IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0092 of 2004S
(High Court Civil Action No. HBC 153 of 1997L)

BETWEEN:

YANUCA ISLAND LIMITED

Appellant

AND:

FREDERICK WILLIAM EDWARD MARKHAM

Respondent

Coram: Ward, P
Wood, JA
Ford, JA

Hearing: Wednesday, 2 November 2005, Suva

Counsel: Mr J. Apted] for the Appellant

Mr T.D.F. Hughes]
Mr A.K. Narayan] for the Respondent

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

Introduction

[1] The appellant company has appealed to this Court seeking an order setting aside the judgment of Justice Byrne delivered on 4 November 2004 in which the Judge made an order of costs in favour of the respondent in the sum of AUD $597,459.40 plus FJ $68,080.40. The judgment followed on from a long-running personal injury case in which the appellant was the defendant and the respondent the plaintiff. The

claim arose out of an accident which occurred as long ago as 10 August 1988. There had apparently been two abortive trials in 1995 and 2001 respectively but, as counsel who appeared before us were not involved in the case at that stage, we were not enlightened as to the reason for the adjournments.

[2] In the original action the respondent had claimed for pain and suffering and economic loss up to a total of AUD $664,114.00. Following a 13 day hearing in the High Court at Lautoka in August 2003 Justice Byrne, a year later on 9 August 2004, gave judgment in favour of the respondent in the sum (adjusted in a supplementary judgment dated 11 August 2004 to allow for an error) of AUD $441,291.00 together with costs. In September 2004 the Judge, over the course of two days, heard oral submissions supported by written submissions on the question of costs. The respondent had sought costs of AUD $455,511.57 and FJ $87,630.40. In the judgment under appeal dated 4 November 2004, the Judge made the gross sum award set out above but the total allowed contained an obvious error. Sensibly, counsel were able to agree that the costs awarded should have read AUD $420,459.00 and FJ $68,080.40. It is against that award that the appellant now appeals. We were told that the award was the highest amount ever awarded for costs in the High Court. For convenience, unless we indicate to the contrary, all the figures we now refer to in this judgment will be expressed in Australian dollars.

[3] There are a number of particularised grounds of appeal but, in essence, the appellant submits that in making the costs award the Judge failed to act in accordance with established legal principles. The appellant takes particular issue with the Judge's decision to allow costs in respect of the respondent's overseas based solicitors and counsel.

Background

[4] It is appropriate at this point to refer, albeit briefly, to the circumstances surrounding the accident and its aftermath. What follows is taken from the Judge's factual findings.

[5] The respondent, Mr Markham, lived in Bexley, South Sydney. In August 1988 he was 45 years of age, married with two daughters. He had worked in the electrical appliance industry for some 38 years and at the time of the accident he was working as a Sales Representative for a firm called John R. Turk. The Judge referred specifically to the respondent's interest in sport, particularly his active interest in golf. He described him as a fit man and noted the irony that in August 1988 for the first time in eight years, he had opted not to participate in the Sydney City to Surf 14 km run but instead to travel to a Pro-Am golf tournament in Fiji which was to be held at the appellant's resort known as "The Fijian". It was while he was at the resort that he suffered the accident.

[6] On the evening of 10 August 1988 the respondent attended a cocktail reception for participants and sponsors of the golf tournament hosted by the General Manager of the Fijian resort at his residence. At approximately 7:20 p.m., accompanied by two other couples, he proceeded to walk back to one of the Resort's restaurants. They walked along a "roadway which gave onto a pathway" and then, after walking approximately 10 yards up the pathway, the respondent suddenly fell into what he described as "a dark, very deep hole with rugged rocks sticking around it." The edge of the hole was later ascertained to have been about 3 feet from the pathway.

[7] The Judge noted that there was no fence or guard rail in place. He also found that the lighting conditions on the path were poor. He concluded that the appellant was liable in negligence and that there was no contributory negligence on the respondent's part.

