

# Legal Costs: Review of Taxed Costs in *Kambu v Mann* (2018) N7126

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## Introduction

Legal costs are costs ordered by the court against a losing party in a court proceeding. An order for costs is not for the party to make a profit but to recover costs incurred in either prosecuting or defending a legal proceeding.<sup>1</sup> The order for costs is usually made on a party-party basis. In the absence of anything, to indicate some other basis, it can be assumed that costs are to be dealt with on a party-party basis.<sup>2</sup>

## Costs on Party-Party basis

When costs are awarded on a party-party basis, the party ordered to pay the costs is only required to pay those costs that were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party who received the benefit of the order for costs. This is often referred to as the “necessary or proper test”.<sup>3</sup> An unnecessary cost may still be allowed provided that it is proper in the circumstances of the litigation to incur such cost.<sup>4</sup>

Costs that are calculated on a party-party basis are limited to the charges provided in the scale of costs published by the court in which the proceedings are conducted. In the National Court, Order 22, Rule 36, provides that the scale of costs set out in Schedule 2 of the *National Court Rules* 1983 (NCR), shall apply to the calculation of party-party costs. Similarly, Order 12, Division 12 of the *Supreme Court Rules* 2012 (SCR), effectively provides the scale of costs which is set out in Schedule 4 of the SCR shall apply.

## Costs on Solicitor-Client basis

Costs may also be awarded on a solicitor-client basis. This is sometimes referred to as the indemnity basis. In appropriate circumstances party-party costs may be ordered to be paid on a solicitor-client basis.<sup>5</sup>

If party-party costs are awarded on a solicitor-client basis, then the Taxing Officer must allow all costs unless they are unreasonable in amount or they are unreasonably incurred. However, in the National Court, costs that are unreasonable in amount or unreasonably incurred may be allowed provided that the client approved those unreasonable costs.<sup>6</sup> The inclusion of Sub-rules (2) and (3) in Rule 35 of the NCR, could possibly result in no costs whatsoever being disallowed by a Taxing Officer when the costs are taxed on a solicitor-client basis. This is because Sub-rule (4) provides that, the approval by the client, of unreasonable costs, may be express or implied.

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<sup>1</sup> *Jacob Sanga Kumbu v Dr Nicholas Mann as Chairman Representing the UPNG Council Appeal Committee Members and The University of Papua New Guinea and the State* (2018) N7126.

<sup>2</sup> Cost Manual by Graham Ellis SC (2008); see also Order 22, Rule 24(1) of the *National Court Rules* 1983.

<sup>3</sup> Order 22, Rule 24(2) of the *National Court Rules* and Order 12, Division 19 of the *Supreme Court Rules* 2012.

<sup>4</sup> Legal Costs Manual by Ron Travers (2014).

<sup>5</sup> Travers, *ibid*. See also *Supreme Court Rules*, Order 12, Division 5(2)(e) and Order 22, Rule 6(2)(d) and Rule 35 of the *National Court Rules*.

<sup>6</sup> See *National Court Rules* Order 22 Rule 35(2) and (3).

It is arguable that unreasonably incurred costs or costs of an unreasonable amount, should not be allowed by the Taxing Officer, unless the approval of the client was given prior to the costs order being made (and perhaps prior to those costs being incurred). Otherwise, there is no reason why a client, who has received the benefit of an indemnity costs order would ever refuse to approve such unreasonable costs.<sup>7</sup>The onus of proof, in establishing to the Taxing Officer's satisfaction, that the unreasonable costs were approved by the client, rests with the solicitor claiming the costs.<sup>8</sup> On a solicitor-client basis, higher costs may be allowed, than the scale charges, or even if they were not mentioned in the scale of costs.<sup>9</sup>

In the SCR there is no equivalent provision to Order 22, Rule 35, of the NCR. When the Supreme Court makes an order on a solicitor client basis, the costs must be assessed on reasonableness. However, Order 2, Division 1(1)(h) of the SCR provides that, if there is no provision in the SCR, but there is a relevant provision in the NCR, the Supreme Court may apply that provision as if it was a rule in the Supreme Court.<sup>10</sup>

### **Principles Governing Assessment of taxed Costs**

As mentioned above, solicitor-client costs are governed by Order 22, Rules 34 and 35, of the NCR. All costs are allowed unless they are unreasonable or even if they are unreasonable, the client must have approved the amount claimed.<sup>11</sup> These principles have been applied in several cases.<sup>12</sup>

In the case of *Abai & Ors v The State*<sup>13</sup>, Woods J, considered the authority of the Taxing Officer on the concept of 'reasonableness' and held that the following principles may be applied in relation to solicitor-client costs:

1. A client cannot agree to unreasonable or unnecessary costs where the client knows that a third party is to bear those costs.
2. A lawyer cannot charge a client for work which is useless.
3. A lawyer is expected to have a reasonable knowledge of his work and cannot charge for learning his own business.
4. The allowance of time spent and charge out rate of a lawyer is also to cover the general expenses of running an office.
5. All costs are to be allowed but this is to be regulated by the principle of material evidence to support the costs and reasonableness.

