In The Court of Appeal for Bermuda

CIVIL APPEAL
2006: No. 25

IN THE MATTER OF THE INTERIOR TRUST AND
IN THE MATTER OF THE LAST WILL AND TESTAMENT OF
JOHN A. SCRYMGEOUR

BETWEEN

WENDELL MALCOLM HOLLIS

First Appellant

and

JOSEPH C. H. JOHNSON

Second Appellant

and

ALEXANDER SCRYMGEOUR

Respondent

RULING ON COSTS

Date of Hearing: 2 June 2008

Date of Ruling: 5 June 2008

Mr. John Milligan-Whyte, Milligan-Whyte & Smith, for the Respondent

Mr. Andrew Martin, Mello Jones & Martin, for the Appellants

Introduction

1. This matter came before me by way of appeals from orders of the Registrar of the Court of Appeal, pursuant to Order 1 rule 18 of the Rules of the Court of Appeal for Bermuda ("the Rules"). In hearing the appeals, I was therefore exercising the

powers of a single Justice of Appeal pursuant to section 3(3) of the Court of Appeal Act 1964 ("the Act").

2. There were two appeals, made by notice of motion dated 13 and 23 April 2008, arising from matters which were canvassed before the Registrar on 9 and 16 April 2008. On 2 June, I dealt with the two decisions which were the subject of appeals from the Registrar, but reserved in relation to an application made by Mr. Martin on behalf of the appellants ("the Trustees") for a wasted costs order against Mr. Milligan-Whyte in relation to work done by his firm reviewing the bill of costs which had been filed on behalf of the respondent ("Alexander") in respect of the costs of the trial. That application had been argued before the Registrar, but she had referred the matter to the judge hearing the appeals, of which notice had by then been given.

3. The Registrar had refused to tax either the bill of costs lodged for taxation on behalf of Alexander in relation to the costs of the trial or that in relation to the costs of the appeal. In relation to the costs of the trial, the Registrar took the view that there was no order made either by the Supreme Court judge (Riihiluoma A.J.) or by the Court of Appeal, granting Alexander his costs of the trial. She therefore took the view that the slip rule (on which Mr. Milligan-Whyte had relied) had no application, and that in any event the bill was lodged late and was consequently in breach of Order 62 rule 29(1) of the Rules of the Supreme Court 1985 ("RSC"). I agreed, and dismissed that appeal. In relation to the appeal concerning the Registrar's refusal to tax the bill in respect of the Court of Appeal costs, I allowed the appeal on the basis that Order 62 rule 29 RSC had no application to the taxation of the bill of costs in relation to the appeal, pursuant to the costs order of the Court of Appeal. I therefore directed that that bill should be dealt with by the Registrar in accordance with the Rules.

The Different Jurisdictions

4. Before proceeding to consider the application for a wasted costs order, I should clarify the different jurisdictions which come into play in relation to the different matters which were argued before me. The appeal in relation to the costs in the Court of Appeal clearly fell to be dealt with under the Rules. In relation to the appeal in respect of the costs of trial, this was covered in both notices of motion, and it seems to me that the application based on the slip rule was an appeal from the Registrar when she was acting in her capacity as Registrar of the Court of Appeal. In relation to the position under Order 62 rule 29 RSC, the Registrar was clearly acting in relation to the taxation of a Supreme Court bill of costs in her capacity as Registrar of the Supreme Court. Similarly the application for a wasted costs order seems to me to fall under the jurisdiction of the Registrar as Registrar of the Supreme Court, being an application under Order 62 rule 11 RSC, and having been referred by the Registrar to me as a judge of the Supreme Court under the terms of Order 32 rule 12 RSC.

The Wasted Costs Application

5. There is, as Mr. Milligan-Whyte submitted, a great deal of history to this matter, and for this reason it is necessary to consider the terms of the orders made both in the Supreme Court and the Court of Appeal in relation to costs. At the Supreme Court level, the matter was dealt with Riihiluoma A.J. in a ruling dated 17 April 2007. Having referred to the fact that Alexander, as plaintiff, had prevailed at trial, Riihiluoma A. J. commented that in the normal course costs would follow the event. However, he carried on to consider the application of Order 62 rule 6 RSC. He then took the view that the Trustees, as defendants at trial, had not acted unreasonably and made an order that they were entitled to their costs of the proceedings at trial out of the fund held by them in their respective capacities as executor and trustee. Riihiluoma A.J. made no order giving Alexander his costs of the trial. As I understand it there was no appeal from the fact that Riihiluoma A.J did not award Alexander his costs of the trial. If Alexander and those acting for him believed that Riihiluoma A.J. should have made an order for costs in

Alexander's favour, it was up to them to seek leave to cross appeal on the issue of costs.

6. In the Court of Appeal, the matter of costs was dealt with at the end of the judgment in these terms:

> "In the circumstances, the appeal is dismissed and the decision of the Trial Judge affirmed. Costs of Appeal to be the respondent('s) to be taxed if not agreed. Costs to be paid by the Executors of John's estate."