[8] In his 64-page judgment the Judge detailed the medical evidence relating to the respondent's injuries. Although they were of both an orthopaedic and neurological nature, the most significant injury was a lesion in the right temporal lobe which resulted in brain damage. For pain and suffering and interest thereon and future medical expenses the Judge awarded $85,631.00.

[9] The head injuries in turn affected the respondent's ability to cope with managerial positions he was subsequently promoted to. In March 1995 he was demoted from Branch Manager to "Counterhand". In 2000 he was promoted to Assistant Branch Manager but in February 2002 he stepped down and was again reduced to the position of Counterhand where he remained until the date of trial. The Judge accepted medical evidence that the respondent should cease work at the earliest opportunity. These findings led to the making of an award for economic loss in the sum of $355,660.00.

[10] In his subsequent judgment on costs, Bryne J. observed:

> ***"Litigation of this nature in the High Court of Fiji does not come cheap. In this case it carried heavy responsibilities on those concerned with presenting the plaintiff's case as efficiently as possible to the court and I am satisfied it was not a simple case but one which required thorough preparation which was reflected in the award of damages which I made. The Defendant chose to fight this case on every front. Liability was hotly contested and the medical case fought hard. Mr Prior's evidence (the Forensic Accountant) was seriously contested and, although the Defendant was duty-bound to question Mr Prior's opinion and his actuarial figures, by so doing the Defendant must have been aware of the risks it took if the Court accepted Mr Prior's evidence."***

Costs

[11] The rules governing the High Court's jurisdiction to award costs are contained in Order 62 of the High Court (Amendment) Rules 1998. Order 62 r.12 provides that the Court may make an order for taxation of costs on either the standard basis or the indemnity basis and if the order is silent as to the basis of taxation then the costs shall be taxed on the standard basis. Relevantly, however, under the heading "Special circumstances in which costs shall not or may not be taxed", O.62 r.7 (4) provides:

> ***"In awarding costs to any person the Court may order that, instead of his taxed cost, that person shall be entitled --***

(a) . . . .
(b) to a gross sum so specified in lieu of those costs; . . ."

[12] The Judge, after citing a number of authorities relating to the exercise of the Court's discretion to award costs, specifically referred to the provisions of O.62 r.7(4) and went on to say:

> *"I consider that this is a case in which it is appropriate to award a gross sum rather than costs to be taxed."*

He then proceeded to make his assessment of the gross sum amount.

Appellant's Submissions

[13] In submissions before us, counsel for the appellant, Mr Apted, did not follow the order of his grounds of appeal. Instead he dealt first with the appellant's fifth ground of appeal which reads:

> *"The learned judge failed to exercise his discretion judicially and in accordance with established legal principles in Fiji when he held on page 5 of his Judgment delivered on 4 November 2004 that he had no confidence in the Chief Registrar and Deputy Registrar to tax bills of costs."*

The passage referred to from the judgment reads as follows:

> *"The Plaintiff argues that I should fix a gross sum rather than order costs to be taxed. Mr Haniff disagreed and mentioned some cases in which his firm had appeared before the Chief or Deputy Registrar of this Court when bills of costs were taxed. He did not give any details of these cases but stated he had confidence in the abilities of the Chief Registrar and Deputy Registrar to tax bills of costs. I cannot share Mr Haniff's confidence. Even in my own State of Victoria in Australia where the Taxing Master of the Supreme Court held a Master of laws degree most solicitors in Victoria including myself were reluctant to have costs taxed for one reason only, that to do so*

> ***was time-consuming and costly. When bills of costs were taxed after the parties could not reach agreement the client always had to pay his solicitor for appearing on the taxation, some taxations taking a whole day or even more depending on the nature of the case."***

[14] The appellant submitted that this extract from the judgment shows that the real reason why the Judge failed to order taxation on the standard basis was, not because of the recognised purposes such as the avoidance of expense, delay and aggravation involved in a protracted litigation arising out of taxation but because of his lack of confidence in the taxing officers and so, to that extent, he misdirected himself. Mr Hughes, for the respondent, submitted that a fairer way of reading the Judge's remarks were to recognise them as an honest and accurate response to counsel's remarks about the gentlemen involved.