These principles have been adopted and applied by the National and Supreme Courts.

### **Taxing Officer's Discretionary Powers**

A scale of costs is a schedule which sets out the fees that a Taxing Officer is to allow on a taxation of costs for various items of work performed by solicitors, noting that some fees are within the discretion of the Taxing Officer. The Taxing Officer's power for National Court matters is set out under Order 22, Rules 39 and 40 of the NCR and for Supreme Court matters, it is set out under Order 12, Division 32, of the SCR. Within this legal framework, a Taxing Officer has a wide discretion, in deciding the extent to which costs ought to be allowed.<sup>14</sup>

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<sup>7</sup> Travers, above, n4 at p12.

<sup>8</sup> See Order 22 Rule 35 of the *National Court Rules*.

<sup>9</sup> See *National Court Rules*, Order 22 Rule 36 (2) (d).

<sup>10</sup> Travers, above, n4 at p13.

<sup>11</sup> *Sankin v PNG Electricity Commission* (2002) N2257.

<sup>12</sup> See *Canisius Karingu v PNG Law Society* (2001) SC674; *PNG Ports Cooperation Ltd v Canopus No71 Ltd* (2010) N4288; *Napoleon Canonizado v Kapu Rageau* (2001) N4382 and *Bank South Pacific Ltd v Thomas Serowa*(2014) SC1373 and *Salvation Army (PNG) Property Trust v Jorgenson* (1997) N1644. (1998) N1726.

<sup>14</sup> See Order 22 Rule 36 of the National Court Rules and Order 12 Division 21 of the Supreme Court Rules

A Taxing Officer's discretionary power is open for review by the court upon an application for review of the taxed costs by a party who is dissatisfied with the allowance or disallowance in whole or part of an item.

## **The Kumbu v Mann, UPNG and the State case and Reviewed Taxed Costs**

### *Brief Facts*

The plaintiff (Kumbu) was a law student at the University of Papua New Guinea (UPNG). He was suspended in 2008 and finally excluded from UPNG in the final year of his studies. Kumbu sought a judicial review of the decision of UPNG to terminate him from studies in *Kumbu v Mann*.<sup>15</sup>

On 20<sup>th</sup> July 2012, Cannings J, granted the relief sought by Kumbu and reinstated him to continue his studies at UPNG. On 14<sup>th</sup> September 2012, Cannings J, ordered costs in favour of Kumbu on a solicitor-client basis.<sup>16</sup>

On 28<sup>th</sup> April 2015, the first and second defendants filed a notice of motion seeking a review of the certified costs by the Taxing Officer on the grounds that it was excessive and unreasonable. On the same day, the plaintiff also filed his notice of motion seeking a review of the certified costs on the grounds that it was excessively and unreasonably reduced by the Taxing Officer.

The first and second defendants' grounds of objection were that:

1. the Taxing Officer allowed excessive amounts on various items;
2. the Taxing Officer failed to tax off excessive amounts on various items; and
3. the Taxing Officer failed to disallow excessive amounts of time spent by the plaintiff on various items.

In *Kumbu v Mann*<sup>17</sup>, Makail J, pointed out that the Taxing Officer is guided by the prescribed scale of costs in Schedule 2 of the NCR and may apply different rates for each item or work performed by the lawyer subject to, amongst other things, that the costs are necessarily or reasonably incurred in connection to the legal proceedings.

### *Court's power to assess taxed costs*

Makail, J, held that the court may exercise such powers under Order 22, Rules 60 and 61, of the NCR to review the decision of a Taxing Officer in relation to taxed costs. In this regard his honour stated that the court may consider all the work necessarily done, objections raised by the aggrieved party and decision of the Taxing Officer on each item.

In this case, the court in its' decision, sets out all the parts in Schedule 2 of the NCR (scale of costs), to assess the amount claimed by the plaintiff. The court's reasoning in each part is summarized as follows:

#### Part 1 – Preparation of Documents including filing and service

A large body of documentation was prepared for the case, whether they were necessary and relevant must be taken into account in assessing the costs.

