In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: 57

BETWEEN:

FEMI BADA

Appellant

-v-

CAPCAR ENTERPRISES LTD.

Respondent

RULING
(Review of Taxation of Costs)
(in Chambers)

Date of hearing: February 7, 2013
Date of Judgment: February 12, 2013

Ms Keren Lomas, Lomas & Co, for the Appellant/Defendant

Mr Taaj Jamal, Cox Hallett Wilkinson, for the Respondent/Plaintiff

Introductory

1. The Appellant appeals against the decision of the Registrar to (a) disallow its counsel's actual hourly rate of $500 per hour to $450 per hour; and (b) reduce a preparation item by half an hour, upon taxation on an indemnity basis with the result that a claim for $10,931.67 was allowed in the reduced amount of $9,392.50.

2. In purely commercial terms it is obvious that an appeal by way of rehearing in a dispute over roughly $1500 involves the expenditure of a disproportionate amount of legal costs. However the appeal does raise important points of principle and stubborn litigants have always played an important part of the development of the common

law. The main question raised is the following: when indemnity costs are taxed and reliance is placed upon a contractual indemnity clause, what impact does this have on the principles applicable to the taxation?

The Costs Order

3. By a Specially Indorsed Writ of Summons dated February 10, 2012, the Plaintiff sought $237,606 for breach of a contract under which the Defendant provided temporary staff to the Plaintiff ("the Contract"). The Defendant counterclaimed for the sum of $38,491, interest and "*(d) Costs incurred on a full indemnity basis pursuant to Contract in enforcing the terms of the Contract and this action.*" It was common ground that the Contract validly existed. In paragraph 2 of the Defence, various portions of the Contract were pleaded including the following:

> "*Indemnity*
>
> *In consideration of the Agency entering into this Agreement with the Client, the Client hereby undertakes to fully and effectively indemnify the Agency against all costs and expenses which the agency incurs: (i) as a result of any loss, injury or expense incurred by a Candidate, or by any other person as a result of the actions of the Candidate, howsoever caused; or (ii) in enforcing any of the terms and conditions contained herein including, without limit to the generality of the foregoing, the recovery of all monies due from the Client whether by proceedings or otherwise.*"

4. The primary defence raised to the Plaintiff's claim was an exemption clause also contained in the Contract so that, as a matter of analysis, the Appellant's costs of defending the proceedings were *prima facie* an "*expense incurred…in enforcing any of the terms and conditions*" covered by the indemnity provisions of the Contract.

5. On October 29, 2012, the Registrar signed a Consent Order which had previously been signed by the Appellant's attorney and the Respondent's former attorneys of record) in the following substantive terms:

> "*IT IS ORDERED that this action be and is hereby discontinued and that the Plaintiff shall pay the Defendant's costs to be taxed on a full indemnity basis [if not agreed]*".

The taxation hearing before the Registrar[1]

6. The central issue first clearly identified as falling for determination in the course of the review hearing before me was not fully argued before the Learned Registrar. Mr

[1] The Registrar's notes are understandably brief. As foreshadowed at the conclusion of the hearing, I listened to the Court Smart recording of the hearing to supplement the submissions of counsel as to precisely what transpired.

Jamal was newly instructed and does not seem to have raised any or any substantial specific objections to the Bill. He made the broad complaint that, in the round, the total amount claimed seemed unreasonable. He made it clear that he was not going so far as to suggest that the time Ms Lomas claimed to have spent on the items set out in her Bill had not actually been spent. The only specific item he pointed to as excessive was a three hour preparation item.

7. Ms Lomas essentially submitted that the costs claimed were reasonable expenditure, had actually been incurred and accordingly ought to be allowed. She was at pains to explain how adversarial the Respondent's former attorney had been by way of explaining the overall level of expense reflected in the Bill. In one sentence, almost in passing, she noted that the costs were being sought pursuant to a contractual indemnity clause and a Court Order for indemnity costs. Counsel did not assist the Court, having heard her opponents' objections, by even referring briefly to the correct approach to taxation in the circumstances nor by explaining how the contractual indemnity clause impacted on such approach.

