IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.126/97

Proofed WDP 1/10/02

BETWEEN : ***POLYNESIAN AIRLINES*** - ***Plaintiff***

AND : ***KINGDOM OF TONGA*** - ***Defendant***

BEFORE THE HON. JUSTICE FINNIGAN

Counsel Appearing: Mr Waalkens for plaintiffs
Mr Gimblett for defendant.

Date of hearing: 8th & 9th May 2000.

Date of judgment: 19th May 2000.

Further Judgment of Finnigan J on Taxation of Costs

Introduction

In the judgment issued on 27 January 1999 I determined liability for costs and directed that costs be paid by the plaintiffs. They were to be taxed according to SCR Order 29 rules 2-4 if not otherwise agreed.

Subsequently, within the mandatory 28 day period of O29 Rule 3 (2), the defendant lodged a bill of costs showing profit costs of Lstg.346,333.74 and disbursements including fees paid to counsel, other lawyers and expert witnesses, of Lstg. 238,524.57. The total amount of the bill was L584,858.31. Within the mandatory 14 day period the plaintiffs notified that they wished to be heard by filing a notice of objection which stated 5 grounds. Full particulars of objection were subsequently filed pursuant to an order.

Legal Argument and analysis of the bill of costs in respect of this taxation occupied two full hearing days before me. The arguments are strongly opposed. What I now say is in response to the written and oral submissions of counsel which I shall not specifically set out. I take particular note of the plaintiffs' detailed particulars of the objections dated 20 March 2000 which Mr Gimblett characterised as "the agenda for this hearing" and the defendant's detailed responses. Reference to any of those submissions is necessarily brief by reason of time constraints. What occurred in the hearing was not strictly a taxation as such but rather was argument of the principles applicable as if on a review of taxation, which is illustrated by the suggestion of Mr Gimblett about how the matter could proceed if necessary after my judgment by adjustment of the figures.

The Law In Tonga About Taxed Costs

Primarily this law is stated in the Supreme Court Rules 1991, relevantly it is stated an Order 29 R3 (1), (2) and R4 (1). These Rules came into effect on 1 January 1992.

Rule 3

(1) Where the Court is unable to assess costs under rule 2 such costs shall be taxed in accordance with this rule.

(2) The party entitled to costs shall within 28 days after the date of the order for costs lodge with the Court a bill of costs showing brief details of, and the sums claimed in respect of:
- (a) the amount of time spent in preparation of pleadings and general preparation for trial ;
- (b) the amount of time spent in court ;
- (c) counsel's fees ; and
- (d) any other disbursements.

Rule 4

(1) (i) This paragraph applies to costs payable by one party to another under an order in civil proceedings.

(ii) There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party.

(ii) Unless there are exceptional circumstances there shall not be allowed:
- (a) any costs in respect of work done prematurely and not subsequently proving of use;
- (b) any costs incurred or increased as a result of negligence, mistake, or over-caution;
- (c) any unusual expense.

On 6th February 1992 the court issued a Practice Direction which I shall refer to as PD 02/92.

1. This Practice Note is issued for the guidance of the legal profession in Tonga, after consultation with the Law Society.

2. In respect of any Bill of Costs taxed in the Supreme Court under and in terms of Order 29 of the Supreme Court Rules 1991 the amounts allowable (a) as between party and party or (b) as between agent and client where no charging arrangement has been entered into in writing, shall be in accordance with the terms of paragraph 4 hereof.

3. For the construction of paragraph 4 hereof –
   (i) "Senior Counsel" means a King's or Queen's Counsel or Counsel of equivalent standing seniority and experience ;
   (ii) "Counsel" means any person licensed to practice law in the Kingdom of Tonga who is not a "Senior Counsel" or a "Locally qualified Lawyer";
   (iii) "Locally qualified Lawyer" means any person licensed to practice law in the Kingdom of "Tonga who is not a member of a foreign Bar or Law Society, or who does not have a degree in law from an accredited university obtained by examination.

4. (1) Subject to paragraph 4(2) hereof, the MAXIMUM fees which shall be allowable on taxation are -

		Senior Counsel pa'anga	**Counsel** pa'anga	**Locally** Qualified Lawyer pa'anga
(a)	All meetings, incidential court appearances, preparation and all work not covered by items (b) hereof - PER HOUR	150	100	75
(b)	Conducting Trials. Appeals, or any other substantial Court hearing set down for at least one day (to include) time spent travelling to and from Court for such appearance) - PER DAY	1000	600	450

(2) In any case a Judge of the Supreme Court on special cause shown may allow an increase in any of the above charges, of such amounts as he thinks fit.

(3) All disbursements must be properly vouched.

(4) There shall be allowed as disbursements all reasonable sums necessarily expended by Senior Counsel, Counsel and Locally qualified Lawyers in respect of travelling costs, and subsistence when required to reside away from their ordinary place of residence.

- 6th February, 1992 -

There are some judgments of the Court which interpret those provisions that are relevant and these are as follows: First, on 23 January 1991 *O.G.Sanft & Sons & Another v. Johnson & Others* [1991] Tonga Law Reports 1. This is a judgment issued before Order 29 was passed, but I shall refer to it in respect of one principle.

The first judgment issued after Order 29 and Practice Direction 02/92 came into effect was on 6 November 1992. This is *Tonga Development Bank v. Niu,* unreported C231/92 judgment 6 November 1992, Ward CJ. Counsel for successful plaintiff was from outside Tonga and the judgment stated relevantly on page 1 to 2 as follows.

> *"The maximum fees laid down in the Practice Note are reasonable and sensible. There can never, however, be a hard and fast rule and, in cases of exceptional difficulty for example, it is always open to a lawyer to seek rates in excess of these figures. When counsel comes from overseas, the same general principles apply. He appears as a member of our legal profession and subject to the same rules as other members. That includes the rules as to costs. If he does not wish to be paid at those rates, he should not accept the instructions or should ensure he is properly covered by special arrangements with his lay clients. Costs rules are made to ensure fairness to both parties and it is clearly not fair to order higher costs against the losing party simply because his opponent has employed a lawyer who charges at a higher rate.*
>
> *Most cases before the Courts here do not require counsel from abroad but where such a course is necessary, charges outside the tariff may be appropriate. In such cases, application should be made to the judge in chambers for the case to be certified as meriting remuneration at rates in excess of the scale and/or requiring the attendance of counsel from overseas and/or requiring two lawyers. Such application should be made as soon as the need is apparent and failure to seek such certification may result in costs in excess of the scale being refused.*
>
> *This case does not, at this stage, appear to involve any special difficulty but the need to instruct counsel from overseas arose from the limited number of*

counsel (in terms of paragraph 3 of the Practice Note) resident in Tonga. Of those that are resident, one is the first defendant and another represents him.