[15] Whatever the reason, we think it unwise for the Judge to have included personal observations of this nature about senior Court staff in a judgment. Having said that, however, we do not accept the substance of the appellant's submission. The Judge was not required to give any reasons for his decision to fix a gross sum. In making the remarks in question, we are satisfied that he was simply taking the opportunity of reinforcing, from his own experiences both in Fiji and the State of Victoria, the soundness of the recognised principle that the making of a gross sum award does avoid the delays and expense involved in a protracted taxation exercise.

[16] Appellant's counsel then dealt at some length in his submissions with the first, second and sixth grounds of appeal. Essentially under these grounds the appellant alleged that the Judge, in making a gross sum award, failed to apply the correct common-law principles. Specifically, he alleged that the Judge failed to act judicially in:

> ***"(a) failing to consider and apply the "partial indemnity" principle (when exercising his discretion under O.62 r.7(4));***
>
> ***(b) failing to consider what would have been awarded on a taxation and ensuring that his award was below that;***

(c) going on to make a gross award assessed on an "indemnity basis"; and

(d) doing so without giving any reason and contrary to principle."

Respondent's Submissions

[17] One of the submissions made forcefully in response to the appellant's submissions by Mr Hughes for the respondent was that prior to the costs hearing in the High Court, the respondent had lodged with the Court Registry all the invoices and other documentation necessary to support his claim for costs and expenses and Mr Haniff, who was then appearing for the appellant, had been given every opportunity to consider all that material before presenting his submissions. Mr Hughes stressed that at the costs hearing Mr Haniff had made a number of important concessions (as had the respondent) which the Judge took fully into account.

The Costs Award

[18] At this point, it is timely to examine the Judge's assessment to ascertain the specific Items that remain in dispute after allowing for the concessions made in the High Court by counsel for both parties. The Items making up the gross sum award are summarised in the final paragraph of the judgment as follows:

Summary of costs allowed:

Item 1. Solicitors' costs:	$177,000.00
Item 2. Counsels' fees:	$283,673.00
Item 3. Disbursements:	$ 30,494.60
Item 4. Counsels' travelling etc:	$ 16,234.78
Item 5. Medico-legal fees:	$ 8,580.00
Item 6. Video etc:	$ 6,555.75

Item 7. Mr Prior & others	$ 54,975.14
Item 8. Miscellaneous	$ 19,946.13
Total :	$597,459.40
Item 9. Fiji solicitors (including Mr Narayan's fee)	FJ $68,080 .40.

[19] In awarding all the disbursements and expenses as "costs" in the way that he did, the Judge was no doubt mindful of O.62 r.1(4) which provides:

> ***"References to costs shall be construed as including references to fees, charges, disbursements, expenses and remuneration and, in relation to proceedings (including taxation proceedings), also include references to costs of or incidental to those proceedings."***

[20] Returning to the Judge's summary, as we have indicated earlier, counsel for the appellant pointed out that Item 1 had been duplicated because it had already been included in the Item 2 total of $283,673.00. Counsel for the respondent agreed with that submission. We will return to examine the breakdown of Item 2. It formed a critical part of the appellant's case.

Item 3

[21] This Item related to disbursements. The total figure shown in the summary for disbursements is $30,494.60 but the breakdown shown for disbursements in paragraph 28 of the judgment totals $25,284.60 only. The error in the judgment was not raised before us by counsel but the total allowed for this Item is obviously incorrect and the amount will be reduced by $5,210.00 to $25,284.60. In terms of the concessions we referred to earlier, we note the Judge's comment that counsel for the appellant did not criticise any of these charges.

Item 4

[22] The total shown in the summary under this head, which related to counsels' travel, is $16,234.78 and that figure equates with the total shown in the breakdown of this

Item in the judgment. Immediately after the breakdown, however, the Judge went on to make a reduction of $592.50 from one claim because of "a query" that had been raised by Mr Haniff and then (at paragraph 29) he referred to an agreement that had been reached between counsel allowing for a reduction of 20% off another claim. The effect of these two reductions is that the total sum allowed under this head should be shown as $13,902.59 instead of $16,234.78.

