THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 205 of 1994

CIVIL APPEAL NO. 6 of 1996

BETWEEN

FENTON AUGUSTE

Appellant

AND

FRANCIS NEPTUNE

Respondent

Appearances:

Mr. H. Deterville for the Applicant
Mr. D. Theodore for the Respondent

2002: August 08

2002: December 17

JUDGMENT

PEMBERTON J.

[1] The RULES OF SUPREME COURT, (REVISION), 1970 at Order 62 Rule 33 (1) provide that a party dissatisfied by the decision of a taxing officer in respect of the amount allowed

on any item on a review, may apply to a judge for an order to review the taxation as to that item or part of the item complained about. Under Rule 33 (5) the judge may make such order "as the circumstances may require and in particular may order that the taxing officer's certificate be amended where the review is as to amount only.

[2] By Application filed herein, the Appellant applied to the Court for the following relief:

1. The order made on the 17th day of August 2001 by the Learned Registrar awarding the Respondent costs in the sum of $49, 857.50 in suit 205 of 1994 be varied and that the sum to be awarded as costs be increased to the sum of $101,857.00;
2. The order made on the 17th day of August, 2001 by the Learned Registrar awarding the Respondent costs in the sum of $38,236.00 in Civil Appeal No. 6 of 1996 be varied and that the sum to be awarded as costs be increased to the sum of $125,236.00.

[3] This matter has had a long history, and arose out of a claim for personal injuries suffered by the Appellant. The Respondent herein was found liable to compensate the Appellant and the Court made an order that he pay the Appellant's costs both in the High Court and in the Court of Appeal. The Bills of Costs were taxed and reviewed by the Taxing Officer. The Appellant herein was dissatisfied with the decision of the Taxing Officer.

[4] Both Counsel agreed that the main contention was quantum and not the items on the Bills of Costs. There were three areas of dispute upon which Counsel approached the Court and upon which they require a determination, to wit:

1. The fees awarded to Counsel, both leading Counsel and second / junior Counsel;
2. The amount awarded under the head General Care and Conduct;
3. The figure awarded for uplift in General Care and Conduct.

The Court shall address each in turn.

[5] (a) FEES TO COUNSEL BOTH LEADING COUNSEL AND SECOND / JUNIOR COUNSEL

In deciding whether the Taxing Officer exercised her discretion in accordance with the law, the Court found guidance in the seminal text of de Smith's Judicial Review of Administrative Action by J.M. Evans (4th ed.) Sweet and Maxwell 1980 at page 285 under the rubric "Principles governing the exercise of Discretionary Powers" which reads as follows:

> In the purported exercise of its discretion it …must act in good faith, must have regard to all relevant considerations, …Nor where a judgment must be made that certain facts exist can a discretion be exercised on the basis of an erroneous assumption about those facts. These several principles can be conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. …Thus discretion may be improperly fettered because irrelevant considerations have been taken into account; …
> (Emphasis mine)

Further, even if the authority exercising the discretion has regard to irrelevant matters in arriving at its decision, it must not be manifest from the record that it was influenced by those matters. The learned author goes on at page 340 to state:

> The influence of extraneous matters will be manifest … if the authority has set them out as reasons for its order….

A tribunal in exercising a discretion vested in it by law, must ask the right questions. It must give reasons for its decision and those reasons must be evident on the face of the record. It is true that these principles apply to the exercise of administrative functions but it is the

Court's view that they apply with equal force to the exercise of judicial functions, such as the case at bar.

[6] The record reveals that in the exercise of her discretion in making the award on the level of fees to be paid to Counsel, the learned Taxing Officer used the following bases in coming to her decision:

1. "striking a fair medium between adequate remuneration to competent Counsel and the pocket of his client".
2. making of "necessary enquiries"
3. considering of "the authorities"
4. "inflation"

As far as the first item above, the question to be asked is whether the Taxing Officer ought to have been influenced by this so much so as to have it reflected on as one of the bases of her decision. Counsel for the Appellant thought that this had no place in this matter. Counsel for the Respondent argued that this remark "was not indicative of a failure to direct herself as to the correct principle but rather revealed her appreciation of the fact that the economy within which one operated and the means of the clientele were factors rightly to be taken onto account". It is the Court's view that this is not a relevant consideration. The unsuccessful party's impecuniosity is a matter for the parties themselves to take into account when settlement of the award is to take place. That is not one of the guidelines for the exercise of discretion. One can depart from the prescribed scale but not, with respect from stated principles.