Those circumstances justify instructing counsel from abroad. I also consider it merits a charge above the standard rate. I order that Mr Waalkens be paid at a rate 25% above the scale maximum which is a rate of 125 pa'anga per hour for the costs claimed under paragraph 4(1)(a). The costs claimed are reduced by 24 pa'anga and I tax the total costs, therefore, at 675 pa'anga."

The next relevant judgment was issued on 10th October 1994, this was *Edwards v. Kingdom of Tonga* [1994] Tonga Law Reports 62, 68 (Ward CJ).

The basis on which costs are taxed is set out in Order 29 rule 4(1).

"There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party."

That is substantially similar to the English RSC Order 62 rule 28(2) prior to 1986. When our Rules were drafted in 1990, the intention was clearly to apply that rule rather than the more recent rule in England. Thus the intention of our O 29 r4(1) is that the basis of taxation should be "party and party" rather than the standard basis now adopted in England. Recent authorities in England, therefore, are of limited value. Even cases prior to 1986 should be treated with care because of significant differences between the wording of O 29 of our Rules and O62 of the English RSC.

The use of the phrase "reasonably necessary or proper" means that a cost may be justified either as being reasonably necessary when it was incurred or that it was reasonably proper to incur it even though it may not in the event have been necessary. The test of reasonableness applies in both cases; Societe Anonyme Pecheries Ostendaises v Merchants Marine Insurance Co [1928] 1 KB 750.

The principles of party and party taxation have been settled for a long time. In Smith v Buller [1875] LR 19 Eq 473, Malins VC explained at 475:

"It is of great importance to litigants who are unsuccessful that they should not be oppressed by have to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them."

Most cases before the Court here do not require counsel from overseas, but where that is thought necessary charges outside the scale maxima may be appropriate. And the judgment in *Niu's* case (above) allowed counsel who

happened to be Mr Waalkens to be paid at the rate of 25% above the scale maximum.

Now the next case I should also mention is *Fonua v. MBf Bank Limited* unreported, C618/98 judgment 29 January 1999 (Ward CJ) where full solicitor and client costs were allowed as a principled exception to the general rule in respect of costs.

The Bill For Taxation

The Bill of Costs before me sets out all the costs actually incurred by the Defendant, subject to the adjustments which are indicated in the bill which reduce some amounts to be less than full indemnity amounts. The object of that is to avoid breaching any rule which limits indemnity costs to indemnity of actual costs. These costs and the bill of costs are claimed by the defendant as "reasonably necessary or proper" within the meaning of Rule 4 (1)(ii) of Order 29.

It is the defendant's case that wherever costs that are greater than the maxima in PD 02/92 have *in fact* been incurred and were *in fact* "reasonably necessary or proper" as interpreted for purpose of R4(1)(ii) then on taxation they "shall be allowed", i.e. the Court is bound to allow then. Mr Gimblett set out his most telling submissions on this topic at paragraph 10 of his skeleton.

I cannot accept this proposition in entirety. It is based on a judgment of the English Court of Appeal, which appears on paragraph 12 of Mr Gimblett's skeleton of argument, *Wraith-v-Sheffield Forgemasters Ltd [1998] 1 ALL ER 82.*

Indeed that judgment is the corner stone of the Defendant's claim for reimbursement of a very high percentage of its actual solicitor and client costs and for practically every disbursement incurred by its solicitors in connection with the case. That judgment's turns on application of English RSC O62 r12(1) which is set out on page 85 g of that judgment.

On pages 85 and following, Kennedy LJ set out the history of r12(1) which had started in existence only in 1986. He referred to a prior rule, R32 of O40 of the Consolidated General Orders of the Court of Chancery, at p. 86 of the judgment.

It is that pre 1986 situation that exists in Tonga, as Ward CJ held in *Edwards* (above). I cannot be guided by later cases, which lay down principles as they arise from later redrafting of the Rule.

There may be some help for the Court in Tonga from costs procedures in New Zealand. However, as the New Zealand Court of Appeal said in *Kuwait Asia Bank v. National Mutual* [1991] 3NZLR 457, to which Mr Waalkens referred me,

at 460, there is no recognisable practice in Court of Appeal or High Court regarding taxation. Costs in New Zealand are fixed as a contribution only and by reference to a scale of costs as the judgments make clear. Costs are generally fixed on that basis by the High Court itself, on memoranda from counsel or otherwise and by Court of Appeal of its motion.

That healthy practice is the practice which can be adopted under O29 R2 of the Supreme Court Rules in Tonga. However the Court of Appeal and Supreme Court has generally left costs for Counsel to agree, or otherwise to submit the taxation.

For conduct of taxation in Tonga, I have found guidance in *Simpsons Motor Sales [London] Limited v. Hendon Corperation* [1994] 3All ER 833 (Ch.D.)and *Halsbury* 4th Edition Vol.37. This volume of Halsbury was published in 1982 and states the English Law about taxation of costs as at that time, and thus states the principles for Tonga. The authorities for application of SCR O29 in Tonga are the judgments of this Court which I have set out above. I am satisfied that English decisions about the application of the English RSC O62 R28 are authority in Tonga for applications of the Tongan provisions as well.

I am satisfied that under English RSC O62 R28, costs were normally taxed on the party and party basis (Halsbury paragraph 744). All references to Halsbury, unless otherwise stated, will be to Vol 37, 4th edition.

There is no statutory provision in Tonga for taxing costs on the indemnity basis, i.e. reimbursement by the paying party of all costs incurred by the receiving party except those unreasonably incurred or unreasonable as to amount. These words are in Halsbury paragraph 744 and refute what is nearly enough the claim that the defendant makes. However the Supreme Court in Tonga has a statutory discretion about who may pay the whole costs (S15 SCA cap 10) and the Court may order costs on that basis. It did so recently in *Fonua v. MBf Bank* (above).

