In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 190

IN THE MATTER OF THE ELCOME TRUST

AND IN THE MATTER OF A DECLARATION OF TRUST BY DAVID GEORGE GOODWIN DATED 5TH JUNE 1998

AND IN THE MATTER OF A DECLARATION OF TRUST BY SUSAN DIANNE EADIE DATED 28TH APRIL 2000

AND IN THE MATTER OF AN APPLICATION PURUSANT TO ORDER 85 RULE 2 OF THE RULES OF THE SUPREME COURT 1985

Date/s of Hearing: 7 January 2010
Date of Judgment: 18 January 2010

The applicant in person; and
Mr. K. White for the respondent.

JUDGMENT

1. This judgment is given on the parties' cross-applications under RSC Order 62, r. 35[1] for a review of the Registrar's taxation of the applicant's costs pursuant to an order of Bell J made on 30th April 2009. The underlying proceedings concern Ms. Goodwin's application for disclosure of documents by the trustees of a family trust of which she is a beneficiary.

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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. The respondent trustee's application for a review is brought by summons of 21st December 2009, and it seeks to challenge the Registrar's allowance of any costs for Ms. Goodwin's time. Ms. Goodwin, by her summons of 22nd December 2009, challenges the Registrar's –

(a) allowance of her time at a rate of only $20/25 per hour;

(b) disallowance of items 1-24, 45 and 48, and item 2 of her disbursements; and

(c) taxing down of items 26, 30, 31, 33, 34, 36, 39, 42 and 54; and

(d) disallowance of the costs of preparing her bill of costs.

1(a) - The Appropriate Rate

3. The respondent's argument is that Ms. Goodwin, as a litigant in person, is excluded from the operation of Ord. 62, r. 18 by sub-rule 18(6). Order 62, r. 18 allows a litigant in person to recover costs for work done by themselves, not exceeding two-thirds of the amount that would have been allowed if they had employed an attorney. Insofar as is material, the rule provides –

> **"62/18 Litigants in person**
> 18 (1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an attorney on the litigant's behalf together with any payments reasonably made by him for legal advice relating to the conduct of or the issues raised by the proceedings.
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> (2) The amount allowed in respect of any item shall be such sum as the Registrar thinks fit but not exceeding, except in the case of a disbursement, two-thirds of the sum which in the opinion of the Registrar would have been allowed in respect of that item if the litigant had been represented by an attorney.
>
> (3) Where it appears to the Registrar that the litigant has not suffered any pecuniary loss in doing any item of work to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that item not more than $50.00 per hour.
> . . .
>
> (6) For the purposes of this rule a litigant in person does not include a litigant who is a practising attorney."

4. The respondents argue that sub-rule (6), by excluding practising attorneys from the operation of the rule, means that such an attorney is not entitled to any costs when acting in person. However, a consideration of the cases helpfully produced by Ms. Goodwin indicates that the common law position before the enactment of the rule was that, while lay litigants in person were not entitled to claim costs for their time, a practising lawyer was: see London Scottish Benefit Society v Chorley (1884) 13 QBD 872. That the principle still survives is illustrated by Malkinson v Trim [2003] 2 All ER 256; and Khan v Lord Chancellor [2003] 1 WLR 2385.

5. The effect therefore of Ord. 62, r. 18(6) is to remove attorneys acting in person from the two-thirds limitation imposed by Ord. 82, r. 18(2) on other litigants in person. That was the view of the Court of Appeal in Malkinson v Trim (*supra*):

> "17. Sub-rule (6) excluded solicitor litigants from the ambit of Order 62 rule 18. They did not benefit from the power to allow costs conferred by sub-rule (1); but, conversely, the costs which could be allowed to them were not subject to the restrictions imposed by sub-rules (2) and (3). It is, I think, clear that the rule making body intended that the position of a litigant who was a solicitor (or, more accurately, a practising solicitor) should remain unaffected by the rule; that is to say, it should continue to be governed by the principle, or rule of practice, established in the *London Scottish Benefit Society* case. That that was the view of the editors of the Supreme Court Practice appears from Note 62/B/139 in the 1999 edition:
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> > "Where a practising solicitor sues or defends in person he is entitled on taxation of his costs to the same costs as if he had employed a solicitor, except as to such charges as are rendered unnecessary by his acting in person (*London Scottish Benefit Society v Chorley* (1884) 13 QBD 872) and the same principle applies where a solicitor acts by the firm of which he is a partner (*Bidder v Bridges* [1875] WN 208).""

6. However, I do not think that the note from the Supreme Court Practice states the rule entirely accurately. It is not that an attorney is entitled to the same costs as if he had employed a solicitor. It is rather than an attorney practising in person can recover the level of costs appropriate to himself, because it is his professional skill and labour which is being valued, not some hypothetical attorney whom he might instructed. This is implicit in the reasoning in the London Scottish Benefit Society case (see above), and is explicit in the

extract from Dixon's Lush's Practice, 3rd ed., p. 896, which was approved by the court in that case:

> "an attorney regularly qualified is allowed to make the same charges for business done when he sues or defends in person, as when he acts as attorney for another."

7. That that is the true rule also emerges from R v Stafford, Stone and Eccleshall Justices, Ex p. Robinson [1988] 1 WLR 369 at 372 –

> "It is perfectly plain that over a great many years a solicitor may properly recover his own profit costs . . . whether or not the work is done by partners or clerks within the firm or done by the solicitor himself."

