In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2002: No. 10

BETWEEN:

ANN BARTELSON BEACH

Petitioner

- and -

ROGER JOHN BATTEN BEACH

Respondent

Date of Hearing: 12th January 2010
Date of Judgment: 22nd January 2010

Dennis Dwyer of Wakefield Quin for the petitioner; and
Kelvin Hastings-Smith of Appleby for the respondent.

JUDGMENT

1. This judgment is given on the respondent's application under RSC Order 62, r. 35[1] for a review of the Registrar's taxation of the petitioner's costs of ancillary relief proceedings pursuant to orders of Storr AJ made on 6th August and 16th December 2004.

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[1] Insofar as relevant, the rule provides –

"(1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by him in respect of any item, may apply to the judge for an order to review the taxation as to that item or part of an item.

. . .

(3) An application under this rule shall be made by summons and shall specify the nature and grounds of the objection and the items or parts of items the allowance or disallowance of which or the amount allowed in respect of which is objected to . . . "

2. Although the underlying proceedings were fiercely contested, generating numerous affidavits, the eventual proceedings before Storr AJ proceeded largely by agreement, he only being asked to resolve five rather subsidiary issues. The big issue, being the value of the parties' assets, was agreed in the sum of $8.42M for the respondent husband's personal assets; $1.24 for the petitioner wife's assets; and $9.2M for a discretionary trust. It was also agreed that the wife should received 45% of the joint personal assets and 33.33% of the assets of the trust. Applying those proportions to the eventual figures the learned Assistant Justice awarded the wife a total of $5.74M. I think it fair to say, therefore, that these ancillary relief proceedings concerned more than the average amount of assets.

3. By his written judgment of 6th August Storr AJ directed, by agreement, that the question of costs "be dealt with subsequently". He then dealt with that matter in a later written ruling of 16th December 2004. I consider the terms of that ruling crucial for this review, and so will set it out at length. The learned judge said:

> "Having carefully considered the submissions and the content of the relevant material, I do not consider that the Petitioner's conduct was such as to misplace the general proposition as to costs. I find that it was necessary for the Petitioner to issue and to pursue ancillary relief proceedings in order to secure a financial provision for herself and I therefore order the Respondent to pay the costs of those proceedings.
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> "Turning then to the basis on which the award of costs is to be made, I am asked to award the costs on an indemnity basis. For the purposes of this judgment I will accept that the Supreme Court of Bermuda has jurisdiction to make an order on an indemnity basis. Indeed this is not contested by either party.
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> "In seeking an order for costs on an indemnity basis Mr. Dwyer urges that such an award is appropriate as the Respondent, throughout the enquires as to means leading up to the trial of this matter, acted in a manner designed to thwart the Petitioner in her attempts to ascertain his true wealth. In particular, says Mr. Dwyer, the Respondent delayed revealing his assets as long as he possibly could, citing, by way of example, the fact that it was not until he filed his 13th and 14th Affidavit that he finally explained the reasons for the creation of various trust for the benefit of third parties.
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> "In consequence of this, Mr. Dwyer urged that the task of the lawyers and of accountants employed by the Petitioner's advisers, was made much more onerous and lengthy than it need have been.

> "Needless to say, the Respondent's case is that he fully co-operated with the Petition's request for information, which he says, were grossly excessive and indeed amounted to financial harassment on her part.
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> "Having considered the Affidavits which were filed and the Rule 77 (4) requests and replies, I feel that the common fund basis of taxation is the appropriate basis for my award. Whilst it might be said that the behaviour of the parties was six of one and half a dozen of the other, it was the Respondent who held the financial information necessary for the resolution of this case. He could have been more forthcoming in his disclosures and I do not consider that the Petitioner should be penalized in her efforts to obtain the relevant information by restricting her recovery of the costs occasioned thereby to a party and party basis.
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> The Respondent will therefore pay the Petitioner costs on the common fund basis."

4. The reference to a taxation of a common fund basis derives from Ord. 62, r. 28(3) and (4) of the Rules of the Supreme Court 1985 ('the RSC') as they stood at the time[2]. Ord. 62, r. 28(3) empowered the court to award costs on a common fund basis and then paragraph (4) defined that basis:

> "(4) On a taxation on the common fund basis, being a more generous basis that that provided by paragraph (2), there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and paragraph (2) shall not apply;"

5. Paragraph (2) governed a taxation on the 'party and party' basis, and it provided that on a taxation on that basis "there shall 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."

6. Having awarded costs on the common fund basis the learned Assistant Justice continued:

> "Finally, complaint has been made by the Respondent that many of the Petitioner's enquiries under Rule 77 (4) have been onerous, repetitive and unnecessary. This is a matter for the Registrar on transaction (*sic*). The fact that I have awarded costs on a higher scale is not to be deemed to restrict the Respondent's right to press this issue on taxation of such costs by the Registrar who must be satisfied that the costs claimed are

[2] That basis of taxation has now been abrogated by the Rules of the Supreme Court Amendment Rules 2005.