Halsbury paragraph 745 notes as follows:

> *"On a taxation on the party and party basis there are to be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included. In practice, however it is a fiction that taxed costs are the same as costs reasonably incurred but the law does not recognise the difference between the sum which it awards as costs on the party and party basis and the larger sum which in fact a litigant has to pay."*

And that is the difference between the two arguments in the present case. I rely on that paragraph and upon the other statements of principle that appear in footnotes to that paragraph.

However, I must be careful to ensure that any statement of principle relied on arises only from O62 r28(2) before 1986 and not from some other part of the English O62 and not from judicial consideration of other parts. There is not scale of costs in Tonga other than PD02/92, and no guidance on its application other than the Tongan cases which I cited above.

Fees paid to counsel were closely regulated in England under O62 before 1986 (see Halsbury paragraph 751), but those English provisions have not been enacted in Tonga. However, decisions of principle on this topic and related topics by the English Courts which are other than applications of those provisions are judicial authority in Tonga pursuant to S4 of the Civil Law Act.

Therefore it is a principle in Tonga that in a taxation on a party and party basis, the costs of more than 2 counsel will not normally be allowed unless certified as proper (see the authorities cited in Halsbury paragraph 751, particularly footnote 6). It is also good Law in Tonga that the proper measure for counsel's fees is [citing from Halsbury paragraph 751]:

> *"The proper measure for counsel's fees is such fee as would be acceptable to a hypothetical counsel capable of conducting the case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation."*

The authority for that proposition is *Simpson's* case (above) which is cited by Kennety LJ in *Wraith* (above) as part of the history of the development of the taxing rule. Simpson is instructive for our purposes. At p/837 I Pennycuick J noted the absence of judicial authority on amounts, particularly in connection with counsel's fees on a party and party taxation. He referred to "broad statements of principle" such as those of Malins VC in *Smith v. Buller* to which Ward CJ referred in *Edwards* (above). Pennycuick J noted at p.837-838 that the "necessary" costs stipulated by Malins VC must become (under O62 R28) "necessary or proper for the attainment of justice etc."

He went on at (p838 B) "one must then apply the words of r28 (2) to the particular circumstances as best one can ..." That is about as far as the case goes on that topic.

However in respect of counsel's fees, the topic of his decision, he stated in greater detail the test I have just recited from Halsbury paragraph 751 and this is on page 838 C to E and further G – H.

The learned Judge then sets out the argument advanced before me by Mr Waalkens, that less eminent counsel could have conducted the case for a much lower fee. He decided that by saying in the following words from page 839 B.

> *"One can only proceed by estimation based on such knowledge and experience as one possesses. On the best consideration that I can give the matter, I am not myself persuaded that this particular fee is higher than one would expect leading counsel, competent to conduct this particular case, to charge for his services. Equally, I do not think this fee should be regarded as being a particularly high one that was occasioned by this leading counsel's pre-eminent reputation."*

I conclude that these words are the guidance which I have to accept, because those dicta were made against the background of the rule that equates to the Tongan Rule. They set out the practice for Tonga. I turn now to consider the various heads of the defendant's claim in advanced in submissions.

Before, finally doing so however, I deal with a preminarily matter which was my reserved preminarily ruling about the admissibility of the affidavit of Afqar Dean. The affidavit relates to principles applied in England that are not the principles to apply in Tonga, but it is a factual statement of the current English practice. I admit it for the purpose of comparing English taxation practice with that in Tonga and with the situation in New Zealand.

Defendant's choice of the Solicitors and 2 Counsel who conducted its defence.

In brief, I find the Defendant's choice of solicitors reasonable for the reasons advanced by Mr Gimblett. Briefly these are that this litigation is in reality a contest over liability for quantum of about US$3.5 million between two parties trading worldwide and based in London. They are international insurers that insure very substantial risks across national boundaries. The plaintiff instructed a specialist attorney in San Francisco. The defendant's insurer was justified in the terms used by Pennycuick J in *Simpson* (above) in instructing a London City firm, and the firm called Barlow Lyde and Gilbert which is one of 5 or 6 such firms that specialise in aviation insurance claims is one of them. The fact that the claim arose in Tonga is incidental to the main commercial and legal issues. After all the object was to make and settle a claim, and the parties were in London. Only for factual reasons related to the Kingdom of Tonga and the security arrangements at its main airport was it appropriate to consider counsel from this part of the world. I shall return to this, because that is what occurred. Both counsel and experts were employed in this part of the world.

Counsel

I bear in mind the dicta I have cited from *Simpson*, and from Halsbury. First I shall deal with the trial. I reject the contention that the expense of having three persons present for the trial was necessary in terms of R4(1)(ii). Unquestionably all three representatives of the Defendant was supremely competent and thoroughly familiar with the case. So much so that attendance of two only of them is what I think reasonable in this context of party and party costs. Both Mr Webb and Mr Lydiard were admitted to the Tongan bar for the trial, Mr Gimblett was not. Those two alone were certified and expected to operate as the Law Practitioners conducting the trial in my view could have done so. Indeed Mr Webb and Mr Gimblett could have done so. In the context of R4(1)(ii) to go further was to do more than was reasonably necessary for defending the rights of the defendant. All expenses associated with the attendance of the Mr Lydiard at the trial are therefore taxed off the bill. For this exercise I regard Mr Gimblett as the person who was junior to Mr Webb in the trial and I disregard the fact that he was not an admitted practitioner in Tonga for the purposes of this exercise. Other overseas practitioners were involved apart from those two and I shall return to the part played by them in the proceedings. That includes practitioners in New Zealand and practitioners in Tonga.

The Fees Charged By Those Two Practitioners.