[23] Once again this mistake was not referred to by counsel before us but there will be a deduction of $2332.19 from the total shown for this Item. Again we note that, apart from the two matters which we have now adjusted, there appears to have been no opposition by the appellant in respect of this claim.

Item 5

[24] The total amount allowed for medico-legal fees is shown in the summary as $8,580.00. The breakdown of this Item in paragraph 34 of the judgment, however, reads as follows:

Dr W. A. Stening	$180.00
Dr Grahame Mahoney	$770.00
Dr Jill Farrelly	$700.00
Professor James Lance	$990.00
Sydney x-ray	$550.00
Prof K. F. Kennett	$8,580.00
Total :	$11,770.00

[25] The Judge specifically noted that there was no dispute as to this claim but, as can be seen, the total allowed in the summary represents Professor Kennett's fee only. Moreover, we note from the Appeal Record that the actual fee charged by the Professor for his "major psychological report" (including GST) came to $7,150.00

but 20% ($1,430.00) was then added on to that amount in an "account rendered" addressed to the respondent's Sydney solicitors because, presumably, of delays in payment. Whatever the reason, we see no reason why the appellant should have to pay the additional 20% shown in the account rendered. The $1,430.00 will, therefore, be deducted from the total for this item leaving an amended total of $10,340.00.

Item 6

[26] This Item totalling $6,555.75 related to expenses involved in video conferencing between Fiji and Sydney. We were told that this was the first occasion that such technology had been used in the High Court. Not surprisingly, it does not appear that any objection was taken by the appellant to the charges and we proceed on the basis that the amount is not in dispute.

Item 7

[27] This Item amounting to $54,975.14 related to witnesses' expenses. There is no breakdown of the figures in the judgment but the Judge noted specifically that there was no dispute about the claim.

Item 8

[28] Item 8 totalling $19,946.13 related to miscellaneous matters. There appears to have been no dispute in the High Court as to the claim but we note from the breakdown set out in the judgment that the largest sum involved is $7,895.10, representing the FJ $10,000.00 which the respondent had been ordered to pay into Court as security for costs. The issue was not raised before us but, as with any payment of security for costs, once the case is over and the plaintiff has succeeded, the amount is then refunded by the Court to the plaintiff. The Registrar confirms that in this case the full amount was refunded to the respondent's Fijian solicitors on 18 August 2005. The sum of $7,895.10 will, therefore, be deducted from the award leaving a new total for this Item of $12,051.03.

Sydney Solicitors' Costs

Items 1, 2 and 9

[29] We return now to Items 1 and 2 which cover solicitors' costs and counsels' fees. We also deal at the same time with Item 9 which is the FJ $68,080.00 award in respect of the Fiji solicitor's costs, including Mr Narayan's fee as counsel. As we have already noted, counsel before us agreed that the total shown for Item 2 of $283,673.00 is incorrect because it wrongly includes the $177,000.00 figure for the respondent's Sydney solicitors' costs shown in Item 1.

[30] The respondent's Sydney solicitors were G. H. Healey & Co. It appears that at the costs hearing, Mr Hughes presented an account from that firm which showed a total fee (before disbursements) of $295,000.00. There was no schedule produced, however, showing any breakdown as to how that amount was made up. Mr Hughes informed the Judge that his client was prepared to claim only $177,000.00 in respect of his Sydney solicitor's costs and two thirds of all counsel fees. The judge commended the respondent and counsel for what he called, "this practical and realistic approach."

[31] That was not the end of the matter, however, because Mr Haniff argued, and this point constitutes the appellant's fourth ground of appeal, that the Judge should disallow any sum claimed by the Sydney solicitors because of the provisions of section 52 of the Legal Practitioners Act No. 19 of 1997 which state that, "a person shall not, unless that person is the holder of a current practising certificate, practise or act as a legal practitioner of Fiji." In this regard, the Judge's attention was drawn to his own decision in ***Thomas & Potter v Turtle Airways Ltd*** CA Nos. HBC 1024 and HBC 1025 of 1983, where he had disallowed the costs of Sydney based solicitors because they had not been admitted to practise in Fiji.