#### Part 2- Block allowance for preparation of documents

Nil

#### Part 3 – Counsel's fees

The time spent in court in a day including the waiting time for lawyers should be 30 minutes and a further 1 hour to cater for waiting time. This time can cater for application for Judicial Review for leave, interlocutory applications, direction hearing, pre and post-trial matters and adjournments.

For substantive hearing scheduled for half a day, should be 3 hours and 30 minutes. For attendance at the Registry, the onus was on the plaintiff to prove his claim on time and date.

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<sup>15</sup> *Kumbu v Mann* (2012) N4746.

<sup>16</sup> *Kumbu v Mann* (2012) N4784.

<sup>17</sup> *Kumbu v Mann* (2018) N7126.

#### Part 4 – Travelling Expenses

Unnecessary cost incurred is not allowed, but reasonable amount of costs for the days schedule for hearing of the application for costs. Costs for hire car and accommodation are only for the day of hearing the application; other expenses incurred for other days are unnecessarily incurred.

Transport fee is K20 per trip to deliver letter to first and second defendants counsels.

#### Part 5 –Attendances

The costs incurred under this part are for counsel, who is a lawyer, who solely practices as a barrister. In this case the plaintiff was not a lawyer and did not practice solely as a barrister to be entitled to claim costs under this item. Seventeen Thousand Five Hundred awarded by Taxing Officer under this item was disallowed.

#### Part 6 – Allowance to Witnesses

Nil

#### Part 7 – Preparation for Trial

There is no fixed amount given under this part. All work necessarily or properly done in preparing for a trial or hearing of any cause or matter, whatever the mode of trial or hearing or for the hearing of any appeal, or not otherwise provided for under this part, cost is discretionary.

The plaintiff claimed K2, 000 per hour as his charge out rate. The Taxing Officer used K350 as the plaintiff's charge out rate to tax the costs. The court used K250 as the standard rate and clerk's rate is K25 per hour for reviewing the costs.

- Letters Out

The court said drafting a letter even the lengthy one will not take more than 30 minutes. The cost of preparing a letter is K1.66 per minute. One Hundred Kina divide by 60 minutes = K1.66 per minute. The plaintiff is allowed 6 minutes to prepare a letter. So  $K1.66 \times 6$  minutes = K9.96 to the nearest kina is K10.00 per letter.

For letter going out, the rate is K10.00 per letter.

- Letters In

The court said K1.66 per minute by 2 minutes is K3.33. Perusing letters, the rate is K3.33 per 2 minutes.

- Preparing and perusal of court documents, the rate is K250 per hour.

#### Part 9 –Taxation of Costs

The application of one sixth rule applies under Order 22, Rule 56, of the NCR. According to this rule, where on taxation of any costs, one sixth or more of the amount of the bill of costs is taxed off, the costs of preparing the bill and attending the taxation will not be allowed. No sum is awarded for costs of taxation.

- 10% Goods and Services Tax (GST)

The plaintiff was not awarded 10% GST because he represented himself in the proceedings. He was not engaged in a business to provide legal services nor did he engage a law firm for its legal services to be entitled to a claim of 10% GST.<sup>18</sup>

The plaintiff's itemized bill of costs was in the sum of K5,505,174.40. After tax, the sum awarded was K1,165,009. 00. However, the Court allowed for the plaintiff on solicitor-client cost, a sum of K80,139.87.

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<sup>18</sup> Compare this case to Napoleon Canonizado case (*Napoleon Canonizado v Kapu Rageau* (2011) N4387) where it was held that 10% GST is allowable to the lawyers because if legal services rendered to a client.

## Comments on the Kumbu v Mann case

There are published judgments on review of taxed costs where the courts have taken similar approach to review taxed costs on the ground of “reasonableness”. The exercise of the Taxing Officer’s discretionary power must be based on reasonableness with proper pleadings on the particulars supported by evidence. The Taxing Officer must not allow any costs on items not clearly pleaded with particulars supported by evidence. However, where the work is presumed to be done, though such cannot be claimed, it must be done on reasonableness.<sup>19</sup>

There are instances where plaintiffs represent themselves in court and where costs are awarded in their favour, they are not entitled to certain items claimed. In this case, the plaintiff was not entitled to costs under Part 5 (attendances with other lawyers for advice, reviewing of court documents by another lawyer, conferences and consultation). He was also not entitled to 10% GST.<sup>20</sup>

In contrast, in the Karingu case<sup>21</sup>, the plaintiff who was a lawyer represents himself in court and was entitled to claim costs for seeking advice from legal advisers, attendances by interviewing witnesses, loss of his leisure time, disbursement and 10% GST. Whether or not GST is allowable in a bill of costs, will depend on whether or not the party claiming the costs is registered for GST purposes.