[7] With respect to the second item, ought not the Taxing Officer to have revealed what these enquiries were, of whom they were made, when they were made and receive submissions on them from the parties? The question raised by the third issue is what were the authorities relied upon and how were they interpreted by the Taxing Officer. The fourth issue raised the reason for taking inflation into account and the methodology to be employed to deal with it.

[8] The task of the Taxing Officer is to award to the successful party such sums as will indemnify him against the actual sums paid to his solicitor: See HAROLD v SMITH (1860) 5 H & N 381; GUNDRY v SAINSBURY [1910] 1 K. B. 99. The Court is of the view that this does not encompass the duty to "balance the scales of justice" so as to arrive at a fair payment. The guiding principle is one of indemnity at a reasonable level. Thus in answer to the first question, the Court finds that irrelevant considerations were, not only taken onto account but also were considered so highly as to form one of the bases of the decision.

[9] Counsel for the Appellant when addressing the other three considerations, directed the Court's attention to RE GIBSON'S SETTLEMENT TRUSTS [1981] 1 All E. R. 233 per Sir Robert Megarry at page 241. The learning there is instructive to the case at bar and states:

> Before I turn to my conclusions on this review, however duty compels me to deal with one further matter. RSC Order 62 r 34(4) requires a taxing officer who has reviewed a taxation to state, on request, 'the reasons for his decision on the review, and any special facts or circumstances relevant to it. The duty to give reasons is plainly most important. The reasons are needed initially to enable the unsuccessful party to decide whether to carry matters further. If he does bring the taxation before a judge for review, the reasons are needed to enable the parties to know the propositions they have to attack or defend, and also to enable the judge to understand why the taxing officer did what he did. All this, of course, is obvious. As Sachs J. once emphasized, the duty of a taxing officer is to make a full statement of all his reasons, and this duty may well entail stating specifically whether or not the matter complained of was taken into account. Sachs J. also pointed out that a 'taxing officer is not entitled to take cover so to speak under an omnibus

> statement that he has taken "all relevant circumstances" into account; ...
> (Emphasis mine)

[10] The Court states at the outset that the other bases of the decision are not in themselves offensive or contrary. However, did the learned Taxing Officer satisfy the criteria as laid down above by merely stating baldly that "necessary enquiries" were made or that the "authorities" were "considered" or that "inflation" was "taken into account also". The Court opines that by doing this, the Taxing Officer did not go far enough in satisfying the duty to give reasons for her decision. Even if even the questions as asked above did not feature in the decision making process, the Court is of the view that the learned Taxing Officer ought to have let us into her confidence with respect to the thinking behind the indicators upon which she based her decision.

[11] (b) THE TWO COUNSEL RULE AND THE PERCENTAGE AWARDED TO SECOND COUNSEL

There is no argument as to whether the case at bar merited two Counsel. This Court shall take that as a given. The Court accepts as well that both Counsel can sit at the Utter Bar: See DEMERARA BAUXITE COMPANY LIMITED v JOSEPH R. HUNTE (1974) 21 W.I.R. 109 per Luckhoo C. at page 121:

> In this Court, under the Federal Supreme Court Rules 1959 O 2 r 3(2), it is clear that the Taxing Officer, unless the court orders otherwise, could in the ordinary way allow costs for both Counsel, even though both be selected from the Outer Bar, in which case junior counsel's fees would be 2/3 of the fee allowed to leading counsel.

What this Court understands the issue to be is what is the ratio of fees to be allowed, lead to second/junior Counsel. Counsel for the Appellant referred the Court to the case of F v F

(*Costs: Ancillary Relief)* [1995] 2 F. L. R. 702 in which Cazalet J. sitting in the Family Division had this to say:

> …Historically junior counsel's fee has been assessed as a proportion of leading counsel's fee. This was formerly two-thirds but more recently fifty percent has become the norm. …it would be inappropriate for a taxing authority to follow slavishly a set proportion of leading counsel's fees in arriving a junior counsel's fees. In a normal case, I would expect 50 percent to reflect the division of responsibility, effort and the other factors which a taxing authority is required to consider.

