In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 391

BETWEEN:

LINDA SHARON SWAN **Plaintiff**

-v-

GORDON RICKY WOOLRIDGE

TRADING AS PHOENIX LAW CHAMBERS

Defendant

JUDGMENT

(in Court)[1]

Date of trial: January 29, 2014

Date of Judgment: February 14, 2014

Ms. Stephanie Hanson, Conyers Dill & Pearman Ltd., for the Plaintiff
Mr. Gordon Ricky Woolridge Jr., Phoenix Law Chambers, for the Defendant

[1] In order to save costs, the present Judgment was circulated to the parties without a hearing to formally hand down judgment.

Introductory

1. The Plaintiff was the Defendant law firm's first client when it was established in early 2008. The retainer commenced in December 2007 when the firm's principal, Mr. Woolridge, was leaving another firm and concluded in or about January 2011 when the final bill was rendered. She was represented in a civil property dispute before the Supreme Court and Court of Appeal which was not resolved in her favour. She struggled to pay her legal fees and was required to take out a loan. After the dust from the litigation had settled and after having paid over $170,000 to the Defendant, she began to investigate the basis on which she had been billed. She formed the view that she had been charged an excessive amount of interest and on October 25, 2012 she commenced the present action seeking to recover approximately $65,000 which she contended she had overpaid.

History of proceedings

2. On November 29, 2012, the Plaintiff obtained judgment in default of appearance. A Writ of Execution was taken out against the Defendant on January 21, 2013. This prompted the Defendant to respond to the action and apply by Summons dated January 25, 2013 to set aside the Judgment and Writ of Execution. I granted the relief sought by the Defendant on February 14, 2013 when trial directions were also ordered on the basis that the Defendant should be allowed to defend the case on the merits but that the Plaintiff could be compensated for any delay by an expedited timetable.

3. Leave to adduce expert evidence on the Plaintiff's account with the Defendant was given with a deadline for service of March 31, 2013 for the Plaintiff and April 30, 2013 for the Defendant. On February 28, 2013, the Defendant filed a Defence and Counterclaim which:

    (a) averred that the Plaintiff had agreed to pay interest on sums due pursuant to the contract of retainer at the rate of 5% per calendar month; and

    (b) claimed (principally) unpaid fees in the amount of $24,374.77 plus interest thereon at 5% per calendar month pursuant to contract.

4. In her Reply and Defence to Counterclaim, the Plaintiff denied agreeing the interest rate claimed by the Defendant and averred that the applicable rate was 5% per year payable monthly. This was the rate she thought she was being charged by the Defendant and in the absence of agreement the rate prescribed by law under the Interest and Credit Charges (Regulation) Act 1975. The rate charge was a fee which was neither fair nor reasonable as required by the Barristers Code of Professional Conduct 1981.

5. The Defendant failed to comply with the deadline of April 30, 2013 for serving its expert evidence and on May 16, 2013 I ordered that unless the report was filed within 28 days the Defence would be automatically struck out. The Defendant failed to comply with the Unless Order and, on August 8, 2013, I made a further Unless Order providing the Defendant with another 28 days within which to serve its expert evidence in reply to the Plaintiff's expert report. I awarded the Plaintiff the costs of the action to that point which I summarily assessed at $7500 and ordered should be paid within 28 days. On September 17, 2013 the Defendant filed a report from its own accountant but no independent expert evidence at all. On September 19, 2013, I gave directions for the matter to be set down for trial and gave the Defendant until October 31, 2013 to pay the Plaintiff's costs in default of which the Defence and Counterclaim would be struck out.

Issues for determination at trial

6. At trial the Plaintiff gave evidence and her expert was not required to attend for cross-examination. The Defendant's former Office Administrator, Ms. Romelle Woolridge, gave evidence for the Defendant. The main issue in controversy was whether or not the Defendant was entitled by virtue of an agreement with the Plaintiff to charge 5% interest per month or 60% per year (possibly as much as 69% on a compound basis).

7. Krys Global's March 26 2013 Report prepared by Patrick McPhee concluded that if the Plaintiff was only liable to pay interest over the agreed period at 5% per annum, she had overpaid the Defendant $63, 498.60 as at January 17, 2011. Interest due to her to March 31, 2013 at the rate of 7% was calculated at $8,459.31.

8. This expert evidence was not contradicted by any other independent expert evidence. It is important to note, however, that it was common ground between the Plaintiff's expert and the Defendant's accountant (whose report by its terms was not intended to be relied upon by anyone other than the Defendant) that the Plaintiff had paid the Defendant in excess of $170,000 of which over $60,000 was attributable to interest.

9. In the Defendant's favour it must be noted that it was common ground that interest was not charged at the very beginning of the retainer and was not charged for a considerable period after the end of the retainer.

Findings: did the Plaintiff agree to pay interest at the rate of 5% per month?

10. I find that the parties did not enter a binding agreement that interest would be payable at the rate of 5% per month on the Defendant's accounts for the period April 1, 2008 to December 31, 2009. Mr. Woolridge in cross-examination suggested to the Plaintiff that she well understood he was charging interest at the rate of 5% per month in light of her delinquency based on a conversation they had. He also suggested that if she was as unfamiliar with interest rates as she claimed to be, she ought to have easily

seen from invoices received that the rate of interest she was being charged was 5% per month and not 5% per year payable monthly as she claimed to have understood to have been agreed.

11. The Plaintiff testified that in her experience references to interest rates in the business world are invariably to annual rates of interest. To my mind it is a notorious fact that interest rates are ordinarily calculated on an annual basis even if they are paid monthly. Unless she was told the interest rate was 60% per annum, the Plaintiff would quite reasonably have been entitled to assume that 5% per month meant 5% per annum payable on a monthly basis.

