[2012] SC (Bda) 1 Civ (11 January 2012)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: No. 53

BETWEEN:

ROBERT GEORGE GREEN MOULDER

Plaintiff

- and -

MESSRS. COX HALLETT WILKINSON (A FIRM)

First Defendant

and

STEPHEN P COOK

Second Defendant

and

MICHAEL ALAN CRANFIELD

Third Defendant

and

PAUL JEREMY SLAUGHTER

Fourth Defendant

and

JANET MURRAY SLAUGHTER

Fifth Defendant

Dates of Hearing: 24 November 2011
Date of Judgment: 11 January 2012

Paul Harshaw for the Second Defendant/applicant;
No appearance for the Plaintiff.

JUDGMENT
(TAXATION REVIEW)

INTRODUCTION

1. This judgment is given on the second defendant's application under RSC Order 62, r. 35[1] for a review of the Registrar's taxation of his costs of the action, which were awarded to him (and the other defendants) following my judgment of 26th November 2010, striking out the plaintiff's claim.

2. The taxation was conducted on 18th August 2011. The plaintiff did not appear at the hearing or file notice of any objections to the various items in the second defendant's bills of cost. The application for review was out of time, but the applicant's attorney explained that by saying he was waiting for the finalized bills to be returned from the Registry. I accepted that explanation and enlarged time accordingly.

3. The applicant appeared in person from the inception of the action up until 15th October 2010, thereafter he was represented by Mr. Harshaw. He therefore lodged two separate bills of costs, the first certified by the applicant in person, and second certified by Mr. Harshaw. The form of certification in each case appears to me to be inappropriate. It is that "the castings of this Bill of Costs are true and correct". The certification required by the rules, at least in the case of Mr. Harshaw's bill, is "that the costs claimed do not exceed the costs which the receiving party is required to pay him or his firm". However, no point was taken on that. As to the applicant's costs while in person, he is a practising member of the Bar, and hence is entitled to claim costs at a reasonable hourly rate: see <u>In the Matter of Elcome Trust</u> [2010] SC (Bda) 3 Civ (18th January 2010). His hourly rate was charged at $500, and the Registrar seems to have accepted that.

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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 . . . "

4. The original amount of the first bill was profit costs of $17,400; and the second bill was $26,155.50, being profit costs of $25,500 plus $655.50 for disbursements. The learned Registrar taxed off $4,200 (24%) from the first bill, and $7,312.50 (28%) from the second. The general grounds of the application for a review are that the reductions were unreasonable and arbitrary, and failed to take account of the size and complexity of the case.

5. Complaint is also made that the paying party did not participate in the taxing process, and therefore challenged no items. The reductions were, therefore, all on the Registrar's own motion and it is said that she should not have done that, although no authority was produced on the point. In my view, in a case like this where the paying party was unrepresented, the Registrar was obliged to scrutinize the costs critically and ensure that they were reasonably incurred and that the amounts were reasonable, resolving any doubts in favour of the paying party, as required by Ord. 62, r. 12(1).

6. In general, looked at in the round, I do not think that the learned Registrar's reductions were excessive. This was not a taxation on an indemnity basis. I do appreciate that on a review such as this that I have a discretion to reconsider the taxation afresh and am not fettered by the manner in which the Registrar exercised her discretion: see Mudrasinghe v Penguin Electronics [1993] 3 All ER 20. That does not mean that I will attach no weight to the Registrar's decisions on the various items. Nor does it mean that I will tinker with the amounts allowed or disallowed.

7. Mr. Cook's own costs

(i) Items[2] 6, 7, 8 & 10 - $2,250 (4½ hours) deducted from 11 hours for considering the claim and preparing a Defence. Included in that was 4 hours for researching the law. I do

[2] The items in the original bills were not consecutively numbered, which makes reference difficult, although I accept that there is no requirement in the rules in that regard. There is such a requirement in the CPR, and generally I think that that should be followed here: see CPR 43PD.4, para. 4.9. The items challenged on the review were numbered in the schedule to the summons as they would have been if the original items had been numbered, and I have followed that in this ruling.

not think that that was properly allowable at all: lawyers are assumed to know the law and cannot normally charge for researching it. I take that to be self-evident, but if authority was needed there is the following (which I accept was not referred to at the hearing):

> "Time spent considering the law and procedure is usually non-chargeable – and the higher the expense rate, the more law and procedure the fee earner is expected to know. In a review of criminal costs it was held that leading and junior counsel can be assumed to be fully up-to-date with the law in the field in which they hold themselves out as practising in and they will not be paid for researching the law unless the case is unusual or infrequent (*Perry v Lord Chancellor* (1994) Times, 26 May, QBD). The same principle of course applies to civil work and to solicitors." ['Cook on Costs', Butterworths 2004, p. 230]

While I accept that this case had some unusual elements, largely because the plaintiff was in person and his claims were pushing the envelope of accepted law, I do not think that the case was so unusual as to warrant going outside this general rule. This is particularly so as Mr. Cook's rate of $500 per hour is considerable above the guideline base rate for 9+ years post-qualification experience, which is $350: see Practice Direction 2006 No. 11. On that basis, looked at in the round, I think the amount actually allowed by the Registrar for considering the claim and drafting the Defence was reasonable and fair.