[32] The Judge heard legal argument in relation to the submission. For the respondent it was contended that the Fiji firm of A K Narayan (now "AK Lawyers") was the firm on the record that was responsible for all work done in Fiji and that Healey & Co

simply acted as the Sydney agents for that firm, hence, their costs were recoverable. The Judge accepted the respondent's submissions on this issue holding that the Healey costs had been properly incurred on behalf of the solicitors on the record in Fiji.

[33] In making this finding, the Judge noted:

> ***"Mr Haniff stated that if the Court considered that the costs of Healey & Co as agents are reasonable then I have jurisdiction to make such a finding and to allow them as costs reasonably incurred, a very realistic concession. I am of the opinion that the costs as reduced by Healey & Co are reasonable."***

[34] Although the concession as recorded is not perhaps completely free from ambiguity, Mr Hughes assured us that the point Mr Haniff was making was that the agency issue was critical to his submissions and if, contrary to Mr Haniff's submissions, the Judge found that Healey & Co had acted as agent for the Fiji solicitors on the record then the appellant accepted, subject to the Judge's concurrence, that the reduced costs claimed were reasonable.

[35] The appellant invited us to overturn the Judge's finding on the agency issue. Mr Apted submitted strongly that a close analysis of all the relevant documentary material did not support the conclusion that Healey's had acted as agents for the Fijian solicitors on the record. In addition to the ***Turtle Airways*** decision we were referred by both counsel to the following authorities: ***Kylie-Jane Anderson v Iowane Salaitoga*** [1999] 45 FLR 241; ***TNT Bulkships Ltd v Hopkins*** [1989] 65 NTR 1; ***New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd*** (No2) [2005] NSWSC 276; ***Elders Trustee & Executor Co Ltd v Herbert*** (Estate of) (1996) 111 NTR 25 and ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** (No 2) [2002] 1 QdR 183.

[36] We have given careful consideration to counsels' submissions. The issue of whether or not there was an agency relationship as found by the Judge is a matter of

fact. The Judge had all the relevant documentation before him and, of course, he heard full submissions on the point. He also had the advantage of having presided at the substantive hearing. An Appeal Court will only interfere with a finding of fact if it is so untenable that it cannot stand. We have not been persuaded that the Judge's finding on the agency issue in the present case fits into that category. Given the concession we have referred to, we are prepared to treat the $177,000.00 award for solicitors' costs as an Item not in dispute.

Counsels' Fees

[37] Having analysed the concessions made in the High Court by the appellant's then counsel, it can be seen that there are effectively two amounts in dispute. First, there is the figure of $106,673.00 being the balance of the award of $283,673.00 shown under Item 2 of the summary after deducting Healey's costs of $177,000.00. This sum is made up of fees charged by the respondent's overseas counsel together with a small charge made by the respondent's original Suva solicitors. Secondly there is the award of FJ $68,080.44 by AK Lawyers which includes Mr Narayan's fee as local counsel. The challenge to the allowance in respect of counsels' fees was made in grounds three and eight of the written grounds of appeal.

[38] The $106,673.00 has been broken down in the judgment as follows:

"Mr Paul Hayes (February 1996 -- June 1997)	$1,100.00
Ms Preston (April 1999 -- April 2002) for conferences, letters to solicitors, telephone conversations with Fijian Agent and other charges totalling --	$9,991.00
Mr Maurice Neil QC (February 1995 -- May 2002) --	$9,100.00
Mr TDF Hughes (July -- August 2003 and continuing) for Preparation, Conferences, Research, Travel Advice and Appearances and attendances at Views and at trial --	$85,266.00"

There was an additional amount of $1,216.00 allowed on account of charges by Messrs Fa & Co (Suva solicitors). There was no challenge to this amount and it will be allowed in full.

