In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016 No: 46

MYRNA HILL

Appellant

-v-

MICHAEL E. SMITH

Respondent

JUDGMENT

(In Court)[1]

Appeal-jurisdiction of appellate court to make primary factual findings-action to recover unpaid legal fees-relevance of reasonableness of fees in a global sense when client has requested a fee estimate which is exceeded

Date of Hearing: December 21, 2016
Date of Judgment: January 6, 2017

The Appellant appeared in person
Mr. Keivon Simons, Smith & Co., for the Respondent

[1] To save costs this Judgment was circulated to the parties without a hearing.

Introductory

1. The Appellant appeals against the decision of the Magistrates' Court (Wor. Juan Wolffe, Senior Magistrate) dated December 29, 2015 entering judgment in favour of the Respondent for unpaid legal fees amounting to $6,206.27 after deduction of $1574 had been made to the amount initially claimed. The one ground of appeal was as follows:

> "*The Magistrate based his judgment on matters totally unrelated to the claim presented by the Plaintiff in this case.*"

2. This ground of appeal at the outset seemed wholly misconceived. However, by the end of the appeal it was clear that a meritorious ground of appeal did exist. In lawyers' terms, the complaint was that the Learned Senior Magistrate had erred by failing to decide the real issue in controversy between the parties. As is regretfully not infrequently the case with litigants in person, good points are often buried deep beneath a pile of bad points, bad points which are often accompanied by unwarranted attacks on the integrity of persons of unimpeachable good character (in this case her former attorney).

3. The Appellant though small in stature, puffed up with a sense of righteous indignation, presented her arguments with considerable force and emotion. In the course of the hearing I noted that (1) she had clearly been a very difficult client for Mr Smith, and (2) that it was easy to understand why the Learned Senior Magistrate had failed to apprehend the main plank of her defence

4. It was against this background that I shifted from my starting assumption that the present appeal involved an attack on an unassailable judgment which was invulnerable to successful challenge.

The proceedings in the Magistrates' Court

5. It was common ground that the Respondent was retained in relation to a claim asserted by the Appellant against her condominium association (Flamingo Court) for failing to properly maintain her property. Mr Smith in supporting his claim gave extensive evidence of the nature of his initial retainer and instructions, covering the period in respect of which the Appellant had paid his bills without protest and the period to which the disputed bills related. He explained that it was agreed that his time would be charged at the rate of $600 per hour. In discussing his advice about settlement and the estimate that he gave of the likely costs, he explained that one reason why he advised settlement is that he believed that health problems which had recently faced might make it impossible for him to conduct a trial. The Respondent cross-examined her former attorney about the reasonableness of the time spent on matters for which she had already paid. The notes of the cross-examination suggest

that she devoted more time on cross-examination in relation to the period covering bills which she had already paid (Appeal Record, pages 30-31, 34-35 and 37-38) and less time to cross-examination on the bills for the period to which the Respondent's claim related (pages 38-39).

6. Despite having conducted such a wide-ranging cross-examination, at the very start of her own evidence-in-chief the Appellant gave the evidence which formed the central plank of her appeal:

> "*The 26th June 2013 letter and the meeting in August 26th 2013 have nothing to do with the Plaintiff's claim, as well as all of the financial document…The first three items I have paid for. So we have wasted a lot of time discussing something that is not relevant. I still believe I was overcharged. I do not see the need to discuss it any further because they are not part of the claim….December 11th 2013 meeting in which Plaintiff told me or recommended that I settle, that is when I became unhappy with the services and advice.*"

7. The nub of her defence to the claim that she was bound to pay for the time reasonably incurred by her attorney on her behalf was recorded by the Learned Senior Magistrate in his notes of the Appellant's closing submissions in the following terms:

> "*The total fee charged by Smith & Co was $10,341.53-The total I have paid is $2,175.00 or 21% of total fee. My not paying my bill was that I was dissatisfied with the service and in disagreement with time charge to the tune of 80%. The Plaintiff overcharged me by 80% or about $8000….*
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> *-Quote of $1500 was given to negotiate a settlement.*
>
> *-Mr Smith wrote irrelevant emails and letters.*
>
> *-It would have been cheaper to go to Court. Initial claim against Flamingo Court was $5000 approximate.*"

