In The Supreme Court of Bermuda

CIVIL JURISDICTION
2013: No. 126

BETWEEN:

MICHAEL PEARMAN

PLAINTIFF

-and-

(1) TERRY FRAY
(2) KENDAREE FRAY

DEFENDANTS

Before: **Hon. Jeffrey Elkinson, Assistant Justice**

Appearances: **Mr Cameron Hill, Westwater Hill & Co, for the Plaintiff**

Mr Martin Johnson, Martin Johnson, for the 2nd Defendant

Date of Hearing **24 March2021**

Date of Jugment **26 March 2021**

JUDGMENT

Review of Taxation

Elkinson AJ:-

1. This application is for a review of the Assistant Registrar's taxation of three bills of costs concerning litigation which commenced in 2013. The trial of the matter in the Supreme Court concluded in 2017 and the taxation took place nearly 2 years after that. This application for Review is being heard nearly two years after that.

2. The Review takes place further to the provision in the Rules of the Supreme Court 1985, Order 62 Rule 35 which sets out

> ***62/35 Review of Registrar's decision by a Judge***
>
> *35 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. There had been various changes of attorneys over the years for the Plaintiff and it is only Mr. Martin Johnson on behalf of the second defendant who remains as an attorney who has been in the case from the outset.

4. In relation to the three bills of costs which were taxed, there are challenges by the second defendant to various items claimed by the Plaintiff which the Assistant Registrar allowed and challenges by the second defendant to the items which the Assistant Registrar disallowed from her bill of costs. From the submissions made by Mr Johnson on her behalf, two questions of principle were raised.

5. The first raised concerns about the certificate on the bill of costs presented by the Plaintiff's then attorney, Benedek Lewin. They were certifying not only for their own fees but also for the fees of

the previous attorneys, Trott and Duncan. They had purported to certify, in accordance with the requirement at Order 63 Rule 29 (5) (b) (iii), that the costs being claimed in the bill of costs do not exceed the costs which the receiving party is required to pay to his firm. As set out in that part of the Rule

> *"(iii) which contains a certificate, signed by that attorney or, if the costs are due to a firm, by a partner of that firm, that the costs claimed therein do not exceed the costs which the receiving party is required to pay him or his firm."*

6. The certificate on the Plaintiff's bill of costs for taxation stated as follows: –

> *"I, Peter Sanderson, an attorney at Benedek Lewin Limited, hereby confirm that this bill of costs was produced from invoices rendered by Trott and Duncan to the Applicant and, to the best of my knowledge, do not exceed the amounts payable by him."*

7. Trott and Duncan had billed various amounts, being the usual items one would expect to see. By way of example, there were charges for attendance at the hearing, responding to various emails, conferences with client and preparation for trial.

8. I find that the certificate on the bill of costs was not in appropriate terms. The certification states that the bill of costs was produced from invoices rendered by the previous law firm to the client and then caveats the very confirmation which is required by the Rules to be made. The certification is important as it ensures that the losing party does not pay more than the winning party actually paid to his attorneys. In this instance, the certification is not satisfactory having regard to the caveat. Further, it should have been signed by all law firms to whom the paying party was indebted and the certificate should have been in the form as specified by the Rules, namely that

".. the costs claimed therein do not exceed the costs which the receiving party is required to pay him or this /her firm."

9. However, Mr. Johnson was forthright in informing the court that this point had not been taken before the Assistant Registrar during the taxation of the bill of costs in July 2018. I find it inappropriate at this stage, given the passage of time and in particular that the point was not taken below, to now disallow the Plaintiff his taxed costs for this reason.

10. The other point of principle raised by Mr. Johnson on behalf of the second defendant was that witness statements, as opposed to affidavits or affirmations, do not require the $15 revenue stamp. Mr. Hill on behalf of the Plaintiff was prepared to concede that this was correct; that where a party has inappropriately expended money on revenue stamps, that expense cannot be recoverable from the losing party. However, Item 50 in the Schedule to Order 62 (Rule 32) Part I, referencing fees payable into the Registry of the Supreme Court sets out that on filing *"an affidavit or any other document"* the fee is $15. I do not see why a witness statement would not attract this fee as it fits appropriately under this Item. To make good this conclusion, I note that an affirmation is not referred to explicitly in Item 50 but one would expect, and the practise is, to affix $15 of Revenue Stamps to it. A witness statement is appropriate to be included in this Item and so I find there is no reason to disallow this sum

11. In respect of the bills of costs and the complaints made by Mr. Johnson in respect of them, I shall deal with each of those bills of costs in turn.