This Court will not normally accept in a taxation the fees of law practitioners as vouched disbursements. It was argued that the Tonga rule, 029 R2 (above) allows at (c) that counsel's fees may be submitted as disbursement because (d) allows *"any other disbursements"*. In the present case I cannot accept that interpretation and there are three reasons. This is firstly because the principle laid down for me in *Simpson* is that I must rely on whatever knowledge and experience I possess. In respect of the fees of London City barristers I have no knowledge and no experience. It cannot be expected that a taxing officer in Tonga would have. Second it is because the 2 practitioners were, in Tonga, part of the merged profession and were acting as such and subject to the provisions of the law practitioners Act No.21/1989. Ward CJ make this point also in *Niu* (above). Under the Act, S8 (a) all law practitioners are entitled to appear as counsel in any Court in the Kingdom. Under S24 all Law Practitioners are entitled to recover as fees either their taxed costs on an agreed fee. Even the agreed fee is subject to review by this Court under S25. The title counsel is used in the Court to denote any law practitioner who appears. This is the universal practice. It is confirmed to a degree by the use of that term in PD02/92.

I pause to mention the Practice Direction, the force of which was a point of contention in the argument. It does not have the full force of a statute, but it does have authority. It was issued by the Court pursuant to its inherit

jurisdiction to regulate and control its own process. (See *Halsbury vol.10 paragraph 909 and vol.37 paragraph 12).* As paragraph 1 of the Practice Direction makes clear its purpose is the guidance of the legal profession in Tonga. The word "guidance" is not a pointer to voluntary compliance. Paragraph 4 sets fees which are "MAXIMUM fees which shall be allowable on taxation".

This raises the interpretation of R3(2), and my third and final reason for rejecting the argument that R3(2) provides for admitting counsel's fees as a disbursement. On the reading of R3(2) as a whole, I find it provides for a bill that shows brief details of and the sums claimed for (a) time spend before trial (b) time at trial (c) fees of the law practitioners who conducted the proceedings and (d) any other money claimed for sums paid out incidentally. The bill is to be filed by "a party" to court proceedings and "counsel's fees" are the fees that the lawyer is charging the party. It is rare, but acceptable practice, for a law practitioner in Tonga to brief another for the purpose of conducting a trial. "Counsel's fee" is however still a law practitioner's fee, it is not a disbursement. *Niu's* case (above) illustrates that.

Now I come to Mr Webb's fees for the trial. He is pre-eminent in the field of aviation insurance litigation. He demonstrated that. I have held that to retain him was "reasonable necessary or proper for the attainment of justice and for defending the rights of the defendant". Even in that restrictive context he surely is entitled to a fee that reflects the experience and skill that he displayed in conducting the case for the defendant. But the approach to his fee is through paragraph 4(2) of PD02/92. On special cause shown I may allow an increase in the maximum rates of such amount as I think fit. And that is the only way I can fix a fee for Mr Webb. The taxing Judge here has a discretion, unfettered except by principle. The principles governing the discretion are set out in *Edwards* (above) and *Niu* (above) and *Simpson* (above) particularly at page 838 CD and E. The question is: What is the amount that is "reasonably necessary or proper" not for Mr Webb but to pay as a fee for counsel capable to defend the rights of the defendant in this particular case. In *Simpson's* case, the judge concluded that what had been charged by pre-eminent counsel was not higher than would have been charged for that particular case by any leading counsel who had been competent to conduct that case. However in the present case I have an affidavit from Mr Turner which is evidence, if I accept it, that competent counsel were available in New Zealand and the fee charged would have been in the vicinity of NZ$350 to NZ$450 per hour. Clearly there is range, and I am prepared to hold that it may be wider than that.

I hold that Tongan provisions apply, and they require that Mr Webb's fees be taxed. First I tax off all fees for travelling time and for days on which no work was done. These were charged on the not unreasonable understanding with his briefing solicitors that Mr Webb had removed himself from his fee earning

environment by travelling to Tonga and was unable to earn as he otherwise would have on the days when he was absent from London either travelling or actually in Tonga. While reasonable in that context, these fees are not "reasonable necessary or proper for defending the rights of the defended". They have nothing to do with the plaintiff's claim, they arise from Mr Webb's London domicile.

Next, pursuant to paragraph 4 of PD02/92, for the days of the trial which I fix at 11, I allow an increase in the maximum fee for Senior Counsel (which by definition include a Queen's Counsel). The amount of the increase is in the end subjective and open to discussion. The refresher fee actually paid was Lstg 2,500 per day. The maximum before discretionary increase in Tonga is TOP$1,000 per day. The proceedings are Tongan so the Tongan practice provides an objective standard and must be given greater weight than foreign practice, i.e. in this case English. T$2,000, i.e. double the Tongan maximum, is as far as I feel I can go and I allow TOP$2000 per day for 11 days. I note subsequently that it appears from Mr Turner's affidavit to be about what New Zealand Senior Counsel might charge as a solicitor client fee.

I turn to Mr Gimblett's fees for the trial. For this exercise, I disregard the fact that he was not an admitted practitioner. He participated as instructing solicitor. On the same basis as above I would tax off any fees for travelling time. There may be no charge made for his time spent not working but if there is any element of such a fee it should be taxed off. For the 11 days of the trial I treat him also as Senior Counsel. This may seem paradoxical, but it is consistent with Tongan practice. He is easily equivalent to any of the Law practitioners, local and overseas, who in Tonga are rated as "Senior Counsel". I exercise my discretion here and increase the maximum daily fee. The amount which I allow is TOP$1,500 per day which is the maximum plus 50%.

Trial Preparation

The first point to note is that Mr Lydiard was fully involved as counsel in preparation. Under Mr Webb's oversight he did much of the preparation work done by counsel. All three of the lawyers were involved, and indeed other English practitioners and clerks as well. The task for me here is to apply R4(1)(ii) to a large number of detailed charges, made by English standards, for work of various kinds done by solicitors and clerks who are not members of the Tongan bar. It is practically impossible to single out any from the others as being NOT "reasonably necessary or proper for the attainment of justice or for defending the rights of the defended". Neither have I any objective guide by which to assess the quantum of the various fees charged to the defendant for these services. I have only my subjective experience of fees charged in Tonga by which to judge these items, and the objective categories of R3(2)(a)and (b) – the amount of time spent in preparation and the amount of time spent in court.

I have considered the submissions of both counsel about this point. Mr Gimblett for the defendants submits that all the preparation charges should be allowed, on the basis that (i) employment of his firm and the 2 barristers was reasonably necessary for the preparation (which I have accepted) and that (ii) the amounts claimed are reasonable having regard to, among other things, rates for similar firms and counsel. He submits that PD02/92 does not provide guidance.