[12] In DONALD HALSTEAD v BANK OF NOVA SCOTIA Suit No. 136 of 1987 Antigua and Barbuda, the learned Registrar had to consider the issue of whether the two-thirds rule in respect of second/junior counsel applied in this jurisdiction. The learned Registrar in coming to her conclusion NOT to apply the rule gave as her reason that she "was not convinced that junior counsel in this matter did sufficient work on the matter to justify any larger award". What evidence did the learned Taxing Officer in the case at bar have to consider?

[13] Counsel for the Appellant submitted that the learned Taxing Officer had before her evidence of the "work and participation of second Counsel" to wit, that all issues of liability were handled by him. In the Court of Appeal the issue of damages were separated into sections and second counsel also argued in court". In the circumstances, Counsel for the Appellant opined that junior counsel was entitled to at least two-thirds of the fee granted to lead Counsel. Counsel for the Respondent was in agreement with the proportion of 40% junior Counsel and 60% lead Counsel. The Taxing Officer in reducing lead Counsel's fee from $40,000.00 to $25,000.00 granted on the review, $5,000.00 to junior Counsel, reflecting that junior Counsel's fee was 20% of lead Counsel's fee. With respect to Refreshers, the amount was 30% of lead Counsel's fee. No reasons were given for the percentages used, so that the Court has no information as to the basis of the decision. Suffice it to say that no

material has been placed before the Court to warrant a departure from the usual practice of awarding junior Counsel two-thirds of the fee paid to lead Counsel. The Court is of the opinion that the ratio of 50% can be employed when both Counsel are of similar standing at the bar and there is evidence that the duties performed in attending the client have been evenly dispersed.

[14] Counsel for the Appellant is of the view that the sums awarded previously by the Taxing Officer both for duties carried out in the High Court and the Court of Appeal should be restored. The Court is in agreement with that submission and based on the above learning, finds that the fees awarded to lead Counsel be $40,000.00 in the High Court and $60,000.00 in the Court of Appeal. In relation to junior Counsel, the fees awarded to be $25,000.00 in the High Court and $40,000.00 in the Court of Appeal.

[15] GENERAL CARE AND CONDUCT

(a) TIME SPENT

Both Counsel and the Taxing Officer were in agreement that proper remuneration for time spent on preparation and general care and conduct of the matter should be calculated on an hourly basis. The issue lay in how much per hour was to be fixed. The claim presented by the Appellant was 125 hours at $300.00 per hour. The Taxing Officer found the time excessive and the remuneration high. The learned Taxing Officer opined that "From my knowledge and experience no attorney in St. Lucia is capable of devoting undivided attention for days/weeks on end to any one individual matter having to deal with so many different aspects of a fused practice…". That opinion/conclusion may have been correct had not the case lasted twenty-eight (28) months and four (4) days from filing of the writ, 29th March, 1994 to trial of the action in the High Court, 31st July, 1996. It is this Court's opinion that looking at the nature of the case, the issues to be tried and the type of evidence to consider, the necessary interaction with client and witnesses and general care and conduct of the matter, 125 hours was a reasonable time to put forward as the basis of remuneration. In the Court of Appeal, the time from filing of the Appeal, 30th August, 1996 to the time of

determination of the hearing of the Appeal, 24th November, 1997, was fourteen (14) months and twenty-six (26) days. The Court determined that a period of 50 hours is reasonable as the basis of remuneration in the Court of Appeal.

[16] (b) RATE PER HOUR

The learned Taxing Officer stated in relation to this:

> I have considered the recommended $300.00 per hour and found that it is not reflective of a fee payable to the "AVERAGE" solicitor. It is certainly payable to Counsel with a wealth of knowledge and experience of both Plaintiff/Appellant and Defendant/Respondent in this case. However, my task in balancing the scales of justice is to arrive at a fair payment which is neither "excessive" nor "oppressive".
> (Emphasis mine).

The Learned Taxing Officer based her conclusion on the fact that "no proper written account has been provided to substantiate the claim and therefore I will apply the JOHNSON vs. CORRUGATED [1992] 1 AER 169 test of 'the average cost of an average solicitor in the relevant area at the relevant time on the basis of the general knowledge and experience of the economics of conducting a solicitor's practice in St. Lucia". (Emphasis mine). However, as found above the learned Taxing Officer did not let us into her thoughts as to what are the actual factors and figures relied upon to inform her decision. In addition, and with due respect, balancing the scales of justice would have been paramount in the trial of this action. The Court repeats that the basis of taxation is indemnity. The rate of $300.00 per hour was agreed by Counsel as a reasonable rate and the Court sees no need to depart from this figure. The rate of $300.00 per hour is therefore restored. The Court therefore finds that for General Care and Conduct the amount payable

will be 125 hours x $300.00 per hour = $37,500.00 in the High Court and 50 hours x $300.00 per hour = $24,000.00 in the Court of Appeal.