8. The difficulty which arises in this case is how to apply that rule to an employed attorney. Ms. Goodwin is not in practice in her own right, but is employed in the Attorney General's Chambers. I have not been shown any case which concerns such a person. All the reported cases seem to concern self-employed solicitors in their own practice. The difficulty is that the profit costs for such a person will include an element for overheads – for his contribution to running the office from which he practices, including accommodation, equipment and staff. How then to value the time of a person who does not have any responsibility for such overheads? Of course, when an employed attorney is acting in their principal's business there is no problem, because there will be an element for overheads apportioned out to their time charges. But the value of their time to themselves will not include an element for those overheads because they are under no liability to contribute to them. Thus Ms. Goodwin does not have to make a contribution to the running costs of the Attorney General's Chambers. She asserts that her charge out rate for taxation when acting for her principal is $450 per hour, and she relies upon my Practice Direction 11 of 2006, which establishes guideline figures for the taxation of profit costs. She was first called in Bermuda on 6th January 1992, but she only claims 12 years post qualification experience. That puts her in the bracket of $350 and upwards.

9. It seems to me that the value of an employed attorney's time is their salary. I have no evidence of what that is in Ms. Goodwin's case, but think it wrong to prolong these

proceedings by remitting the matter to the Registrar to take evidence. I think that I can properly take judicial notice that professional employees in the Attorney General's Chambers are going to be somewhere between salary scales 42 – 45, and that the top of that range is in the region of $161,500 per annum. Assuming a 40 hour week that gives a maximum of around $77.50 per hour gross. That is going to be subject to deductions, but I think that employing a fairly broad brush approach the appropriate figure for her time for the purposes of this taxation is $75 per hour. To give her any more would be to confer upon her an unwarranted bonus, and I accept Mr. White's submissions to that extent.

1(b) – disallowance of items 1 – 24, 45 and 48 and disbursements item 2

10. No reasons were given for disallowing these items, but items 1 – 23 had been objected to on the ground that Ms. Goodwin had an attorney of record, namely Appleby, throughout that period, and that appears to be reason for disallowing items 1 – 24. Indeed Ms. Goodwin only filed a notice that she would be acting in person on 13th February 2009, although she had stated that in a letter of 26th January 2009, when she filed her second affidavit and an amended Originating Summons. She counters that this represents work actually done by her, and that in any event Appleby have not billed her, and she therefore makes no claim for their costs. It is apparent from the bill itself that that is correct. I therefore accept her position on that. Someone had to do this work. If Appleby had billed her, their costs would have been considerably higher, given the rate that I have allowed. I would, of course, not allow two sets of costs for this work, but think that Ms. Goodwin is entitled to one, as if she had acted for herself throughout.

11. As to the appropriate time allowance, rather than remit the matter for the Registrar to consider the items individually, I have considered what the appropriate allowance for each is. I consider the time for the following items excessive and reduce it as indicated:

Item	**hours claimed**	**allowed**
8.	2.3	1.5
10.	3.5	2.00

17.	12.8	8.00
22	7.3	5.00

Otherwise I allow each of these items for the amount claimed.

12. Items 45 and 48 were minor items which the Registrar disallowed in her discretion. I see no reason to go behind that.

13. Item 2 of the Disbursements was for payments to Mr. Alan Dunch, an attorney with firm of Mello Jones and Martin. The bill is for $937.50 and is dated 31st March 2009. It is largely unparticularised, because it incorporates a substantial previous balance of $750. At the hearing Ms. Goodwin told me that that represented a one hour meeting plus 0.2 hours for reading emails from her. She said that she had gone to Mr. Dunch to get someone to represent her, but in the end he did not, although he gave her some advice[2]. I do not think that the cost of failed attempts to get representation are allowable. They are essentially wasted costs, and I therefore uphold the learned Registrar in that respect.

1(c) –the amount allowed in respect of items 26, 30, 31, 33, 34, 36, 39, 42 and 54

14. This concerns a variety of individual items which the Registrar taxed down. I think that that was a matter for her discretion. I accept Mr. White's submission that this court should only reject the opinion of the taxing officer if it can be shown that he or she took into account irrelevant considerations, failed to take into account relevant considerations or was clearly wrong: see Hart v Aga Khan Foundation [1984] 1 WLR 994 at 1006 g-h. That has not bee demonstrated to me, and I therefore decline to interfere with the learned Registrar's decision in this respect.

1(d) – Taxation Costs, item 1

15. I also allow Ms. Goodwin her time at $75 per hour for preparing the bill of costs. Normally I regard that as included in the overhead element of a lawyer's charge-out rate, but having discounted her rate to exclude that, she is entitled to her reasonable time.

[2] See also paragraph 54 – 57 of her second affidavit.

However, I do not think that 8.9 hours is reasonable for what should be a collation exercise, and I therefore allow her 5 hours for that plus the 1.5 hours allowed by the Registrar for attending the taxation.

16. In summary:

1. The allowable rate throughout should be $75 per hour.

2. I allow items 1 – 24 at $75 per hour, subject to the reductions noted above.

3. I refuse to interfere with the Registrar's discretionary reductions.

4. I uphold the disallowance of Mr. Dunch's bill.

5. I allow 5 hours for the preparation of the bill of costs at $75 per hour.

I leave it to the parties to recalculate and agree the sum payable accordingly. I give a liberty to apply if they cannot agree the arithmetic. Once that has been done I will order that the Registrar's certificate by amended accordingly, pursuant to RSC Ord. 62, r. 35(5).

17. I heard argument as to the costs of the review. I think that Ms. Goodwin won on the main elements, namely the allowable rate (albeit not to the extent for which she contended) and items 1 - 24. I think that costs should follow the event. I assess her costs at 5 hours for preparation and 4 hours attendance at the hearing, for a total of $675, to be paid forthwith

Dated this 18th day of January 2010

Richard Ground
Chief Justice