7. Obviously, the Court of Appeal judgment dealt only with the costs of the appeal, and not those of the trial. Mr. Milligan-Whyte sought to argue before me that the words "Costs to be paid by the Executors of John's Estate" somehow extend the reference to "Costs of Appeal" to include the costs of trial. There can be no justification for such an interpretation. The words mean what they say. Since Riihiluoma A.J. had not awarded Alexander the costs of the trial, the position following delivery of the Court of Appeal's judgment on 15 June 2007 was therefore that there was no order granting Alexander his costs of the trial. So the words "Costs to be paid by the Executors of John's Estate" can only refer to the costs of the appeal.

8. The bill of costs for the trial was predicated upon the basis that Alexander had in fact been awarded the costs of trial. The bill itself was dated 18 February 2008, was signed by Mr. Milligan-Whyte, and began with the words:

> "The following table sets out the Bill of Costs of the Plaintiff in the action who was ordered his costs of the action to be paid by the Executors of John Scrymgeour's estate by order of the Court of Appeal dated June 15, 2007."

The complaint on behalf of the Trustees is not just that this was not the effect of the Court of Appeal's order, but that Mr. Milligan-Whyte in lodging the bill was well aware of this. In this regard Mr. Martin referred to the efforts that Mr. Milligan-Whyte had made since the delivery of the Court of Appeal judgment in June 2007 to secure confirmation that the effect of the Court of Appeal judgment had been to grant Alexander his costs of the trial. Such steps were obviously inconsistent with a belief that there was already an order in existence granting Alexander his costs of the trial. It is necessary to consider those steps to put the application for a wasted costs order in perspective.

9. The starting point is a letter which Mr. Milligan-Whyte wrote to the Registrar of the Court of Appeal on 19 June 2007. In relation to the Court of Appeal's order in regard to costs, Mr. Milligan-Whyte said that the first issue was whether the Court of Appeal's ruling on costs applied to both the trial and the appeal. A separate issue raised was whether Alexander's costs would come from his late father's estate, in view of the fact that Riihiluoma A.J had not made an order in terms granting Alexander his costs. The letter proceeded to make submissions as to the merits of an order for costs of the trial in Alexander's favour, and concluded, following references to sections 8 and 11 of the Act, with a request that the Court of Appeal hear counsel, so that the issue of costs could be dealt with during the then current session of the Court.

10. Naturally, this letter prompted a response from Mello Jones & Martin to the Registrar saying that the judgment of the Court of Appeal was clear, and that it was inappropriate for further submissions to be made through the office of the Registrar after the Court itself has heard argument and decided the matter. That letter in turn prompted a six page letter from Mr. Milligan-Whyte to the Registrar, which submitted that the Court's order on costs was ambiguous, or contained an accidental slip or omission, such as would be capable of correction pursuant to the slip rule. The letter concluded by suggesting four different ways that the matter could be brought before the Court of Appeal, but submitting that each was less

expeditious and more expensive than having the Court of Appeal confirm the operation of the slip rule. This letter in turn brought a response from the Registrar dated 27 June 2007 which simply referred to the terms of the different orders as to costs.

11. The next development was that Milligan-Whyte & Smith filed a notice of motion on 13 November 2007, which sought to set aside the "decision" of the Registrar as evidenced by her letter of 27 June. In that letter, the Registrar had done no more than refer to that part of Riihiluoma A.J's ruling on costs which said that the Trustees were entitled to the costs of the proceedings, as referred to in paragraph 4 above. The notice of motion characterised that short piece of correspondence as a decision by the Registrar to refuse the submissions of counsel, those submissions being to the effect that Alexander was entitled to his costs of the trial by operation of the slip rule. Such a "decision" could never have been made by the Registrar, being a matter for the Court of Appeal, and with respect to Milligan-Whyte & Smith, it does seem to me that the filing of this notice of motion was misconceived. The Registrar was obviously of this view, and wrote back to Milligan-Whyte & Smith on 14 November 2007 indicating that she was unclear as to why a notice of motion had been filed, bearing in mind that there had been no chambers decision or court order which was the subject of appeal. The notice of motion had purported to provide grounds of appeal.

12. In any event, the next step was that Mello Jones & Martin filed their bill of costs on behalf of the Trustees on 23 October 2007. That bill was taxed by the Registrar on 12 December 2007. Milligan-Whyte & Smith then filed a bill of costs on behalf of Alexander in relation to the costs of the trial on 21 February 2008, which is the bill which the Registrar refused to tax on 9 April 2008. The bill itself comprised more than fifty pages, and the point made by Mr. Martin was that he and members of his firm were obliged to review this bill in case their argument that there was no order entitling Alexander to tax a bill of costs was rejected.

The Applicable Principles

13. In this regard, Mr. Martin relied upon the case of *Ridehalgh-v-Horsefield* [1994] Ch. 205. That case was decided by the English Court of Appeal on the basis of the regimen applicable in England. That involved the application of a combination of section 51 of the Supreme Court Act 1981 and Order 62 rule 11. Section 51 of the English Act referred in terms to wasted costs as any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of the legal representative concerned. The Bermuda rule gives the Court the discretion to make orders where:

> "costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition".