[17] UPLIFT

The modern trend reveals that a sum or sums is or are awarded for "uplift". The learned Taxing Officer did not make an award under this head. Counsel for the Respondent found that the decision not to award a sum for uplift was correct, as it was a concept "foreign to our law". Counsel for the Appellant considered that the Taxing Officer ought to have given an award under this head and suggested that 70% was the appropriate level. Counsel relied on cases decided in the Untied Kingdom in the 1990's to come to his conclusion. The Court embraces these decisions and will seek to address the lacauna as identified by Counsel for the Respondent. In that regard, the Court finds that the learned Taxing Officer ought to have awarded a figure for uplift based on the principles as adumbrated by Evans J. in JOHNSON v REED CORRUGATED CASES LTD. [1992] 1 All E.R. 169 at page 84:

> I approach the assessment on the following basis. I am advised that the range for normal, i.e. non-exceptional cases starts at 50%, which the registrar regarded, rightly in my view, as an appropriate figure for 'run-of-the-mill' cases. The figure increases above 50% so as to reflect a number of possible factors – including complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken towards the client and others, depending on the circumstances – but only a small percentage of accident cases results in an allowance of 70%. To justify a figure of 100% or even one closely approaching 100% there must

be some factor or combination of factors which mean that the case approaches the exceptional.

[18] Counsel for the Appellant further opines that the Taxing Officer had decided that the matter was "exceptional" and was therefore at a loss to understand why a figure for uplift had not been awarded, based on this finding. This Court is in agreement with that view. It does seem therefore that the conclusion arrived at is unsupported by the earlier finding of the very learned Taxing Officer. This Court therefore has the task of deciding the level of the uplift to be awarded and will be guided by the principles stated above. From an evidential perspective, the Court looks to the decision of the learned Taxing Officer when she states "…A vibrant twenty year old working male was reduced to a 'vegetable' wearing pampers. Not only would he be incapable of providing for himself or his child but he became totally dependant on his relatives having no control of his bowels, unable to clean or feed himself. A paraplegic cannot be considered the same as any other personal injury victim." In addition, the Taxing Officer recognized that Counsel produced extensive witness statements, assisted the Court with authorities and narrowed the issues to those that were relevant. In other words, Counsel handled this case expertly, taking onto themselves responsibilities which were at that time not the 'run-of-the mill'. The Court finds that the award of 70% uplift is reasonable in the circumstances of this case.

[19] The Court therefore determines that the Appeal is allowed.

ORDER:

The Court therefore orders as follows:

1. The order made on the 17th day of August 2001 by the Learned Registrar awarding the Respondent/Appellant costs in the sum of $49, 857.50 in suit 205 of 1994 be varied and that the sum to be awarded as costs be increased to the sum of $101,857.00;

2. The order made on the 17th day of August, 2001 by the Learned Registrar awarding the Respondent/Appellant costs in the sum of $38,236.00 in Civil Appeal No. 6 of 1996 be varied and that the sum to be awarded as costs be increased to the sum of $125,236.00.

3. That the costs of and incidental to this Appeal be determined in the sum of $5,000.00.

4. That the Respondent herein do pay the sums stated in paragraphs 1, 2 and 3 of this Order to the Appellant.

The Court gratefully acknowledges the assistance of Counsel.

CHARMAINE PEMBERTON
HIGH COURT JUDGE.

RULES OF SUPREME COURT (REVISION), 1970 Order 62 Rule 33 (1), (5) - Costs – Appeal against decision of Taxing Officer – Exercise of Discretion by the Taxing Officer – Matters to take in to consideration in the exercise of discretion – Duty to take only relevant factors into account – Duty to give reasons for decision – How far is this duty to extend – Two Counsel from Outer bar – Ratio of fees lead to junior Counsel – when to depart from two-thirds rule – Uplift – when to award a figure for uplift.