12. In relation to the costs awarded to the Plaintiff on the application for leave to appeal, Mr. Johnson challenged this bill which amounted to $3425, with an additional sum of $100 for preparing the bill of costs. Mr. Johnson sought to persuade me that various items on the bill were not appropriate to be claimed, such as a notice of change of attorney. He submitted that the defendant is not responsible for any change of an attorney for the Plaintiff. However, I am satisfied that if this is an event in the course of the litigation then there is no reason why the successful party cannot claim those costs. In stating this, I am guided by Order 62 Rule 12 which establishes that the test to be applied on the taxation of costs, whether on the standard or indemnity basis, is that of reasonableness.

13. There is further guidance set out in the Schedule, Rule 62 Rule 32 Part II of the 1985 Rules

"Amount of Costs

(1) The amount of costs to be allowed shall (subject to rule 18 and to any of order of the Court fixing the costs to be allowed) be in the discretion of the Registrar.

(2) In exercising his discretion the Registrar shall have regard to all the relevant circumstances, and in particular to—

(a). the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b). the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the attorney;

(c). the number and importance of the documents (however brief) prepared or perused;

(d). the place and circumstances in which the business involved is transacted;

(e).the importance of the cause or matter to the client;

(f).where money or property is involved, its amount or value;

(g).any other fees and allowances payable to the attorney in respect of other items in the same cause or matter, but only where work done

in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question."

14. The Assistant Registrar would no doubt also have been guided by the authority of Golar LNG v World Nordic Se [2012] SC (Bda)2 Com and the Practice Direction contained in the English Supreme Court Practice 1999, Order 62 Part B at page 1228.

15. Mr. Johnson abandoned, appropriately, his objections relating to the bill of costs being presented out of time, incorrect hourly rate and his objection to the claim by the receiving party for a fee for consideration of the Court of Appeal Rules, on the basis that this should be disallowed as *"…attorneys are expected to know the law."*

16. In the circumstances, I reduce the amount payable under this bill of costs from $3425 to $3325, with the addition of the $100 fee for the preparation of the bill of costs for the taxation. In total, this amounts to $3425.

17. With respect to the Plaintiff's bill of costs arising from the award made by Mr. Justice Hellman in his final determination of the matter, his order for costs was that the Plaintiff only receive one-third of their costs from the 7th November 2016. This was the order the trial judge thought appropriate to make having regard to the issues raised and how matters developed at trial.

18. Mr. Johnson objected to the invoice of the expert witness, Mr. Kevin George, in the amount of $14,276. It was claimed as a disbursement. The Court was not provided with a copy of this invoice and Mr. Johnson informed the court that he had never seen the invoice, even at the taxation stage, a fact which was not in contention. Mr. Johnson's objection related to his view that costs were being claimed by the Plaintiff for Mr. George after Probate had been granted and after the conveyance of the roadway to the Plaintiff on 7th November 2016. He complained that Mr. George's opinions were given before 7th November 2016, not least that in 2015 Mr. George had formulated an opinion in respect of the disputed property based on the documents which the second

defendant had provided as an exhibit to an affidavit of 8th October 2014. Further the Judge had ordered that the costs were not to include any relating to Probate.

19. In the absence of a detailed breakdown of Mr. George's work, I find that it is appropriate, given the submissions, to consider the reasonableness of the charge. In the circumstances, given that Mr. George did give evidence at the hearing and that Mr. Justice Hellman referred to the benefit he had from his expert evidence in respect of conveyancing practice, I am minded to allow his costs but to make a reduction of 25% in respect of that charge.

20. Mr. Johnson also complained of duplication of many of the items which were included in the bill of costs. Having reviewed the bill of costs I am satisfied that the Assistant Registrar properly exercised his discretion. I was not provided with a copy of the bill of costs which the Assistant Registrar had actually taxed but only a copy which counsel provided the Plaintiff and the Court from his own notes of the hearing, the accuracy of which was not challenged. Having reviewed this, I allow $21,160 for fees and $3680.67 for disbursements, amounting to $24,840.67 together with the $100 taxing fee, making $24,940.67.