It is the second point that I cannot accept. There is no mandate in Tonga for finding a foreign practitioner's charges reasonable by comparing them with other similar foreign practitioners. The test is whether the charges were reasonably necessary for the defending the defendant's rights. Those rights were challenged in Supreme Court of Tonga and the question is what expenditure was reasonably necessary. It has to be assumed that a pre-eminent firm of London solicitors and pre-eminent London barristers did a great deal more than was reasonably necessary. It is right that they should charge their client for what they did but it is <u>not</u> a principle of taxation in Tonga that for every service they rendered their client the unsuccessful plaintiff should pay. The plaintiff should pay for only what was reasonably necessary for the defence to the claim.

The defendant's solicitors have put in a detailed bill of costs of 46 pages. The related explanatory schedule is 59 pages. One approach to the taxation task is to peruse these two documents in tandem, assessing from the schedule whether the task and the time set out in the bill of costs were reasonably necessary for the defence of the defendant's rights. After that is the question of the fee charged.

That is a task to be undertaken with counsel present. Some of the charges are clearly reasonably necessary for defence of defendant's rights, and would be acceptable to the paying party without discussion. Others require further explanation, particularly as to time taken. Yet others require explanation as to content. The relationships between entries in the bill of costs and entries in the schedule is not always self-evident. "Letters of average length", "telephone attendances" and "personal attendances" are not readily identifiable as reasonably necessary or not. It could appear to the unaided reader that some items have been charged for twice – eg. the bill of costs Part II, Part A (vii) on page 8. The corresponding page in the schedule is page 3. In the bill of costs there is a charge of L1,147.50 for a personal attendance of 4 hours 30 minutes on 7 October 1995 by a partner on the Crown Law Department in Tonga. In the schedule the same meeting is included in an overall claim for 39 hours, which is additional. It appears on bill of costs on p.8 in Part A (ix) Documents, included within a claim for 93 hours and 30 minutes.

Also included in that 93 hours 30 minutes is time spend in Tonga at meeting with the Minister for Justice and the Chief Justice, and in visiting the Police

Training College and videoing police cadet. A great deal of detailed explanation may be necessary before these and other detailed entries in the bill of costs and schedule are accepted as reasonably necessary for defence of the defendant's rights in the claim made by Polynesian Airlines.

Time spent by partners "collating documents" at L230 per hour and "discussing with colleague" at L265 per hour (Schedule Part V, p6) are not automatically recognisable as being reasonably necessary for defence of the defendant's rights in the claim. Neither is time spent by an assistant solicitor "considering photographs", and "drafting fax to client, ... reviewing file for outstanding information ... and discussing with partner" (Schedule Part VII p.8).

I cannot carry out unaided a detailed assessment of the individual parts of this bill of costs and its schedule, or of the work done by assistant solicitors, trainee solicitors and people called paralegal.

The approach to adopt

I have rejected the English approach contended for by Mr Gimblett. I have also found it impossible to apply unaided the rate per hour approach of paragraph 4 (1)(a) of PD 02/92. I turn therefore to the approach contended for by Mr Waalkens.

I have considered the submissions of both counsel about English practice Tongan Practice and New Zealand practice and for this purpose I have read and taken into account parts of the affidavit of Afqar Dean and the affidavit of JW Turner.

I accept and hold that the Tongan practice as set out in Supreme Court Rules, PD02/92, *Edwards* and *Niu,* is closer to New Zealand practice than to English Practice. In Tonga costs are intended to be a contribution towards the solicitor and client expenses of a successful party, calculated by reference to a scale, whose maximum may be exceeded. The Law Practitioners Act 1989 allows agreement about solicitor and client fees (subject to oversight and taxation), yet the Rules restrict recovery against those fees to only what was reasonably necessary expense and PD02/92 sets a scale of maximum costs which will be allowable upon taxation of those fees. So what is accepted by the client as reasonable may not be what is reasonably necessary for party and party taxation. This point is noted in Halsbury paragraph 745.

If I were able to tax the bill for preparation costs I would apply the test of reasonably necessary and allow costs as a percentage increase of the maximum scale costs in PD02/92. Since I cannot do that I turn to the alternative method which Mr Waalkens expounded in his submissions.

Mr Turner in his affidavit in paragraph 15 deposes that in New Zealand at the time of this case, the Courts were allowing costs above scale and the awards were in a range of 40% to 70% of solicitor client costs. For guidance they had the scale, just as Tonga has PD02/92, and commonly allowed increases above the scale. A rule of thumb that was explained by Mr Waalkens was a 3 day to 1 day calculation, i.e. for each day in court, it may be that 3 days preparation is reasonable. In Tonga's case, reasonably necessary.

Mr Waalkens proposed a rule of thumb for the present case of 10 days' preparation to 1 day of hearing, because of the complexity and particularly by reason of the documents that were discovered and used. He then recited a variety of calculations, intended to illustrate that applying the Tongan scale fees to that number of days for the solicitor and both barristers produced results that were compatible with the amounts which Mr Turner deposed might have been awarded as costs for a similar case in New Zealand. This clearly is imprecise but is acceptable and useful as a guideline. However I think it understates the amount of necessary pre-trial work. I shall increase the rule of thumb preparation time not by about 3 as Mr Waalkens suggested but by 5 times and so I shall apply a standard of 15 days preparation to 1 day of trial. If I were to use the scale costs that I have allowed above, TOP$2,000 per day would be allowed for Mr Webb and TOP15000 per day for Mr Gimblett for preparation and for trial, and I would allow the same rate TOP1500 also for Mr Lydiard during the time of preparation.

If then I were to apply those rates, the result would be as I now set out:

(i) Strike out application (1 day)

Preparation

Name	Calculation		Total
Mr Webb	15 x 2000	=	T$30,000
Mr Gimblett	15 x 1500	=	T$22,500

Hearing

Mr Webb	1 x 2000	=	T$2,000
Mr Gimblett	1 x 1500	=	T$1,500
			TOP56,000

(ii) Trial (11 days)

Preparation 11 x 15 = 165 days

Name	Calculation		Total
Mr Webb	165 x 2000	=	330,000
Mr Lydiard	165 x 1500	=	247,500
Mr Gimblett	165 x 1500	=	247,500

Trial

Mr Webb	11 x 2000	=	22,000
Mr Gimblett	11 x 1500	=	16,500

TOP577,500

Total of these amounts is = TOP919,500

The amount actually claimed as "profit costs" is Lstg.346,333.74. To this must be added the fees paid to counsel which, from their invoices, are : for Mr Webb, L94,250 and for Mr Lydiard L49,550. This makes the total profit costs claimed for English practitioners L490,134.00, rounded up.

