[2013] JMSC Civ. 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 04965

BETWEEN	**ROGER ALLEN**	**FIRST CLAIMANT**
AND	**DAUNETTE ALLEN**	**SECOND CLAIMANT**
AND	**VICTOR SPENCE**	**FIRST DEFENDANT**
AND	**K.E.S DEVELOPMENT COMPANY LIMITED**	**SECOND DEFENDANT**
AND	**CAPITAL & CREDIT MERCHANT BANK LIMITED**	**THIRD DEFENDANT**

Marc Jones for the appellant instructed by Henlin Gibson Henlin

Harold Brady for the respondent instructed by Brady and Co

FEBRUARY 21 AND 27, 2013

APPEAL FROM DETAILED ASSESSMENT OF COSTS BY REGISTRAR – RULE 26.9, 65.26, 65.27, 65.28 OF THE CIVIL PROCEDURE RULES

SYKES J

[1] This is an appeal brought against a detailed assessment of costs conducted by the Registrar of the Supreme Court. This is permitted by rule 65.26 of the Civil Procedure Rules (CPR). The rule states that either the receiving party (to whom costs have been awarded) or the paying party (against whom costs have been awarded) 'may appeal against a decision of a registrar in the taxation of proceedings.'

[2] What are the guiding principles in appeals in these kinds of cases? In the view of this court, it is important to recall that the assessment of costs is not capable of exactness. It is largely a matter of judgment on the part of the taxing officer, who in this case, has far more experience than perhaps many if not most of the judges of this court. This is what she does daily. Thus, the principle is that unless it can be shown that she made an error of principle, or the interpretation of some legal principle, or she omitted material considerations or included immaterial considerations appeals against her decision should not be entertained. This is the principle gleaned from the cases referred to below.

[3] An appeal is not to be used to secure a second review of the bill of costs. Great regard should be had to the competence and practical experience of the Registrar in this area. Unless an error of principle, interpretation or serious error in the exercise of the discretion, appeal against the Registrar's taxation is unlikely to be successful. As Buckley J pointed out in **Mealing-McLeod v The Common Professional Examination Board** [2000] 2 Costs LR 223; All England Official Transcripts (1997 – 2008) (delivered March 30, 2000), an appeal is not to be used 'to add a little bit here or knock off a little there.' His Lordship added that 'in the absence of some sensible and significant complaint' permission to appeal should not be granted. In Jamaica, there is no need to seek permission to appeal but the sentiment expressed, would, in the view of this court, apply to appeals from the Registrar's taxation of costs.

[4] A view similar to that expressed in paragraph one of these reasons for judgment was stated by Lawrence Collins J in **Orwin v British Coal Corporation and others** [2003] EWHC 575 (Ch). In that case, the costs judge reduced counsel's fees from £15,500.00 to £5,000.00. Fees for settling the chronology and skeleton arguments

were also disallowed. An appeal followed. His Lordship dismissed the appeal because '[t]here was no error of principle, or other error which justified the intervention of the appeal court.'

[5] Simon J put the matter in even stronger and more definitive terms. His Lordship held that there 'is a well-established principle that this court will not permit appeals on questions which are ultimately matters of judgment for the costs judge' (**Kris Motor Spares Ltd v Fox Williams LL** [2010] Cost LR 620 [55]).

The submissions

[6] Turning now the submission in this case. Mr Jones, on behalf of the appellant, argued that

a. The reduction of fees of Queen's Counsel from $25,000.00 an hour to $18,000.00 an hour and junior counsel from $16,000.00 an hour to $14,000.00 an hour was unreasonable;
b. The reduction by the Registrar of costs to a figure below even that set by the paying party was unreasonable.

[7] The submission was that the special costs certificate for two counsel having been granted then that fact, without more, was justification for the hourly rates sought. The fact of the reduction was in and of itself proof of unreasonableness on the part of the Registrar and therefore this court should interfere.

[8] In respect of the reduction of costs below that put forward by the paying party, the developed submission was that the paying party had one figure and the receiving party had a higher figure. Therefore this was the parameter within which the Registrar ought to have operated and once she went below the floor sum of paying party, she was irrational and unreasonable.

Response to the submissions

[9] This court unhesitatingly rejects these propositions. There is nothing which binds the Registrar to the figures proposed by any of the parties to an assessment of costs. Simply to say that the Registrar should not have arrived at the figure she did is not sufficient to warrant interference with her decision. There is nothing to show that the

Registrar (and it certainly was not presented to this court) was shown evidence of what the usual rates were for Queen's Counsel and a junior where a special costs certificate was granted by the judge who heard the matter so that the amount of the reduction could be placed in some perspective. There is no dispute here over principle or interpretation of law. It is really a dispute over the exercise of a discretion which the Registrar undoubtedly had power to make the decision she did having regard to all the circumstances of the case presented to her. These courts do not set aside the Registrar's assessment merely because a judge of the Supreme Court may or would have arrived at a different decision. This appeal therefore fails.

A procedural point

[10]Before ending a word must be said about the procedure for appeal. Rule 65.28 (2) of the CPR states that the appellant, in his appeal notice '**must** (a) specify each item in the taxation which is appealed; and (b) state the grounds of the appeal in respect of **each** item' (emphasis added).

[11]When the omission to comply with the rule was brought to the attention of Mr Jones, his response was to seek refuge in rule 26.9 which provides that failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.'

[12]It is not sufficient to point to this rule. Had the matter been more complicated it might have necessitated an adjournment and in view of this court, had this been the case, a strong case for a wasted costs order against the attorney would be possible. The client could not be expected to know this kind of minutiae and its implications. An appeal against a detailed taxation, where the parties in the primary litigation are represented by counsel, would largely be attorney driven and it is he or she who would be expected to know which item is being appealed and the reasons for the appeal.

[13]This court is of the view that the procedural steps for taxation appeals must be complied with because it points the respondent and the court to the specific item in issue and the basis for the challenge. With this high degree of specificity, it may be that the respondent agrees and the appeal can be disposed of without a full hearing.

It also facilitates proper preparation by the court which contributes to greater efficiency of the hearing. Counsel are urged to adhere to the procedural guidelines.

Disposition

[14]The appeal is dismissed with costs to the respondent to be agreed or taxed.