(ii) Items 11, 12, 15 and 16 - I thought that, in the overall picture, each of these items was reasonable, and I reinstate the $200 deducted.

(iii) Item 21 - I thought the deduction of $500 entirely appropriate, even generous, for the reasons given above.

(iv) Items 22 to 27 - Given the nature of the claim and size of the documents concerned, I thought that these items as claimed were reasonable and so reinstate them, save that the objection to the taxing down of item 23 was withdrawn. The amount involved is $700.

(v) Item 34 - Given the allowance on item 21 and the amount reinstated for items 22 – 27, I think that the reduction on this was appropriate. This is particularly so because the second defendant did not in fact represent himself on the strike out application.

(vi) Item 35 - The objection to this reduction was withdrawn.

In summary, on the first bill I reduce the amount taxed off by $900, and substitute $14,100 for the amount allowed.

8. Mr. Harshaw's Costs

(i) Items 4, 12, 18, 19, 20, 31 and 48 – These were delivery charges, which the Registrar disallowed. Mr. Harshaw says that where the rules require service these should be recoverable. I think that that makes no difference, and that the Registrar was right to treat them as within an attorney's overheads and disallow them[3].

(ii) In each of items 5, 7, 8, 10, 11, 15, 16, 32, 38 and 45 there is an arithmetical error, in that the amount reduced has been increased by 10% over the charge for the actual time disallowed. This creates some odd figures, such as $990 on item 5, which counsel commented upon in argument. A review of the Registrar's actual manuscript note on the file makes it clear that on item 5 she was intending to disallow 1.8 hours from the 4.3 hours billed, leaving 2.5 hours. The same applies *mutatis mutandis* to all the other instances. I have adjusted the figures accordingly. The correct total of the amounts disallowed for these items is $4,600, and not $5,060. I therefore reinstate $460.

(iii) Item 5 - This is for perusing the hearing bundle (4.3 hours). Much of this would have been familiar material if Mr. Harshaw had been instructed from the outset, so there is an element of duplication of work already done by Mr. Cook. I accept, of course, that Mr. Harshaw had to do that work, but that does not mean that the paying party has to pay for it all. Against that background I think that the disallowance of 1.8 hours, or $900 was reasonable.

(iv) Item 7 – This is for looking up the law on solicitor's duty of care to third parties (2.3 hours). The Registrar disallowed 0.3 hours off the claim of 2.3 hours. Apart from the

[3] This would have been the outcome under the CPR, see 43PD.4, para. 4.16(4).

arithmetical error (see above) I see no reason to disturb this, the allowance for legal research being generous.

(v) Item 8 – Looking up the law on limitation (1.2 hours, of which 0.2 disallowed). Same comment as for item 7.

(vi) Item 10 – Annotating pleadings and considering causes of action (2.7 hours of which 0.7 were disallowed). I see no reason to disturb this.

(vii) Item 11 – Considering and annotating authorities (4.6 hours of which 1.6 hours were disallowed). This has to be read with items 15 and 16. In all Mr. Harshaw spent 8.7 hours considering authorities and a further 4.3 drafting his submissions, for a total of 13 hours. The Registrar reduced that by 5 hours to 8 hours in total. I do not think that an unreasonable reduction.

(viii) Item 15 – Considering and annotating authorities (4.1 hours of which 1.6 hours were disallowed). See above.

(ix) Item 16 – Drafting written submissions (4.3 hours of which 1.8 hours were disallowed). See above.

(x) Item 32 – Considering draft judgment (1.1 hours of which 0.4 were disallowed). The judgment was 15½ substantive pages on letter page with line and half spacing. Not all of it concerned Mr. Cook. I think the Registrar's assessment reasonable.

(xi) Item 38 – Looking up law on indemnity costs (1.6 hours of which 0.6 were disallowed). I think the disallowance right, both because this was legal research and because no such application was in fact made.

(xii) Items 43 & 44 – these were disallowed in their entirety. There were two sums of $1,100 representing 2.2 hours for preparing each of the two bills of costs. Mr. Harshaw says that his was not for the underlying preparation but was for his checking them prior to signing the certificate. My view is that that makes no difference, and that all work relating to the preparation of the bill of costs is within the overheads element in the hourly rate. Moreover, as Mr. Cook certified his own bill, it is not clear why there is an element in Mr. Harshaw's bill for doing that as well.

(xiii) Item 45 – the objection to this reduction was withdrawn.

In summary on the second bill, I reinstate $460 in respect of the arithmetical error, but otherwise make no change.

9. In order to save further costs, I propose to deliver this ruling by e-mail and put signed copies out for collection. As the outcome was *de minimis*, I make no order as to the costs of the review.

Dated this 11th day of January 2012.

Richard Ground
Chief Justice