[39] The appellant's principal submission in respect of the Items identified is that the Judge erred in the exercise of his discretion in allowing these fees in that he failed to consider, (1) whether the counsel involved had taken out practising certificates in Fiji; (2) whether it had been reasonable for the respondent to retain overseas counsel, and (3) whether the fees claimed by overseas counsel could exceed the scale fees provided for in Appendix 4 to the High Court (Amendment) Rules 1998 without certification.

[40] Counsel for the respondent stressed that the Judge had a discretion in awarding costs on a gross sum basis and that his award in respect of counsels' fees was fair and just.

[41] Although a Judge does have an unlimited discretion in making a gross sum award of costs under O.62 r.7(4)(b), it is well recognised that the discretion must be exercised in a judicial manner. Referring to the English equivalent of the rule in question, Purchas LJ, delivering the judgment of the English Court of Appeal in ***Leary v Leary*** [1987] 1 All ER 261, 265 said:

> ***"The unlimited discretion given by Ord 62,r.9 must be exercised in a judicial manner. How the powers are to be used varies widely from case to case and each case must be considered on its own merits. It is easy to envisage cases where a Judge could be said to have acted unjudicially: e.g. by clutching a figure out of the air without having any indication as to the estimated costs; receiving such an estimate without the details being made available to the other side; or refusing a request to hear submissions on such a schedule if the party against whom the order is to be made makes, on reasonable grounds, an application to be heard."***

[42] Purchas LJ referred with approval to the statement by Stevenson LJ in ***Alltrans Express Ltd v CBA Holdings Ltd*** [1984] 1 All ER 685, another English authority dealing with the exercise of a Judge's discretion in relation to costs, where His Lordship (p.690) said:

> ***"It seems to me that this court is in the same position as it is on any appeal against the exercise of the court's discretion. We must be very careful not to interfere with the judge's exercise of the discretion which has been***

> ***entrusted to him. We can only do so if he has erred in law or in principle, or if he has taken into account some matter which he should not have taken into account, or, and this is an extension of the law which is now I think well recognised, if the Court of Appeal is of opinion that his decision is plainly wrong and therefore must have been reached by a faulty assessment of the weights of the different factors which he has had to take into account."***

[43] The issues raised by counsel for the appellant in relation to the claim in respect of overseas counsel were argued before the Judge and they called for consideration and a decision. The Judge failed to deal with them. He made no finding, for example, that any of the counsel involved, apart from Mr Hughes, had taken out a practising certificate in Fiji. There was no suggestion that any of them were carrying out work as agent for the Fiji solicitors on the record. For these reasons, we uphold the appellant's appeal in relation to this Item and we disallow the following claims:

Mr Paul Hayes	$1,000.00
Ms Preston	$9,991.00
Mr Neil QC	$9,100.00

[44] That then leaves in contention the amounts allowed by the Judge for Mr Hughes's fee, $85,266.00, and Mr Narayan's fee of FJ $37,500.00 which is included in the Item 9 total of FJ $68,080.00

[45] Although it is common ground that Mr Hughes did take out a practising certificate in Fiji, the appellant submits that the Judge erred in:

(1) failing to consider and determine whether it was necessary or reasonable for the respondent to have two senior counsel (one from overseas) when in the appellant's submission local counsel, Mr Narayan, could have adequately handled the case;

(2) failing to have any regard to the amount which might have been awarded on taxation on the standard basis, and

(3) awarding costs for counsel well in excess of scale costs without certification.

[46] There is merit in these submissions. Whilst it is not necessary for a Judge in fixing a gross sum award of costs to carry out any form of taxation exercise, it is incumbent upon him to have some regard to the amount likely to be awarded on taxation on the standard basis. Respondent's counsel made that concession in the Court below and we think that it was properly made. The sum awarded needs to accord fairness and justice to both parties. An award of costs significantly in excess or below the amount likely to be assessed on taxation would tend to support an allegation of "clutching a figure out of the air", borrowing the terminology from ***Leary's*** case and, hence, failing to act judicially.