8. The trial commenced on February 13, 2015, continued on February 27, March 16. June 19, June 26 and June 29 with the evidence concluding and closing speeches on July 8, 2015. Judgment was not delivered until December 29, 2015, almost six months' later. This would have made it difficult to recall the nuances of the evidence and the submissions in a case which was already complicated by the way the Appellant had conducted her case as a litigant in person. The Judgment nevertheless impeccably identified the scope of the instructions received by the Respondent and

carefully assessed the reasonableness of the charges billed to the Appellant, concluding that although the bills were reasonable overall:

- the time billed for preparing for the December 11, 2013 meeting should be reduced by 1 hour ($600);
- the July 31, 2013 invoice should be reduced by $75 to correct an arithmetical error;
- $600 charged on February 4, 2013 in relation to the illness of both counsel should be disallowed;
- the Plaintiff was awarded $6,206.27 out of the $7,781.27 claimed.

9. The following key findings were made:

   (a) the Respondent's agreed hourly rate was $600;

   (b) the Appellant never complained about the fees being charged despite receiving bills until the Respondent sued to recover the outstanding amounts and did not terminate his services despite accusing him of sabotaging her case by letter dated February 25, 2014 after which no charges were billed in any event.

10. No explicit findings were made at all in relation to what was, on a proper analysis of the case, the Appellant's main complaint. This was the argument that having regard to the estimate of $1500 to settle the case given in January 2014 and the fact that her claim was only worth some $5000, the amounts charged thereafter (just over $6000) were disproportionate and unreasonable in a global sense. It bears repeating that it is entirely understandable that the Learned Senior Magistrate approached the case in the way he did in light of the legally confusing manner in which the Appellant conducted her own defence.

Merits of appeal

11. Every appellant has two hurdles to overcome. Firstly, can the appellant demonstrate an evidential error or misdirection of law has occurred? Secondly, can the appellant demonstrate that the substantiated ground of appeal has occasioned "*substantial wrong or miscarriage of justice*" (Civil Appeals Act 1971, section 14(4)).

12. I am bound to find that the Learned Senior Magistrate erred in failing to make any express findings on what was the main factual issue in controversy. In the overwhelming majority of claims for unpaid legal fees, the correct legal and evidential approach will be to identify the scope and terms of the retainer and then decide (where the lawyer has contracted to charge on an hourly basis) whether the time billed for each item of work is reasonable. In the present case, however, the key issues in controversy were:

    (1) whether the lawyer estimated the fees for completing the case by way of settlement in the amount of $1500 as the Appellant contended at trial;

    (2) in any event, whether it was reasonable to incur a further (appromimately) $6000 :

        (a) without the client's express approval,

        (b) without achieving the settlement hoped for or making any recovery at all, taking into account the fact that the value of the client's claim was only in the region of $5000.

13. The circumstances in which an appellate court can interfere with factual findings are, of course, limited. In *Jaquille Stowe-v-R* [2016] Bda LR 44, I described the governing principles as follows:

> "*11. It is well recognised that an appellate court can draw its own inferences from facts found by the trial judge but can very rarely substitute its own primary findings based on the evidence of witnesses whose credibility the appellate court cannot properly assess. Mr Quallo referred the Court to two cases which illustrated these uncontroversial general propositions. In Benmax v Austin Motor Co Ltd [1955] AC 370 at 373, there is a statement which is both illustrative of these principles and the additional question (raised in Ground 3) as to what findings a trial judge ought to record. Viscount Simonds stated:*
>
> > *'This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact , and I would say it would be difficult to for it to do so where the finding turned solely on the credibility of a witness But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as*

relevant be found as specific facts) to negligence ….A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. …'

12. Express reliance was placed by Mr Quallo on the following passage in the judgment of Lord Scott in Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands [2008] UKPC 31 where, after approving Benmax, he stated:

'2 … An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal …"