8. The Registrar in her short decision identified the following principles as applicable to a taxation of costs on the indemnity basis: "*reasonableness…whether it was necessary* [for the costs] *to be incurred*". Taking these considerations into account, she:

    (a) reduced a 3 hour preparation claim to 2.5 hours;

    (b) reduced Ms Lomas' actual charge out rate of $500 to $450; and

    (c) reduced the 1 hour claim for attendance for taxation to ½ hour at $350 (i.e. from $500 to $175.

Findings: governing legal principles

Indemnity costs generally

9. Order 62 rule 12 (2) provides as follows:

> "*On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.*"

10. Ms Lomas complained that the Learned Registrar had ignored the onus of proof under this rule. In my judgment the Learned Registrar clearly had the relevant principles in mind, namely considering whether or not the costs were of an unreasonable amount and/or whether they had been reasonably incurred. The rule clearly creates a presumption that all costs will be allowed. But once an indemnity costs taxation is opposed, it must be open to the Registrar to assess whether or not any costs should be

disallowed because their quantum is unreasonably high or the manner in which they were incurred was unreasonable.

11. What is or is not reasonable will always be a matter of judgment when it comes to the question of how much time was spent on a task or whether a particular expenditure ought to have been incurred at all. Because the presumption is that all costs which were actually incurred are recoverable under Order 62 rule 12(2), clear grounds for finding unreasonableness must be found to exist. Otherwise, the distinction between a standard taxation and an indemnity basis taxation will become blurred to the point of extinction. As Mr Jamal put it, the Registrar would not be discharging her taxation duties if she did not assess the reasonableness of the claim.

12. However, while in the case of a standard basis taxation the hourly rate the receiving party actually paid his lawyer is merely a starting point, in an indemnity basis taxation cogent reasons would have to be found for concluding that the contractual rate was unreasonable. Ms Lomas referred the Court to the '*Guideline Figures for Hourly Rates*' Practice Direction issued by this Court on July 1, 2006, which provides in salient part as follows:

> "*2. In any particular case the starting point will be the rate which the client is actually obliged to pay his attorneys. The obligation to state that rate accurately in the bill of costs is imposed by the indemnity principle, which is reinforced by the certification required by Ord. 62, r. 29(5)(b)(iii). The question, on a taxation on the standard basis, is then whether the hourly rate actually charged is reasonable. In considering this the Registrar should have regard to the rates charged by comparable firms. For this purpose the fees charged by the paying party may give further guidance in particular cases.*" [emphasis added]
>
> *…4. These guideline rates are not scale figures: they are broad approximations only. They are intended to provide a starting point. Costs and fees exceeding the guidelines may well be justified in an appropriate case and that is a matter for the exercise of discretion by the Court. In particular, in substantial and complex litigation a substantially increased hourly rate may be appropriate for fee earners over 9 years' call where other factors, including the value of the litigation, the level of the complexity or urgency or importance (public or private) of the matter, as well as any international element, may justify a significantly higher rate.*
>
> *1-3 years post qualification experience - $200 - $350 per hour*
>
> *4-8 years post qualification experience - $250 - $420 per hour*
>
> *9+ years post qualification experience - $350 per hour and upwards*"

13. The guideline rates prescribed by the Practice Direction, according its terms, only fall to be automatically considered on a taxation on the standard basis. In my judgment, when costs are being taxed on the indemnity basis, some good reason must be shown for challenging the reasonableness of the hourly rate actually charged by the receiving party's attorneys. Accordingly, in an attack on the hourly rate of a senior practitioner was rejected by Ground CJ in *Re Extraordinary Mayoral Election (Taxation of Costs Review)* [2008] Bda LR 28 (at page 5) on the following grounds:

> "*15. Mr. Pachai charged out at $450 per hour. This was not, on the face of it, excessive in light of the guidelines established by Practice Direction 11 of 2006. In particular I take notice that Mr. Pachai has 28 years post admission experience… I therefore see no reason to disallow or discount Mr. Pachai's hourly rate…*"

The relevance of a contractual indemnity clause

14. Ms Lomas placed before me an important authority which was not relied upon before the Registrar which illustrates the distinctive approach required when taxing costs in cases where the receiving party has a contractual right to be fully indemnified. In *Gomba Holdings Ltd-v-Minories Finance Ltd* [1993] Ch 171, the English Court of Appeal considered the correct approach to taxing costs on the indemnity basis in circumstances where a mortgagee also had a contractual right to be paid: "*All costs charges and expenses howsoever incurred…under or in relation to this mortgage…on a full indemnity basis*". Scott LJ giving the judgment of the Court) concluded (at page 194B):

> "*Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.*"

15. So the entitlement to costs awarded by the Court on an indemnity basis requires the paying party to reach one evidential threshold in terms of demonstrating that the costs claimed are unreasonable. Where the receiving party has, over and above an entitlement to indemnity costs derived from a court order the contractual entitlement to "full indemnity" costs, another even higher threshold must be met to justify disallowing to any extent the amount claimed.