21. In dealing with the second defendant's own bill of costs, the trial judge had made an order that the second defendant have her costs arising out of amendments made by the plaintiff, being the costs of and incidental to those amendments. The other costs awarded to the second defendant were the costs of the second defendant’s strike-out application and costs for directions.

22. In approaching this bill of costs, which were claimed in the amount of $132,405, it is clear that the Assistant Registrar did not consider this sum reasonable as he taxed it down to $40,820. The Assistant Registrar in a written ruling acknowledged the research which Mr. Johnson had carried out in the matter, as highlighted by the trial judge, and he did allow additional time which he considered fair and reasonable. Given that the second defendant had a very limited order for costs, mainly the costs arising out of and incidental to the defendant’s amendments, I find that this did not open up the floodgates to allow Mr. Johnson to argue, as he sought to, that because of the amendments by the Plaintiff he had to face a new case and so he was entitled to claim all the costs

up to and including trial. He submitted that this was the work which he had to do which was "incidental" to the amendment.

23. I am satisfied that when such an order is made that it is never the intention of the Judge to give the losing party a right to claim costs right up to and including the trial of the matter. To suggest that those costs are incidental to the amendment would make a nonsense of the costs regime.
24. There was also an objection to the time spent in communication with a witness and applying for the witness to give her evidence remotely. It was submitted that because the Judge rejected this witness's evidence, that those costs should be disallowed. On analysis of the Judgment, it was not that the Judge disallowed her evidence but that he found the witness's evidence was not sufficient to assist the Plaintiff in establishing ownership of the disputed area. Her evidence was accepted for what it was but just because it didn't assist the Plaintiff to succeed on that point does not seem to me to be a basis to exclude the attorney's fees relating to her attendance unless there was a specific order from the trial judge. In reading his judgment, it is clear that the Judge had in mind that the Plaintiff had failed in certain claims and that was one of the bases for him to order that the Plaintiff only get one-third of his costs.

25. A conundrum which Mr. Johnson presented to the court was his objection to the charge for stamps put on affidavits prior to the 7th November 2016, the date before which Plaintiff could not recover costs according to the Judge's order. The affidavits were used post 7th November 2016. I am satisfied that if the affidavits were used subsequent to the 7th November 2016, it must be right that the costs of the stamps are recoverable as a disbursement on taxation. The affidavit could not be presented to the court unstamped so whether the stamp was put on before or subsequent to the 7th November, as long as the affidavit was utilized after that date, the cost of the stamps is recoverable.

26. I reviewed the Assistant Registrar's written judgment of 1st May 2019 which, while relatively brief, was helpful when read in conjunction with a review of the bill of costs. Having dome so, I can find no basis for interfering with the exercise which the Assistant Registrar carried out and his conclusions and the amounts that he taxed off.

27. In the circumstances, I confirm that the amount due to the second defendant from the plaintiff is in the amount of $40,920 (this includes the taxing fee of $100).

28. Mr. Hill in his submissions also made the point that it was unfortunate that the trial judge was not the one to review the decision of the Assistant Registrar as it went without saying that Mr. Justice Hellman had heard and seen the witnesses and fully understood the nuances of the litigation and the orders which he had made as regards the costs. I agree that this would have been preferable and would normally be the practice but in the circumstances where the trial judge is no longer available to hear the matter, there is no alternative but to have the matter dealt with by another judge.

29. Mr. Hill requested, with regards to any order that the court makes on the Review, that there be a stay of execution for six months so that the plaintiff may be in a better position to discharge whatever is owed given that the second defendant's bill of costs will exceed those of the plaintiff. The second defendant, Mrs. Kendaree Fray, addressed the court directly as to why a lengthy stay was not appropriate, not least given the length of time that the litigation had been going on. She was prepared to allow some time but not six months. Having considered the matter, I order that neither party can enforce the amounts due and owing pursuant to the bills of costs before 30th June 2021.

30. In relation to the costs of this application, the parties agreed that there would be no order as to costs.

Dated this 26th day of March 2021

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JEFFREY ELKINSON
ASSISTANT JUSTICE