14. The first key issue (whether or not an estimate was given) requires a primary factual finding while the second (whether the time billed was reasonable in any event) is essentially a question of inference from the primary facts actually found (i.e. that the Respondent billed for the time he actually spent at the agreed rate of $600 per hour). Mr Simons reluctantly agreed that, if I found that the trial judge had adopted the wrong approach to the evidence, it would in general terms be preferable for this Court to substitute its own primary findings for any facts not found below rather than remitting this longstanding case for retrial. In these circumstances, and bearing in mind that the question of the estimate is essentially a matter of construction of two documents, I am satisfied it is appropriate for me to make my own primary findings on this issue. The two documents are the following:

(a) following the December 11, 2013 meeting between the parties when the Respondent advised the Appellant to pursue a settlement of her claim (by the Respondent's own account with a view to saving costs), by letter dated January 2, 2014, the Appellant wrote her lawyer in the following terms:

"*Further to our conversation of December 11th 2013, could you send me a total for the legal expense on the above-mentioned case? Kindly include the cost for the preparation and interview with Paul Harshaw; because, I do not want to receive any additional charges, from your office, after a settlement has been reached*";

(b) by letter dated January 14, 2014, the Respondent replied:

"*Please be advised that Mr. Michael Smith estimates the costs for preparation and interview with Paul Harshaw to be approximately 2.5 hours at $600 per hour provided the interview does not extend into a period of more than two hours.*"

15. In hindsight it seems obvious that the Appellant was asking for an estimate of the total costs required to conclude the case by way of settlement. The Respondent, on the other hand, responded to this request by simply providing an estimate of the costs of preparing for and attending one meeting which it was hoped (but was not guaranteed to) generate a settlement. As I noted in the course of the hearing, it is clear from the oral evidence which was adduced at trial that each communication was misunderstood by its respective recipient. In an ideal world a face to face meeting would have taken place to bring clarity to the position. There was no meeting of minds, and no express modification of the Respondent's retainer restricting his ability to charge for the time he actually spent on the Appellant's case.

16. On the other hand, the Appellant's January 2, 2014 letter (received by Smith & Co. on the same date) made it clear that she was not the archetypal insistent client pressing a lawyer to go forward regardless of costs and only complaining about the costs when a final bill was received or an unsuccessful outcome obtained. Her letter demanded not just an estimate of the most optimistic and modest costs exposure, but also an estimate of the worst case scenario. She complained in her evidence that she was "summoned" to another meeting in January 2014 when she was again simply told that she should settle. According to the bill she received dated January 31, 2014, that meeting took place on January 30, 2014. This was an opportunity for both sides to clarify costs issues which was seemingly spurned. The January 31, 2014 bill from the Respondent showed an outstanding amount of $1500 from previous bills and sought an additional $1980 for work done in January, which included a January 28, 2014 letter to Flamingo Court Limited's counsel proposing settlement discussions.

17. The Learned Senior Magistrate in his Judgment queried why the Appellant did not at this juncture dispute these bills. In my judgment it seems obvious that the Appellant was 'between a rock and a hard place' and was desperate to extricate herself from the battlefield without completely capitulating. She may not have explicitly challenged the billing until she was sued months later, but before she received a further billing the Appellant took two steps which can only be fairly viewed as attempts to stop the haemorrhaging of legal costs. Following a Magistrates' Court hearing on February 5, 2014, the Appellant acting in person on February 11, 2014 abandoned her appeal against an interlocutory ruling in her case against Flamingo Court Limited dismissing her claim against individual defendants. On February 17, 2014, she wrote a letter to Smith & Co instructing them not to communicate further with Flamingo Court Limited after February 28, 2014 suggesting that the company's strategy was to "*rack up legal costs on both sides*". She copied this correspondence to the company's attorney, an extraordinary step which understandably bemused attorneys Canterbury Law Limited. Further, Mr Smith in his own evidence-in-chief acknowledged that the purpose of adopting the settlement strategy agreed at the December 11, 2013 meeting was to "*avoid legal expenses*".