16. I was assisted in concluding that the term "full indemnity", which does not appear in our own Rules, connotes a higher level of recovery than an "indemnity" award by the following practitioner's analysis of the contrasting position under Ontario law:

> "*The full indemnity scale was created by the 2005 amendments to the Rules of Civil Procedure, which provided for additions to Rule 57.01(4) that specifically referred to the court's ability to award full indemnity costs. Prior to these amendments, the term 'full indemnity' was not employed in the Rules with respect to costs. These amendments also created the formal distinction between the substantial indemnity and full indemnity scales. Despite the fact that both substantial indemnity and full indemnity costs appear to have their antecedents in*

the concept of solicitor-client costs, the substantial indemnity and full indemnity scales are different.

While it has not received much judicial commentary, the full indemnity scale generally appears targeted at approaching or achieving total compensation of the successful party for their legal costs incurred. In Manufacturers and Traders Trust Company v. Amlinger, Perell J. suggested that full indemnity costs could include 'legal services outside of the litigation and also services within the litigation that cannot reasonably be expected to be paid for by the opposing litigant, although they might be desirable for the client.' However, in the 2008 decision of Burke v. Hudson's Bay Company, the Court of Appeal for Ontario noted that full indemnity costs were still restricted to costs that were reasonably incurred."[2]

17. This summary confirms what is implicit in the *Gomba Holdings Ltd* case relied upon by the Appellant's counsel. A contractual clause conferring a right to "full indemnity costs" in a costs regime which does not empower the courts to award costs on that "full" basis is designed to create a legal entitlement to a more generous award than is available under the statutory indemnity costs dispensation. One in which the goal of the taxation process is to compensate the receiving party for all the costs they have incurred which fall within the scope of the contractual indemnity clause.

Approach to reviews of taxations by the Registrar

18. In *Moulder-v-Cox Hallett Wilkinson and others(Taxation Review)*[2012] Bda LR 1, Ground CJ described the jurisdiction of a judge hearing a review of a taxation by the Registrar as follows (at page 2):

> "*6. 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.*"

19. I approved this *dictum* in paragraph 25 of my Judgment in *Junos-v- Minister of Tourism and Transport* [2012] SC (Bda) (11 October 2012).

20. It is also important to bear in mind the duty of the party applying for costs to advance his claim in full before the Registrar. As Ground CJ also opined in *Re Extraordinary Mayoral Election (Taxation of Costs Review)* [2008] Bda LR 28 (at pages 1-2):

> "3. *I also consider that it is implicit in the scheme of the rules that the Supreme Court can only meaningfully review the exercise of the Registrar's discretion if the item has been challenged below. It is the Registrar who has the power to tax costs, not a Judge: see Re Extraordinary Mayoral Election (Taxation of Costs Review) [2008] Bda L.R. 28 Ord. 62, r. 191. The proper*

[2] Jonathan de Vries, '*The Law of Costs-A Brief Overview*' at page 10: www.shillingtons.ca.

place to take an objection is, therefore, before the Registrar, and, in accordance with ordinary principles, a new point should only be raised on review if there was a good reason for not taking it below, for instance that the circumstances giving rise to the challenge were not then known to the paying party and could not have been discovered with exercise of reasonable diligence. I take this to be implicit in the nature of the exercise, but if authority were required I would refer to the time-hallowed words of Wigram V-C in Henderson v Henderson (1843) 3 Hare 114:

> *'I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."*

Findings: do grounds exist for disturbing the exercise of the Registrar's discretion?