12. Based in part on the Defendant's Office Administrator's evidence, I find that the Plaintiff was under considerable financial stress flowing from the litigation and over and above her legal fees when she was paying the relevant bills. It is entirely plausible that in these circumstances she struggled to pay as much as she could, not querying the amounts claimed until realised what the scale of her payments was as demands for further payments kept coming. In addition, I find that the Plaintiff did not receive regular bills or statements from which she could easily ascertain either (a) how much she had paid altogether as against how much money was still outstanding, or (b) what interest rate was being charged.

13. I have no difficulty in finding that the Plaintiff did not consciously enter into an agreement to pay 60% simple interest per annum (or more on a compounded basis). Clear evidence would be required to support a finding that she entered into such an extraordinary bargain. The Defendant's case was that all that was verbally agreed was "5% per month". The limited documentary evidence did not support a finding that the parties agreed a 60% per annum interest rate paid on a monthly basis.

14. The Plaintiff denied signing a written 'Fee Agreement'; an unsigned copy was produced by the Defendant. But assuming in the Defendant's favour that she did sign the standard fee agreement, objectively read and construing any ambiguities against the Defendant who prepared the document, I would have been bound to conclude that the agreement was that interest would be at the annual rate of 5% paid on a monthly basis. Clause I of the standard agreement states: "…*Client understands that an interest rate of 5% will be charged on a monthly basis on all outstanding balances.*"

15. On February 2, 2011 she did receive an atypical Reminder Notice from which she could have deduced that interest was being charged at 5% per month if she had carried the necessary arithmetical calculations. However, she may well not have carried out such calculations having received an extremely misleading letter dated December 13, 2009 enclosing other invoices which stated: "*May we kindly remind you that under the Bermuda Bar Council guidelines Chambers charge 5% per calendar month on any outstanding balances*". I accept Ms. Woolridge's evidence that she attended a meeting with a representative of Bar Council prior to this letter

being sent out at which the firm ascertained it was entitled to negotiate whatever interest rates it wished with its clients because Bar Council had not prescribed what interest rates lawyers' could charge. Although the letter accurately stated the interest rate the Defendant was being charged, it was misleading because it incorrectly implied that the rate itself was approved by Bar Council and made it all the less likely that the Plaintiff would either (a) check the interest calculations to the extent that invoices rendered made it possible to do so, or (b) understand that the applicable rate was in fact 60% per year (assuming simple interest and not compound interest was being charged), not 5% per annum payable each calendar month.

16. In summary, the parties never reached any binding agreement on the interest rate payable by the Plaintiff on outstanding bills rendered by the Defendant.

17. In light of this finding it is unnecessary to consider the Plaintiff's alternative arguments to the effect that any agreement to pay 60% interest per annum would have been unlawful because, *inter alia*, it contravened the Barrister's Code of Professional Conduct 1981 and/or the Consumer Protection Act 1999.

18. It follows that the Defendant's Counterclaim for further outstanding fees must be dismissed.

Findings: the applicable interest rate

19. Ms Hanson submitted that in the absence of an agreement as to interest, the rate the Defendant was entitled to charge was governed by the following provisions of the Interest and Credit Charges (Regulation) Act 1975:

> ***"Interest rate where none provided***
> *3 Whenever any interest is payable —*
>
> *(a) by agreement of the parties under a contract governed by Bermuda law; or*
>
> *(b) by law,*
>
> *and no rate is fixed by such contract or by law, the rate of interest shall be 2% per annum below the statutory rate.*"

20. Section 1 of the 1975 Act provides that 7% per annum is the statutory. Mr. Woolridge did not challenge this argument.

21. Accordingly I find that in the absence of an agreement between the parties as to the applicable interest rate, the Defendant was entitled to charge 5% per annum on outstanding balances.

Findings: amount recoverable by the Plaintiff in respect of overpayments of interest

22. The Plaintiff's unchallenged expert evidence calculated the amount due to the Plaintiff in respect of overpayments if interest was properly payable at the rate of 5% per annum instead of 5% per month or a simple interest rate of 60% per annum as being $63, 498.60 as at January 17, 2011. I find that she has proved that she is entitled to recover this sum.

23. Should pre-judgment interest be recoverable on this sum from the date of the last payment made by the Plaintiff (January 17, 2011)? The Defendant has not advanced any or any sufficient reasons as to why pre-judgment interest ought not to be recoverable. The normal rule appears to be that pre-judgment interest is payable on sums found to be due from the date that the payment obligation arose: *Knight-v-Warren* [2010] CA (Bda) 13 Civ at paragraphs 32 to 40. I have considered whether the date from which interest should run should be postponed because the state of the account between the parties was unclear, but on balance the Defendant was obliged to render clear accounts and enter into clear agreements on interest with its clients. The Plaintiff ought not to be deprived of interest due to overpayments made through no fault of her own, save that she chose to become the Defendant's first client at a time when the firm's billing systems were perhaps not yet fully evolved.

24. The Plaintiff's expert calculated her interest entitlement as $8,459.31 to March 31, 2013. I find that the Plaintiff is entitled to recover pre-judgment interest at the rate of 7% on the sum of $63, 498.60 until judgment and thereafter at the same rate on the judgment debt until payment.

Conclusion

25. The Plaintiff is awarded judgment in the sum of $63,498.60 and pre-judgment interest thereon at the rate of 7% per annum until judgment, together with interest on the judgment debt at the same rate until payment. The Defendant's Counterclaim is dismissed. Unless either party applies to be heard as to costs within 21 days of this Judgment, the Plaintiff shall be awarded the costs of the action to be taxed if not agreed on the standard basis.

Dated this 14th day of February, 2014_____

IAN R.C. KAWALEY CJ