So the words "unreasonably" or "improperly" are common, but the Bermuda rule differs by using the phrase "failure to conduct proceedings with reasonable competence and expedition" instead of the word "negligent".

14. Mr. Martin did not rely upon the word "unreasonable", but said that Mr. Milligan-Whyte's conduct in filing and seeking to tax a bill of costs without the benefit of an order entitling him to do so was both improper and negligent. The impropriety which Mr. Martin relied on was the representation in the bill that there had been an order for the costs of the trial to be paid by the Trustees, in circumstances where Mr. Milligan-Whyte knew this was not the case. In relation to the negligence aspect of matters, Mr. Martin submitted that the negligence could be either in regard to filing the bill out of time, or filing it at all.

15. In reply, Mr. Milligan-Whyte indicated that he was not attempting to mislead the Court. He referred to the notice of motion which the Registrar had not issued, and

submitted that filing a bill of costs was the appropriate means of clarifying the position in relation to the costs of the trial.

16. I do not agree with Mr. Milligan-Whyte that the filing of a bill of costs, premised as it was on an order which had not been made, was an appropriate step for him to take. In my view, the combination of the orders for costs made by Riihiluoma A.J. and the Court of Appeal was quite clear and unambiguous. Riihiluoma A.J. did not make an order for costs in favour of Alexander, and the Court of Appeal order dealt only with the costs of the appeal and did not affect the position in relation to the costs of trial. The orders are not capable of any other sensible interpretation. And, as Mr. Martin submitted, Mr. Milligan-Whyte must have appreciated that that was indeed the position because of the steps which he took following delivery of the Court of Appeal judgment. Although Mr. Milligan-Whyte's correspondence with the Registrar sought to suggest that the decision of the Court of Appeal meant that it was "automatic that the costs of the trial are also to be paid by the estate", the reality is that he was, first, trying to get before the Court to argue the point, and, secondly, contending that there were slips or omissions in the Court of Appeal's costs order. Mr. Milligan-Whyte's letter of 27 June 2007 concluded with a request for a ruling on the matter.

17. Against that background I have to consider whether Mr. Milligan-Whyte's conduct can be characterised as either improper or negligent.

18. In *Ridehalgh*, Sir Thomas Bingham M.R. held (page 232) that the word "improper" covered, but was not confined to, conduct which would ordinarily be held to justify a serious professional penalty. He said that whilst it covered any significant breach of a substantial duty imposed by a relevant code of professional conduct, it was not limited to that, and conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion could be fairly stigmatised as such whether or not it violated the letter of a professional code.

19. The Barristers' Code of Professional Conduct 1981 ("the Code of Conduct") provides that it is the duty of every barrister to be competent, diligent and efficient in all his professional activities (rule 6 (iv)). Rule 43(iv) provides (leaving out irrelevant matters) that a barrister shall not knowingly attempt to deceive a Court or influence the course of justice by mis-stating facts. It could therefore be argued that Mr. Milligan-Whyte's statement to the Court in the bill of costs filed on behalf of Alexander breached the Code of Conduct.

20. In relation to the word "negligent", Sir Thomas Bingham noted that this was the most controversial of the three words, and referred to the fact that the earlier rule had made reference to "reasonable competence", the words now in the Bermuda rule. He carried on as follows:

> "That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders".

And further:

> "We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession".

21. There is no doubt in my mind that preparing the bill of costs for taxation without the benefit of an order for costs, at the client's expense, does denote a failure to act with the competence reasonably to be expected of members of the profession. Such an exercise in this case would no doubt run up unnecessary costs for Mr. Milligan-Whyte's own client, and at the same time cause the other side to incur unnecessary costs. It must be the case that in those circumstances, the other side (in this case the Trustees) are entitled to be recompensed for having incurred such unnecessary costs, and it cannot be right that such recompense should come out of Alexander's pocket. In the circumstances, I am of the view that a wasted costs order should be made against Mr. Milligan-Whyte as sought by Mr. Martin, and I so order. That order would necessarily be made under the provisions of Order 62 rule 11(1)(a)(ii) since the other two sub-rules relate to the position between an attorney and his own client. Accordingly, the order I make is that Mr. Milligan-Whyte personally must indemnify the Trustees against the costs payable by them to their attorneys in respect of the work done by those attorneys in reviewing the bill of costs for taxation and attending before the Registrar.

22. In relation to the question of the conduct complained of being improper, that question is of course academic in view of the finding and order I have just made. In regard to this aspect of matters, however, I would say that while I would regard the issue as arguable, I would not have made a wasted costs order on this ground alone.

23. Mr. Martin indicated that he was not in a position to give an accurate figure for the number of hours spent by members of his firm, although he estimated that approximately $15,000 worth of time had been spent on the exercise of reviewing

a very lengthy and detailed bill of costs. As with any order for indemnity costs, the amount of such costs must be reasonable. In the event that the parties are not able to agree the amount of such wasted costs, I would give liberty to apply, so that the amount can be assessed.

Dated the 5th of June 2008.

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Hon. Geoffrey R. Bell
Puisne Judge