> necessary and appropriate. She is perfectly free to disallow any claim which she feels to be excessive notwithstanding the basis on which the costs have awarded."

7. The reference in the penultimate sentence of that paragraph to costs being "necessary and appropriate" is, with great respect to the learned Judge, an error. That expression is a restatement of the limitation contained in the definition of the party and party basis – "necessary or proper". It has no application to a taxation on a common fund basis, where the test is whether the costs were "reasonably incurred". That expression is dealt with by the note at 62/28/16 of the 1979 edition of the Supreme Court Practice, which states:

> "The correct viewpoint to be taken by a taxing officer in considering whether any step was reasonable is that of a sensible solicitor considering what, in the light of his then knowledge was reasonable in the interest of his client."

8. Following Storr J's ruling on the incidence of costs, the petitioner applied for her costs to be taxed. This itself was shaping up to be an extensive process, and a Scott Schedule was ordered. The amount claimed for the petitioner's attorney's profit costs was $143,173.32, but that included a 20% uplift on an underlying $119,311.60. In the event, however, the petitioner's attorneys' profit costs were agreed in the sum of $120,000, and the agreed sum plus the costs of the taxation, being $121,587.50, has been paid paid[3]. What was disputed before the Registrar and is the subject of this review is a disbursement, being the costs incurred in having a firm of accountants, Deloitte & Touche, perform various tasks, including producing an analysis of the petitioner's pre-divorce expenses, reviewing the respondent's disclosure and valuing some of the corporate assets. They submitted six invoices in the total sum of $199,096.72. The Registrar on taxation disallowed $40,000 of this, apportioning that variously among the invoices.

9. In the Scott Schedule the objection the respondent made to these invoices was stated in general terms:

> "The Respondent challenges the entirely of the Deloitte & Touche charges throughout these proceedings. Throughout these proceedings the petitioner made relentless, unnecessary, disproportionate, repeated and wholly unreasonable requests pursuant to rule 77(4). The Respondent prays in aid the penultimate paragraph of the Judgment of Storr

[3] I have taken these figures from paragraphs 5 and 8 of the respondent's submissions of 31st December 2008.

> AG dated 16th December 2004 and respectfully submits that the Registrar should disallow in large proportion the Petitioner's legal costs as it relates to the excessive, oppressive and unnecessary steps taken in relation to Rule 77(4) and should disallow in large proportion what can only be described as unnecessary and pointless work undertaken by Deloitte & Touche in advising the Petitioner."

And it continued in that vein. To the extent that it deals with legal costs (as opposed to the accountancy fees) I simply note that those were eventually agreed without taxation, substantially in the amount submitted less only the 20% uplift.

10. In response the petitioner relied upon two affidavits from Mr. Mark Smith, a partner in the firm, dealing with the scope of the work, and with the level of his charges. In respect of the latter, in his affidavit of 18th January 2008 he deposed:

> "That having reviewed the information I can confirm that the work identified was properly undertaken by my associates under my supervision and that the professional charges imposed by Deloitte & Touche upon the Petitioner in accordance with instructions received were fair and reasonable and based upon the standard accountancy fee prevailing in Bermuda during the period between January 2003 and July 2004."

To the extent that that deals with the reasonableness of the firm's rates it is not controverted by any evidence, and I consider that it deals with the first limb of the basis for taxation: i.e. whether the rate charged (as opposed to the work done) was reasonable. Moreover, I note Mr. Smith's assertion in his letter of 20th February 2006, that on this engagement the firm only charged 75% of its standard rates as a courtesy, and that is not challenged[4].

11. The respondent swore an affidavit of 26th August 2008 in support of the application for a review, in which he makes various points. In respect of the invoice of 27th July 2004 he claims that overtime has been charged without any justification. I was not taken to those items, but the only one that I can see is that for Rachelle Dilag on 21st May, which is described as 'insolvency overtime' but turns out to be at the same rate as insolvency standard time, which for her was apparently $180 per hour. Indeed a review of the billing analysis attached to Mr. Smith's letter of 28th February 2006, shows that the only instance of an anomalous rate above the standard was the

[4] That letter had attachments setting out various analyses of the work done. It was forwarded to Appleby under cover of a letter of 28th February 2006, as a prelude to the taxation.

$240 per hour charged for Rachelle Dilag in respect of preparing binders on 6th February 2004. That was picked up and a refund made: see adjustment calculation at App. B to that the same letter.

12. The respondent takes a point that there is only one engagement letter from Deloitte & Touche, which was countersigned by the petitioner's attorneys, Wakefield Quin, and that is for a maximum of $5,000. I do not think that there is anything in that. Indeed it is a red-herring. Mr. Dwyer produces various letters of instruction from his firm, and in any event his firm was paying the invoices as they came in. I accept Mr. Smith's evidence that the work was done. There is nothing to suggest it was in excess of instructions. The question is whether it was reasonable in the first place.