Fees paid to Other Law Practitioners

From the schedule of vouchers, these are:

Matthew Muir, New Zealand Counsel	Lstg 820
Bell Gully Buddle Weir	Lstg 4505.05
Bell Gully Buddle Weir	Lstg 2976.82
Total =	**L8301.87**

In the two accounts rendered by Bell Gully there may be a small overlap, in that there are 2 accounts which charge for attendances by Mr MacGillivray between 2-10 June 1997. One specifies attendances in Tonga and the other specifies only attendances. Mr MacGillivray could not have been in 2 places at once, but it is a minor quibble.

It seems to me that these fees (L8301.87) must be treated as part of the solicitor and client costs for preparation of the defence for trial. There was a legal opinion work and work done in relation to discovery of the extensive range of documents. This and the other work done was incorporated into the case being prepared. It was done more efficiently and cheaply this way because of lower fees and lower travelling costs, to the benefit of the client. The practitioners involved were not practitioners in Tonga but neither were some of the persons in the London office, who also contributed to the work, and whose work has been charged out as profit costs. Therefore I add these charges to the profit costs part of the bill. The amount of profit costs by this analysis now increases to Lstg.498,436.

From this total I now deduct L7912, being the profit costs in Part XIII of the bill of costs, which relate to the claim for costs. I shall deal with them later. The total now reduces to L490,524.

I have not been told what this sum would be if expressed in Tongan pa'anga at 1997 or 1998 rates, but on enquiry on 16 May 2000 I was given the selling rate of .3737. This is the rate at or near which payment will be made. If TOP919,500 the amount I have calculated as the taxed amount above, is expressed as Lstg. using that rate, it becomes L343,617. Expressed as a

percentage of the profit costs of L490,524, it is 70%. By the scale and contribution method of assessing party and party costs that is used in Tonga, this is at the top of but still within a range of charges that could reasonably have been made by the defendant's London solicitors and counsel for work reasonably necessary for conducting the Defendant's defence. The amount claimed by the plaintiff was substantial, the law involved was arguable and the facts raised by the claim were extensive and detailed. The brevity of the trial was a direct result of painstaking preparation by counsel for both parties.

I therefore tax down the profit costs to TOP919,500 which is L343,617. That is the amount which I allow in respect of the trial, including preparation.

There were many other interlocutory matters and chambers hearings, which were attended by the local practitioners. I have not allowed specifically for them or for interlocutory steps in general. Instead the allowance for them is included in the daily preparation rate, which I have fixed at the same level as the rate for appearances.

Disbursements

PD02/92 provides at paragraph 3 that all disbursements must be properly vouched. The defendant provided vouchers in two binder files. The first one has 28 divisions. The total claim in the bill of costs for those disbursements is L238,524.57 but that sum includes the legal fees charged by counsel from London and New Zealand, which I have included above.

There were further disbursements, which were omitted from the bill of costs. These are the ones in a second binder, which contains 11 divisions. The total of these is L29,419.96. Objection was taken to these, they were submitted very late and Mr Waalkens had little opportunity to check them, and was not able to address each claim individually. I ruled at the hearing that the claims are to be admitted for taxation. I accept that with the enormous attention paid to detail and preparation of the original bill of costs within the statutory 28 days, in February 1998, some disbursements were over looked. I think it just to include all the disbursements and I think it not impossible to apply the principles of R4(1)(ii) to them.

First, some general comments.

1. The principle I apply is the same as above, what was reasonably necessary for the defence of the defendant's rights. Many of the claims I must disallow as not complying with that principle. Among these are e.g. computer programming and training which enabled the defendant's solicitor to do the work more conveniently (Halsbury paragraph 751). Likewise there are unspecified film developing and printing charges and

other expenses which may be considered of wider use and/or to be in the nature of overhead expenses.

2. I have already disallowed travelling time as being not reasonably necessary for the defence *per se*, but being rather an incident of the location of the offices of the defendant's solicitors and counsel. Likewise I disallow travelling expenses. I have held that the defendant's choice of the solicitor and counsel whom it chose was reasonably necessary for the conduct of its defence, but the fact that they were so far from the venue of the trial is not reasonably necessary for the defence of the case and R4(1)(ii) makes these expenses solicitor and client's costs, not costs for the plaintiff to pay in a party and party taxation.

3. Having said that, I do not exclude reasonable subsistence expenses, but I note that the accommodation invoices contain a considerable amount of detail. In an item by item taxation dozens of items would have been taxed off without question. I accept the submission of Mr Gimblett that during the trial counsel had to eat and sleep, but more is claimed than reasonably necessary subsistence. Charges for "nuts", "bottles of wine" unspecified bar expenditure, unspecified restaurant expenditure and charges by restaurants and hotels of unspecified quality are claims to be made on the client perhaps, but they are not likely to be charged to another party in party and party costs taxation.

   In Tonga for taxation of party and party costs the Court, when appropriate can adopt the "per diem" system which is well known here and can allow a basic daily rate. Accommodation plus a per diem of TOP100 is not uncommon for senior visiting personnel.

4. Where an item or service purchased outside Tonga can be recognised as being available here at a cheaper rate then *prima facie* it is the local rate that should be allowed, but this is not inflexible, and clearly to do so will sometimes be unrealistic.

5. Where a voucher for accommodation does not specify length of stay I decline to search for that information and allow one day at TOP150 plus a perdiem of TOP100.00, a total TOP250.00.