The significance of the Kumbu case is that, for the first time, the standard rate on certain items, which were not clearly stated in the Scale of Costs, in Schedule 2 of the NCR were clarified. This case sets out some guidelines for lawyers when they are preparing their bill of costs and for the Taxing Officer when he or she is taxing the costs.

The scale of costs under Schedule 2 of the NCR does not cover rates for each part set out in Table 1 of Schedule 2. The rate is open to the party preparing the bill of costs and is subject to the discretion of the Taxing Officer.

In the SCR, Schedule 4, sets out the rates of each item. For instance, the preparation of documents for trial, the Supreme Court has rates labelled against the items and it guides the Taxing Officer to properly tax the itemized bill of costs unlike the scale of costs in Table 1 of Schedule 2 of the NCR.

The Kumbu case also clarifies the one sixth rule under Order 22, Rule 56, of the NCR and Order 12, Division 39(9) of the SCR. If one sixth or more of the amount claimed in the bill is taxed off, then the amount claimed for preparing the bill or for attending on taxation, will not be recovered and or claimed. In preparing the bill of costs, one sixth rule is applicable and it must be considered by the party preparing the bill of costs. The Taxing Officer is also guided by the one sixth rules when taxing costs on Part 9 - taxation of the bill of costs.

## Conclusion

This review of taxed costs is from an order made for costs to be on a solicitor-client basis. There are other cases where the court has ordered costs on a party-party basis. Whichever the order may be and where a certificate of taxation is endorsed, liability is not an issue in any review application.<sup>22</sup>

In a review application, the court has a wide discretionary power as the Taxing Officer and may allow only costs reasonably incurred throughout the proceeding of the matter. On the other hand, the courts approach to charge out rates for lawyers differ on a case by case basis. A court reviews taxed costs, based on the objection raised by the aggrieved party, on the outcome of the taxation and the Taxing Officer’s decision on each item in the bill of costs. The court can also exercise its discretionary power to review the lawyer’s charge out rate. The Taxing Officer also uses different charge out rates for lawyers in taxation.

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<sup>19</sup> *Sankin v PNG Electricity Commission* (2002) N2257.

<sup>20</sup> See *Kramer Consultants Pty Ltd v The State* [1985] PNGLR 200 and *Bank South Pacific Ltd v Thomas Serowa* (2014) SC1373.

<sup>21</sup> *Karingu v PNG Law Society* (2001) SC10.

<sup>22</sup> *Thirlwall v Eng Chin Ah & Ors* [1988-1989] PNGLR 34.

The current rates set out under Order 22, Schedule 2 of the NCR are said to be very low. The living costs and other associated administrative costs of running legal businesses are very high given the current financial status of the country.

It is therefore, suggested that Table 2 of Schedule 2, under Order 22 of the NCR be reviewed and amended to incorporate standardized charge out rates under each part and item. Also, the charge out rates for lawyers should be standardized in both the NCR and the *Lawyers Act* 1986.

Schedule 4 of the SCR has standard rates for professional work done by a lawyer for his client. It is suggested that similar scale of costs should be drawn for Table 2 of Schedule 2 of the NCR.

So, what is significant about the Kumbu case in relation to other judicial precedents on court reviewed taxed costs? Several poignant points may be drawn from the case. However, two key contributions stand out.

First, the scale of costs, in the NCR is too vague, and is open to any winning party claiming costs, to charge any rate on each item, that is not covered by the charge rate in Schedule 2. The case also scales down the unreasonable charge out rate and the unnecessary work done to inflate the costs for the losing party to pay.

Second, the Kumbu case guides both the Taxing Officer and the lawyer on the reasonable rate to be used for each item although cases may differ. Also, it sets out the reasoning for disallowing costs, allowing costs and reducing the charge out rate used by the Taxing Officer for a person who represents himself or herself throughout the entire proceedings.

Given the above and the challenges in taxation of costs, the Law Society should review the *Lawyers Act* to include standard charge out rates for lawyers ranging in seniority based on years of practice in both the Supreme and National Courts of Papua New Guinea. Also it is recommended that Table 2 of Schedule 2 of the NCR be reviewed to include the standard charge out rate for each item in the bill of costs.