18. A clear picture eventually emerges from the evidential mist of a demanding client with unrealistic expectations about how easy it was to negotiate a settlement against a company which was willing to advance a robust defence to her claim. The Appellant was represented by a lawyer motivated to achieve a successful outcome and seemingly focussed more on the result that on protecting himself against subsequent complaints of excessive billing. This is a quandary that any lawyer who has

represented emotionally-driven clients of limited means in 'small-money' cases recognises only too well. This is a quandary which in a jurisdiction which has limited civil Legal Aid and no contingency fee system is likely to recur over and over again, in a myriad of different particular circumstances. What it is reasonable for a lawyer to bill in these circumstances requires a more critical examination than might be the case when a lawyer can reasonably rely on general instructions to advance a case based on the agreed rate of charges.

19. In my judgment when a client has demonstrated an anxiety about costs and sought an estimate of how much it will cost to close a case that has obviously become uncommercial, a lawyer ought only to be able to rely on a presumption of reasonableness in relation to his fees in the following circumstances. Where the client is given a written warning that their claim is uncommercial and that legal costs will likely far exceed the maximum recovery sought, the client should only be able to challenge bills on an item by item reasonableness basis. In the absence of such an unequivocal warning, the courts will generally be at least entitled (if not obliged) to look at reasonableness in more global terms. This approach may appear overly consumerist in the local typically pro-creditor context. It also may seem somewhat harsh to the Respondent in the present case. Mr Smith clearly acted with consummate propriety in encouraging the Appellant to pursue settlement at an early stage and in lawyers' terms his billings appear to be quite modest in purely abstract terms. It is also clear nonetheless that Mr Smith's health was compromised as a result of an event over the Christmas/New Year period and it is difficult to avoid the suspicion that this may have temporarily blunted the sharpness of his case management skills in the context of dealing with a person who it appears to me must have been a very challenging client.

20. Nevertheless, I find that the correct approach to reasonableness of the fees claimed was a global one, in all the circumstances of the present case, most significantly taking into account the fact that the client in the present case sought an estimate of costs to close her case and was never expressly warned that the costs <u>from that point</u> could exceed that minimum estimate by as much as 300%.

21. The agreed facts based primarily on the Respondents' billing were as follows:

    (1) as at December 31, 2013, the Respondent had billed a total of $3675 and the Appellant had paid $2175 leaving a balance outstanding of $1500;

    (2) having given an estimate of settlement costs of $1500 on January 14, 2014, the Respondent on January 31, 2014 sent out a bill for a further $1980. This brought the total amount billed to $7635 and accordingly it was or ought to have been obvious to the Appellant that the case could not be settled for $1500. The balance outstanding at month end was $3480;

    (3) the final bill dated February 28, 2014 was for a further $4031 which, including the unpaid $3480 balance left a total of $7511 due (excluding interest). By this

point the Appellant had effectively pulled the plug on the retainer. However, the final result was that she had been billed a total of $9686 (ignoring interest);

(4) after an estimate of $1500 was given by the Respondent in response to the Appellant's request in early January for the estimated costs of a settlement, a further $6011was billed.

22. It is noteworthy that the Learned Senior Magistrate, in assessing the reasonableness of the fees on an item by item basis, felt compelled to reduce the Respondent's claim by $1275, although just under half of the deductions related to the bills which the Plaintiff had already paid without complaint. Viewing this deduction globally, it reduces the total bill to $8411, which is still more than 65% in excess of the value of the sum the Respondent sought to recover by way of settlement and failed to recover at all. The billing history together with the supporting documentation strongly supports the following inference in the peculiar factual matrix of the present case. The Respondent ought to have given the Appellant a written warning when sending out the January 31, 2014 bill that it was possible the costs of pursuing even an unsuccessful settlement bid would inevitably far exceed the January 14, 2014 estimate and inviting her to elect either to instruct Smith & Co to continue or to instruct the firm to cease acting. I have little doubt that the failure to issue such a warning may well have been contributed to by the force of the Appellant's own desire to achieve justice, but properly viewed her strong sense that she had been the victim of injustice only undermined her capacity to make sensible judgments about the financial implications of her instructions.