[47] In ***Leary's*** case the Court of Appeal noted with approval that the Judge below had considered carefully the detailed breakdown of costs shown in a Schedule of costs produced by the successful party before assessing the gross sum. It is not clear how the Judge in the present case satisfied himself that the claim of $85,266.00 in respect of Mr Hughes's fee was appropriate. There was no invoice or costs schedule from Mr Hughes showing his hourly rate or how the claim in respect of his fees was made up. All the Judge appears to have had before him was an Item shown as a disbursement entry in the account from Healey & Co for Mr Hughes's fee in the sum of $127,900.00. It appears that at the hearing Mr Hughes offered to reduce the figure to $85,266.00 and the judge simply allowed that amount.

[48] In order to exercise his discretion judicially, the Judge needed to go further and he at least needed to have some regard to the amount, as well as it could be ascertained without engaging in a taxation exercise, likely to be awarded on taxation in respect of counsels' fees.

[49] Consistently with this principle, the Judge needed, in the absence of certification, to have some regard to the scale rates listed for counsel fees in Appendix 4 of the High Court Rules. As the appellant correctly observes, in allowing Mr Narayan's fee at $1850 per day for 20 days in respect of the trial and $500 for taking the judgment, the Judge allowed figures well in excess of those prescribed in the scale rates. The same can obviously be said for Mr Hughes's fee but, as no breakdown has been provided, it is not possible to determine the amount of the excess in his case. As in the case of local counsel, overseas counsel licensed to practise in Fiji need to be aware that, unless the court certifies otherwise, they cannot expect to recover, under a costs award, fees in excess of the rates provided for in the scale.

Conclusions

[50] The Judge has now retired from the Bench and we are reluctant to require the parties to incur the inevitable expense involved if we were now to refer the matter back to the High Court for some form of taxation exercise. What we propose to do, therefore, is fix what we consider to be a reasonable award in total for overseas and local counsel without making any apportionment.

[51] In this regard we have noted the decision of this Court dated 16 August 2002 in a personal injury action with similarities to the present case - ***Yanuca Island Ltd v Peter Ellsworth*** CA No. ABU0085 of 2000S. That case involved the same defendant and the same Resort. The plaintiff was an Australian tourist who had fallen asleep while sitting on the ledge of an open window. He had then dropped some 6-7 feet to the ground. The Court of Appeal varied the judgment of the High Court and allowed damages in the sum of $589,091.00 reduced by 70% on account of contributory negligence. Allowing for certain disbursements, the Court also increased the "global sum" awarded for costs from $30,000.00 to $60,000.00.

[52] We acknowledge the inherent difficulties in trying to compare one costs award with another. In the special circumstances of this case, however, we are of the view that justice can best be achieved by allowing a total amount for counsels' fees in the sum of $75,000.00.

[53] This amendment will result in a reduction in the Item 2 total to $75,000.00 along with the $1,216.00 allowed in respect of the respondent's original Suva solicitor's costs. The Item 9 total will be reduced to the sum of FJ $30,580.40.

[54] The appeal is, therefore allowed and the summary of costs allowed in the judgment is amended to read:

Item 1. Solicitors' costs:	$177,000.00
Item 2. Counsels' fees:	$ 76,216.00
Item 3. Disbursements:	$25,284.60
Item 4. Counsels' travelling etc:	$13,902.59
Item 5. Medico -- legal fees:	$10,340.00
Item 6. Video etc:	$ 6,555.75
Item 7. Mr Prior & others:	$54,975.14
Item 8. Miscellaneous:	$12,051 .03
Total:	$376,325.11
Item 9. Fiji solicitors costs:	FJ $30,580.40

[55] Judgment is entered for the respondent, accordingly, in the amount of AUD$376,325.11 and FJ $30,580.40. The appellant is awarded costs on the appeal of $1,000.00.

Ward, P

Wood, JA

FIJI COURT OF APPEAL

Ford, JA

Solicitors:

Munro Leys, Suva, for the Appellant.
Messrs A K Narayan and Company, Ba for the Respondent.

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