Volume I

Tab	Item	Amount
Tab 1 :	One day accommodation and subsistence (TOP250 x .3737)	93.43
	Film & video tape	40.91
	Develop and process) film & tape)	(67.72 (69.33

Tab 2 :	Withdrawn	
Tab 3&4:	Included above	
Tab 5 :	1997 preliminary bill of costs work	780.00
Tab 6 :	Withdrawn	
Tab 7&8:	included above	
Tab 9 :	Withdrawn	
Tab 10:	Not allowed	
Tab 11:	Courier charges	334.48
Tab 12:	Telephone charges	110.44
Tab 13:	not allowed	
Tab 14:	withdrawn	
Tab 15:	Expert witness' fee including travel time	2079.61
Tab 16:	Not allowed, included above as a profit cost	
Tab 17:	Courier charges	376.40
Tab 18:	withdrawn	
Tab 19:	not allowed	
Tab 20:	telephone charges	102.00
Tab 21:	not allowed	
Tab 22:	Expert witness' fee including travel time	1880.00
Tab 23:	withdrawn	
Tab 24:	Expert witness' fee including travel costs and other necessary disbursements (reduced by TOP$1850 for alternate single airfare TBU-AKL -SYD-BNE = L691 (see below, Vol II, tab 6)	4951.75 - 691.00 4260.75

Tab 25:	included above	
Tab 26&27:	This is regarding the costs hearing, not allowed as a trial disbursement, considered later.	
Tab 28:	considered separately	
		L10,195.07

Volume II

Tab 1 :	Accommodation and subsistence 6 days, 2 persons at TOP$250 per day per person = TOP$3000	1,121.10
Tab 2 :	Accommodation and subsistence	
	1 person 17 days at TOP$250	1,588.23
	1 person 4 days at TOP$250	373.70
Tab 3-5:	Not allowed	
Tab 6 :	Expert witness' airfares (including full return airfare BNE-TBU-BNE) (see above Vol I, tab 24)	1,630.60
Tab 7 :	Expert witness' airfares	1,299.00
Tab 8 :	Not allowed : overhead expenses and meal is Included under tab 9	
Tab 9 :	Excess baggage charges not vouched. Meals and accommodation allowed for days as indicated by other documents (bill of costs and invoices) at TOP250 per day x .3737	
	Mr Webb: accommodation and subsistence 12-28 April 1998 (17 days)	1,588.23
	Mr Gimblett: ditto	1,588.23
	Mr Knight: accommodation and subsistence 21-23 April '98 (3 days)	280.28
	Mr Armstrong: ditto	280.28
Tab 10:	photocopying and	553.73
	associated stationery	52.70
Tab 11:	Not allowed, included above	
		L10,356.08

The total allowed from both Volumes is L20,551.15. This is the amount allowed on taxation under the heading disbursements.

The Proceedings in respect of costs

The proceedings in respect of costs I isolated from the above determinations. Costs were not raised in the substantive proceedings and first arose when, in the judgment, I invited counsel to settle costs. Since that time counsel for both parties exchanged submissions and reached no agreements and the matter came on for hearing on 7 October 1998. There had not been agreement even on the question of liability. I issued a judgment on 27 January 1999 in which I settle the issue of liability in respect of all proceedings up to and including that judgment. Quantum at that time was not an issue.

I tax the costs in respect of the cost liability issue now. Costs normally follow the event and R4(1)(ii) applies to the Defendant's costs claim. The claim starts in Part XIII of the bill of costs, with profit costs L7912 and disbursements L37,872.38 which includes L20,900 for costs draftsment's fees, and L3,713.42 for Bell Gully for preparation and appearance at the hearing. The 3rd disbursement, L13,258.96 was a payment to Crown Law Office Tonga which was for the whole of the proceedings including the costs hearing and indeed preparation for the appeal hearing which has yet to occur.

I follow the same approach as above. Counsel appearing was Mr MacGillivray of Bell Gully, who was admitted as a Tongan Law Practitioner and demonstrated that he also should be classified as "Senior Counsel" for the purposes of PD02/92. I allow him the same rate for appearances as for Mr Gimblett, TOP1500 per day for hearings, and use that rate also for preparation as with Mr Gimblett. For the hearing I allow a full day. For preparation I cannot increase by 5 the basic guideline, I cannot increase it at all. There was nothing difficult or complex above the ordinary in the argument about liability. I allow 3 day's preparation for what was in fact a short halfday hearing. It was 1hr 13 minutes, plus my own time in perusing the written submissions. I allow TOP1500 for the hearing and TOP4500 for preparation, a total of TOP6,000. There is nothing I can allow for disbursements at this stage, because neither Bell Gully nor Crown Law have supplied vouchers for any disbursements they may have had and there are no other disbursements claimed.

TOP6000 converted at the same rate .3737 and rounded is L2422. It is within the range of expense one might expect for an important argument of this kind on a party and party basis.

Three further topics were raised and argued and I now turn to deal with these.

The costs on this taxation.

The defendant seeks reimbursement of the costs of this procedure itself and claims Lstg 66,622.50. There is also one disbursements claim to be dealt with under this head, notably an account from JW Richings & Associates, Law Costs Draftsmen and Consultants, for L20,900. This was their charge at L95 per hour for preparing the bill of costs in taxable form after my liability ruling. VAT was added but the defendant does not seek to recover paid VAT.

I accept that this work was necessary, that it took 220 hours, and that L95 per hour was a charge to be expected for the work was done. It is specialised work. The work was done in furtherance of a right that has been determined by my judgment ; quantum had to be determined. I allow that disbursement in full.

I turn now to the fees actually charged. There has not until now ever been an order made in Tonga for payment of the costs of preparing for taxation. No precedents were put before me and I have found none. Normally this issue does not arise here. I am satisfied that the claim arises properly in the circumstances of the present case were the defendant has a right and is acting in furtherance of it, but I do not expect this case to establish a precedent for run-of-the-mill cases in Tonga. Apart from that invoice for preparation of the bill, the rest of the claim under this head is a supplement and continuation of the original bill of costs and is for fees i.e. "profit costs". They are solicitor and client costs, which the client will pay or has paid. They are charged at full rates of L270 per hour for a partner, L145 and L155 per hour for an assistant solicitor and L85 per hour for trainee solicitors.

They relate to preparation for the taxation hearing. They include making offers of settlement to the plaintiff's representative, which achieved no settlement. They are further costs incurred in attainment of justice and or maintence of the rights of the defendant i.e. the payment of whatever costs the plaintiffs were liable to pay. Therefore they come within the ambit of R4(1)(ii) and the principle applied above applies to them.