13. As to the work done, it is contended that some items included in the invoices were for extraneous matters, such as the petitioner's taxation, and a mortgage. Thus Todd White charged $2,250 for tax consulting during January to May 2004, and there were similar entries by others on 27th January, 24th March and 22nd June 2004 for a further $1,315.50. It seems to me that that sort of issue was disposed of by the Registrar's taxing down of the final three invoices in the sum of $9,000.

14. The more difficult contention is that the work was unnecessary. The respondent in his affidavit takes the point that the invoices do not adequately describe the work, and that the underlying documentation consists only of time sheets and not a description of the work done beyond generalities, such as "reading correspondence" or "reviewing and analysis of Roger Beach information". Mr. Dwyer responds that Deloitte & Touche have offered to allow an inspection of their working papers, which has not been taken up, and there was no application to cross-examine Mr. Smith before the Registrar. Nor, despite the assertion in paragraph 28 of the respondent's submissions of 31st December 2008, have I in fact been taken in detail through each and every item of concern.

15. Similarly, it is argued that the petitioner made unnecessary and exorbitant rule 77 request in order to harass and intimidate the respondent. However, that general allegation was plainly made

before Storr AJ, because he expressly dealt with it in his judgment on costs. The learned Judge recited that he had considered the rule 77 requests and the affidavits, and in the light of that he made the award he did, not just in the petitioner's favour, but at an elevated rate of taxation beyond the ordinary. It is implicit in that that he was not impressed by the assertion, and indeed he then went on to say:

> " . . . it was the Respondent who held the financial information necessary for the resolution of this case. He could have been more forthcoming in his disclosures and I do not consider that the Petitioner should be penalized in her efforts to obtain the relevant information by restricting her recovery of the costs occasioned thereby to a party and party basis."

In light of that, it is no longer open to the respondent to run on taxation the general case that the petitioner behaved vexatiously. He needs to condescend to particulars in respect of specific rule 77 requests, but I have not been taken through them in detail to demonstrate that any particular rule 77 request was unnecessary, excessive or vexatious.

16. At the end of the day I consider that the wife was entitled to obtain accountancy advice given the size of the assets and the complexity of the structures under consideration. The matter was disputed until practically the court door, when the parties were able to agree. Had the matter gone to trial the costs would have been enormous. It is apparent that the Deloitte valuations were instrumental in achieving agreement, and this is particularly so where the eventual outcome of the analysis either confirmed or did not differ that much from the respondent's contention. I do not think that that can now be picked over in detail, short of practically retrying the action. Nor is the argument that the eventual outcome was close to the respondent's initial self-assessment of his assets very compelling. The petitioner was entitled to verify that, and the learned Judge found that the respondent "could have been more forthcoming" during that process.

17. As it was, the learned registrar allowed just over $159,000 for accountancy costs. That represented a 20% discount on the amount claimed. This was in respect of total assets of $18.86M (including the petitioner's assets and the trust). Thus, the sum allowed is less than 1% (approximately 0.84%) of the assets under consideration. The wife recovered $5.74M, so her allowed accountancy costs were 2.77% of her recovery. I do not think that those proportions are

unreasonable. I understand that, in broad terms, the respondent says that she should have agreed from the outset, but that approach is precluded by the award of costs itself. In the circumstances I uphold the learned Registrar's allowance for the accountancy charges.

18. I propose also to deal with the costs of the review, on which I heard argument. In principle the petitioner has won, and should receive her costs on the ordinary basis. I propose to asses them summarily to avoid further cost. Mr. Dwyer seeks his time at 10 hours at $500 per hour. I allow that time, but at $400 per hour, that being the rate I consider appropriate for taxation proceedings[5]. Mr. Dwyer also seeks an allowance for the attendance at the review of Mr. Mark Smith of Deloitte's. That is contested, Mr. Hastings-Smith saying that he did not ask for Mr. Smith's attendance. I accept that. There was no need for Mr. Smith to attend unless required. I appreciate that it may have been helpful to Mr. Dwyer to have him present in case any matter arose on which he could assist, but I do not think that sufficient justification, and I refuse any allowance of his costs. In summary, therefore, I allow the petitioner her costs of the review, which I assess in the sum of $4,000 to be paid forthwith.

19. As I have dealt with all outstanding matters, and do not wish to run up further costs, I will not reconvene to deliver this judgment, but will have it sent out to the parties. It is to stand as delivered on the date it bears.

Dated this 22nd day of January 2010

Richard Ground
Chief Justice

[5] See for instance my ruling of 16th May 2008 in the matter of the Hamilton Mayoral Election, cause no. 2006/357.