21. The Learned Registrar in my judgment approached the taxation as an ordinary indemnity costs application. Had this been the appropriate basis, I would not differ with her award in net terms. Making a summary assessment, it seems clear that she took the global view that the total sum claimed needed to be reduced by approximately 10%. I would not have found any grounds for reducing the hourly rate from $550 to $450 for a lawyer with nearly 40 years post-qualification experience handling a six-figure commercial claim. But looking at the matter in the round, I would not have found any sufficient basis for second-guessing the Learned Registrar's assessment that the total sum claimed was somewhat excessive having regard to all the circumstances of the case. Nor would I have disturbed her decision to reduce the 3 hour preparation item by allowing only 2 ½ hours.

22. However, having regard to the highly persuasive case of *Gomba Holdings Ltd-v-Minories Finance Ltd* [1993] Ch 171, which was not cited before the Learned Registrar, I am bound to find that the approach she adopted to the instant taxation was wrong in law and/or principle. Applying the correct principles, which do not appear to have been considered by the Bermudian courts in any published judgment in recent times (if at all), I exercise my discretion as follows. I find that no or no sufficient grounds have been made out which would justify depriving the Appellant of its contractual entitlement to be fully indemnified for the costs of enforcing its contractual rights. The mere fact that the total amount claimed could be considered unreasonable for the purposes of exercising the taxing discretion applicable to an indemnity costs basis taxation does not suffice to deprive the Appellant of its contractual right to a full indemnity. This would require some exceptional findings such as:

    (a) the time claimed to have been spent on one or more items was not in fact spent;

(b) the hourly rate used to prepare the Bill did not reflect the true terms on which the Appellant's attorney was hired; and/or

(c) the total amount of the Bill was clearly grossly inflated.

23. The Appellant is awarded the full amount of its original claim of $10,931.67 (less the 50% reduction properly made by the Registrar to the amount of $500 claimed pre-taxation in respect of the taxation hearing which only actually lasted for half an hour- $250) in respect of the hearing before her: $10, 681.67 net.

24. It is also ultimately clear that the Appellant's counsel did, albeit without sufficient emphasis or elaboration, orally submit before the Registrar that her client was seeking costs on a contractual basis. In fairness to counsel, it was clear on the face of the pleadings that the Appellant was seeking costs pursuant to a contractual indemnity clause. But in fairness to the Learned Registrar, it was not apparent on the face of the Consent Order which awarded costs that any contractual indemnity clause was required to be taken into account. Not only that; counsel for the receiving party neither referred to the terms of the relevant clause nor explained its legal relevance to the taxation approach at the taxation hearing. This was not the sort of settled point of taxation practice which it was reasonable for counsel to assume the Learned Registrar to have intimate familiarity with, no matter how obvious the correct approach may have instinctively appeared to an acute and experienced advocate.

25. In practical if not strictly legal terms, was what occurred not almost as if the contractual indemnity point raised before me was not raised before the Registrar at all? Should this point be rejected on the grounds that it ought to have been raised previously and was not? On balance, it is not properly open to me to debar the Appellant from essentially fleshing out at the review stage the bare bones of a point which was in fact advanced before the Learned Registrar, albeit in highly skeletal form. In arriving at this conclusion, I take into account the unambiguous pleadings, the equivocal Consent Order and the fleeting oral allusion to the point in argument by counsel.

Conclusion: provisional views on costs

26. The Appellant has succeeded in recovering $10, 681.67, an increase of $1289.17 over the $9392.50 awarded upon taxation. It is obvious that the costs of the present review hearing will equal or exceed the additional amount recovered. It is also clear that the Appellant might well have recovered the amount ultimately awarded had the application been more fully argued before the Learned Registrar. The Respondent's opposition to the claim at the original taxation and upon the present review was quite restrained. In these circumstances it seems palpably unjust that the Respondent should bear the additional costs burden of the present appeal, on top of the obligation to pay an appropriately enhanced substantive costs award.
27. It is my strong provisional view that the Respondent's omission to fully and/or effectively advance before the Registrar the point upon which it has succeeded before

me was sufficiently unreasonable to justify a departure from the costs follow the event principle, pursuant to the provisions of Order 62 rule 10(1) of this Court's Rules. I also have regard to the duty of the parties to assist the Court to achieve the overriding objective under Order 1A rule 3. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, no order is made as to the costs of the present appeal.

Dated this 12th day February 2013 _____

IAN R.C. KAWALEY CJ