The question is, what costs charges or expenses of those claimed are reasonably necessary to determine the quantum of the costs order? To answer the question I must bear in mind 6 basic facts :

1. Liability was not an issue, only quantum.

2. The quantum of the defendant's entitlement depended on either agreement as to quantum or, ultimately, taxation by the Court.

3. The matters in issue were stated in first, a notice of objection and thereafter, a memorandum of particulars of the objection.

4. It was necessary in a chambers hearing for the Plaintiff to obtain leave to file out of time and for the Defendant to obtain an order for filing those further particulars. I can find a record of only one such hearing in respect of the taxation issue.

5. There was only one main question of law and one of fact to be litigated, that was the question of what taxation principle to apply and what charges in the original bill of costs were reasonably necessary for conduct of the Defendant's defence and its claim for costs in its favour.

6. To determine those issues a 2 day hearing was necessary.

For determination of the question I start as before from the premise that geographic location in London does not import any reasonably necessary expense. Neither will taxation allow for the process of consultation with Crown Law officers in Tonga about the principles that are applied in Tonga. As Martin CJ held in *OG Sanft & Sons* (above) (at page 2) taxation cannot allow for a charge for time spent learning what the law is, except for abstruse points which are outside the reasonable expertise of the average practitioner.

The supplementary bill of costs charges only for time and not for the letters, faxes, phone calls etc. that were generated. It does not specify the use of the individual hours, spent, instead it sets out headings in respect of each time period. Some of the times spent, such as for preparing bundles of vouchers was clearly time reasonably necessary, but other times are impossible to assess.

By my quick assessment the total time claimed for is about 272 hours of preparation for the taxation hearing. This excludes times spent by Mr Lydiard as counsel. By any estimate that is very thorough. By any estimate it exceeds what is reasonably necessary.

I use the same standards that I applied above and note that Mr Gimblett was engaged in a hearing of 2 full days. I allow TOP3000 for the hearing. The issues were clear cut and I allow 6 full days for preparation at TOP1500 but that in my view is the maximum allowance against the principle of what was reasonably necessary in party and party terms. The amount allowed therefore is TOP12,000. In Lstg rounded out that is L4,484.00.

Interest on the costs awarded

I accept, as Mr Gimblett submitted, that English practice makes interest on the taxed costs mandatory. It is not so in Tonga. However, I accept also that a judgment in costs is a judgment debt, and that the Court has a discretion whether to award interest.

In my view, to do so is just in the present case. The Court frequently exercises this discretion to add interest to a money judgment and in the exercise of that discretion is generally at the present time allowing 10% per annum or thereabouts. The Law is stated in Halsbury at paragraph 753.

I declare that interest will be payable on the total taxed costs awarded above, the rate be 10% per annum, the time to commence to run from the day 1 calendar month after the date hereof, i.e. one month from midnight tonight that is on and including 20 June 2000.

The Crown Law Office Bill

There was one final issue. This is the bill of costs rendered to the defendant's solicitors by the Crown Law Office. It was for TOP34,612.50 and it is to be or has been paid. It is claimed in full by the defendant as a disbursement. I note that this bill is not restricted to the matters under taxation but contains elements, some identifiable and others presumed, that relate to the forthcoming appeal.

The Solicitor General and the Crown Law Office are the lawyers of the Kingdom of Tonga. They are the solicitors on the record for the defendant and from the commencement of the proceedings, lawyers of the Crown Law office have filed the defendant's documents and appeared as defendant's counsel in chambers hearings. The bill may have been rendered earlier, because it was already included in the bill of costs rendered in February 1998. But the bill before the Court was rendered on 5 May 2000, 3 days before the taxation hearing, as a disbursement to be paid in full by the defendant's solicitors in London and claimed back from the defendant's insurers. It is for the same amount that was included in the February 1998 bill of costs.

The dynamics of the matter are these. The Kingdom of Tonga was insured for some or most of the risks which were affected by the plaintiff's claim and the liability to take up the defence was accepted by the insurers. The insurers then by contract took over the conduct of the defence. They employed lawyers of their choice. Nonetheless the Crown Law office as in house lawyer of the Defendant, was established as the Defendant's lawyer in Tonga and took responsibility before the Court for the conduct of the proceedings. They were the only lawyers for the Defendant in Tonga. They alone had the right to practice in Tonga except for the practicing certificates issued to other counsels for the hearing. They took full responsibility to the Court for the Defendant's proceedings.

The bills of costs rendered by the other legal practitioners in New Zealand to the defendant's London solicitors I did not allow because they were an integral part of the professional preparation process. These practitioners were not contributors like the expert witnesses and the couriers and the telephone

The bills of costs rendered by the other legal practitioners in New Zealand to the defendant's London solicitors I did not allow because they were an integral part of the professional preparation process. These practitioners were not contributors like the expert witnesses and the couriers and the telephone company. Neither was the Crown Law Office. Their work was part of the legal proceedings and is rightly included in the taxed costs of preparing and conducting the defence. If the bill of costs from the Crown Law office were to be allowed then it would have to be taxed pursuant to S24 of the Law Practitioners Act 1989, unless there were an agreement about fees. If the bill were to be presented for taxation, vouchers would be required for the disbursements. However, it is not a bill that I am required to tax in the present circumstances, the disbursement or fee being indeed part of the integal trial process and being included already in the amounts that I have allowed above.

In case of errors and omissions, I am willing to reconsider this taxation on review in order to correct those and the time for that may if counsel wish be abbreviated.

These are the amounts which I shall certify :

A. For the substantive hearing including the interlocutory application to strike out in particular where counsel came from London, and all other interlocutory and chambers matters.
   i) Fees Lstg 343,617
   ii) Disbursements Lstg 20,551.15

B. For the work of establishing liability for the costs.
   i) Fees only Lstg 2,422

C. For the costs on this taxation
   i) Fees Lstg 4,484
   ii) Disbursements Lstg20,900

D. **Total** all of those taxed fees and disbursements: **Lstg 391,974.15**

E. Interest on that amount:
   10% per annum commencing on and including 20 June 2000.

NUKU'ALOFA: 19 May 2000.

JUDGE