an account of debts or other liabilities to be taken or any inquiry to be made.”*

[45] O 44 has no application here as the judgment does not give further directions for conduct of the proceedings in respect of the manner in which any account or inquiry. Further, the HCR, O 45 has general provisions pertaining to enforcement of judgments. It carries 10 sub rules with it. It is not clear which sub rule or sub rules the plaintiff relies under. There is no direction in the consent judgment for account of rental due and payable to the Estate. Therefore, O 45 has also no application to the present application.

[46] The plaintiff has filed some affidavit evidence of his witnesses.

[47] The first defendant opposes this application. He has filed his affidavit in opposition. To which, the plaintiff has filed an affidavit in reply

[48] At the hearing, both parties agreed to file written submissions on the assessment of rent due to the Estate. Accordingly, both parties had filed their respective submissions.

[49] The consent judgment entered between the parties was as follows:

"IT IS HEREBY ORDERED BY CONSENT AS FOLLOWS:

1. *That the Deed dated 6 May 2009, shall be unenforceable.*
2. *That the Estate of Khairati shall be distributed on the basis of the Settlement letter dated 17 July 2006.*
3. *That the First Defendant: Mohammed Aiyub shall be removed as the Trustee of the Estate of Khairati.*
4. *That Mr Faizal Hussein Khairati, Project Manager of Jacks of Fiji (son of the beneficiary and previous Trustees of Nadi, Fiji Mr Mohammed Hussein) is hereby appointed the Trustee of the Estate of Khairati to complete the administration of the Estate of Khairati.*
5. *That Certificate of Title Nos. 6225 and 7200 shall be sold to the highest bidder after:-*
 - a) *Two consecutive English Newspaper advertisements allowing fourteen (14) days for Tenders to be received with \$200.00 deposit with all tenders to go to the Deputy Registrar of the High Court, Lautoka and he shall open the same in the presence of both party's lawyers and/or parties themselves.*
 - b) *The properties (each of them) shall be offered to each beneficiary at the highest tender received. If there is more than one beneficiary wanting to buy then it shall be sold to the one who offered the highest price.*
 - c) *The person(s) awarded the tender shall pay a deposit of ten (10%) to be paid within 10 days of the tender acceptable into Court and sale and purchase agreement shall be done by a lawyer chosen by the new Trustee.*

- d) *If the highest tenderer for either property does not settle or come up with the funds to settle within 42 days from time of acceptance then the deposit shall be forfeited and the property be offered and sold to the second highest tenderer with the same procedure being followed and so on until the property is sold.*
6. *That the costs of the advertisements shall be paid by the defendants.*
 7. *That the estate tractor parked at the residence of Faizal Hussein Khairati shall be sold in same manner by the Trustee to the highest tenderer.*
 8. *That the money from all the sales shall be paid into Court.*
 9. *That the loss of income for the Estate of Mohammed Ibrahim as prayed for in relief F of the statement of claim is agreed at \$20,000.00.*
 10. *That the costs of this action shall be paid to the plaintiff and the same to be assessed by the Court, if not agreed and whether the same is paid by the First Defendant personally to be also determined by the Court.*
 11. *That the Plaintiff shall be at liberty to file affidavit with the bills of costs and fees incurred by him for the present hearing as well as other costs such as air flights.*
 12. *That the distribution of the shares between the beneficiaries shall be determined and assessed by the Court.*
 13. *That the parties and new Trustees shall be at liberty to apply generally.*
 14. *That this settlement shall be the full and final settlement between the parties."*
[Emphasis provided]

- [50] The court made the above consent judgments/orders in accordance with the terms of settlement. Each party and solicitors acting for them had signed the terms of settlement.
- [51] The consent judgment operates as '*full and final settlement*' between the parties (see: para 14 of the judgment).
- [52] A consent order can act as an estoppel which can be raised if fresh proceedings are brought alleging matters encompassed by the compromise (see: *Keith v Walcott* [1929] AC 382).
- [53] There is no order in the judgment that the first defendant has breached his duties as trustee. By consent of all the parties, a new trustee has been appointed.
- [54] Moreover, the judgment does not direct that the first defendant is liable to pay damages to the Estate of Mohammed Ibrahim for loss of rental which is to be assessed by the court.

- [55] Notably, there is no direction in the judgment that the damages or the amount of rental due for the Estate of Mohammed Ibrahim is to be assessed by the court.
- [56] Enforcement of judgments or orders depends on the nature of the terms in question.
- [57] Where parties have agreed for settling the substantive issues in the claim, especially on the basis of full and final, the parties will be precluded from raising any substantive issue in fresh proceedings alleging matter encompassed by the settlement.
- [58] The consent judgment directs how the Estate properties ought to be sold and the proceeds distributed between the beneficiaries.
- [59] The application to assess the amount of rental due for the Estate of Mohammed Ibrahim does not encompass by the settlement reached by the parties, and there is no direction in the judgment for assessment of such rental.

Conclusion

- [60] This application does not arise from the judgment. It is, therefore, an abuse of process to make an application for assessment of damages where there is no order or direction in the body of the judgment for assessment of rental due for the Estate of Mohammed Ibrahim. I would, therefore, strike out and dismiss the application to assess the amount of rental due for the Estate of Mohammed Ibrahim, with costs to the first defendant.

Costs

- [61] The first defendant had made a few appearances in order to defend this application through his solicitor; he has filed an affidavit in opposition and also submissions. I take all into my account and fix costs at \$3,500.00 payable by the plaintiff to the first defendant. The first defendant is entitled to offset this costs against the costs (\$9,500.00) ordered against him in favour of the plaintiff. This means that the first defendant shall pay the plaintiff costs in the sum of $(\$9,500.00 - \$3,500.00 = \$6,000.00)$ \$6,000.00.

The outcome

The application to assess rental is struck out and dismissed with summarily assessed costs of \$3,500.00, payable to the first defendant by the plaintiff.

M.H. Mohamed Ajmeer
26/2/20

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M.H. Mohamed Ajmeer
JUDGE

At Lautoka
26 February 2020



Solicitors:

Mishra Prakash & Associates for the plaintiff
Siddiq Koya Lawyers for the first defendant