23. It is true, as I have already noted above, that it ought to have been obvious to the Appellant once she received her January 31, 2014 bill that the $1500 estimate had already been overshot. However, it is doubtful that the Appellant would have expressly agreed to incur an additional $4031 in legal expenses if told that this level of additional costs was on the cards in circumstances where no specific settlement offer had been made by her opponent and there was no basis for anticipating an early settlement. Clients (particularly individuals involved in family or residential property disputes) will often be preoccupied with their case, emotionally charged and give the impression that they are not unhappy about being billed whatever it takes to achieve a positive outcome. Mr Smith's evidence suggests that this may have occurred in the present case). However, the Appellant's written request dated January 2, 2013 for an estimate of settlement costs took this case outside of the norm and, complaints or not, the Appellant's conduct after she apparently received the January 31, 2014 bill clearly signalled an anxiety about legal costs on her part. Most notably:

(a) she copied her letter of February 17, 2014 addressed to the Respondent to Canterbury Law Limited (making it clear that unless her offer was accepted by February 28, 2014, Smith & Co had no further authority to act on her behalf; and

(b) the following the day the Appellant emailed the Respondent, advising him that she had contacted her opponent's attorneys in terms which

betrayed an unrealistic view of her ability to recover her own costs in full:

> "*Hello Mr Smith,*
>
> *Please see attached letter regarding the offer to settle. Flamingo Court has 2 weeks to accept. If Paul Harshaw insists on claiming cost against me, I will claim my cost against Flamingo Court which includes your legal fees as well as cost for the many hours that I have spent on this matter*."

24. An important factor relevant to any fair assessment of the global reasonableness of costs billed after the January 14, 2014 estimate is the value of the Appellant's claim against Flamingo Court Limited. In her closing submissions she described the claim as initially being in the region of $5000. What is pivotal is the value of the claim which she instructed her attorneys to attempt to settle. On January 15, 2014, she wrote Smith & Co. giving particulars of a claim (excluding legal costs) of $8,675. This was clearly grossly inflated and unrealistic in settlement terms, because the settlement offer eventually made by the Respondent on her behalf on February 4, 2014 was the net amount of $5175. So ignoring the fees billed prior to January 14, 2014 altogether, the Appellant was billed roughly $6000 after the $1500 estimate was given, an excess ($4500) amounting to three times the initial estimate.

25. That estimate was meaningless by the end of January, 2014. The Respondent himself did not suggest in evidence that the Appellant was verbally warned when they met on January 30, 2014 that subsequent events had made the original estimate redundant and that she was in reality facing costs far in excess of that. The post estimate amount billed was, looked at more broadly still, more than the $5175 opening settlement figure which the Respondent was seeking to recover for the Appellant.

26. The omission which occurred on the Respondent's part was an understandable error of judgment made by a lawyer who was otherwise acting quite properly and clearly had his client's best interests at heart. The difference may seem small in lawyer's terms but no doubt is far from trivial from the perspective of a client with limited means who initially commenced her own compensation claim as a litigant in person.

27. In these circumstances I feel obliged to find that a substantial miscarriage of justice has occurred by the decision of the Magistrates' Court reducing the legal costs found to be recoverable by only $1275 by reference to an item by item reasonableness assessment. I specifically find that it was unreasonable to bill the Appellant more than twice the $1500 estimate without warning her of a sharply escalating costs tariff after the January 14, 2014 $1500 estimate was sent out on January 14, 2014.

28. It follows that the Respondent's claim which includes $6000 after January 14, 2014 should be reduced by $3000.

Conclusion

29. I accordingly allow the appeal and vary the judgment in favour of the Respondent by reducing the amount awarded from $6,206.27 to $4,781.27 ($7,781.27-$3,000 = $4,781.27).

30. Unless either party applies within 28 days by letter to the Registrar to be heard as to costs, the Respondent shall pay the Appellant's costs of the appeal which I summarily assess at $150[2].

Dated this 6th day of January, 2017_____
IAN RC KAWALEY CJ

[2] The Appellant incurred a $50 filing fee charge in connection with her Notice of Appeal which in principle she is entitled to recover. A litigant in person may also recover a maximum of $50 per hour in a complicated Supreme Court case for preparation and hearing time. This appeal appears to me to be a $25 per hour level case. The appeal hearing lasted just over 1.5 hours and 2.5 hours seems a reasonable amount of preparation time. My summary assessment is computed as follows: $25 x 4 + $50=$150.