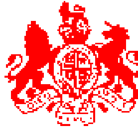

The Court of Appeal for Bermuda

REGISTRAR'S CHAMBERS

Appeal No. 14 of 2015

Between:

COLONIAL INSURANCE COMPANY LIMITED

Appellant/ Paying Party

And

KATE THOMSON and JAMES THOMSON

Respondents/ Entitled Party

BEFORE: **REGISTRAR, SHADE SUBAIR WILLIAMS**

Appearances: Craig Rothwell, Cox Hallett Wilkinson Ltd for Appellant/Paying Party
Paul Harshaw, Canterbury Law Ltd for Respondents/Entitled Party

Date of Hearing: 31 August 2016 and 18 October 2016
Date of Decision: 20 February 2017

RULING ON TAXATION

Delay in Delivery of this Decision:

Regrettably, this decision is delivered after months of delay attributable to the displacement of the Supreme Court Registry from 113 Front Street on account of mold contamination. (See Supreme Court Circulars 21-25 issued between 18 October 2016 and 17 November 2016). Barring particularly urgent matters, chambers hearings listed before the Registrar in November and December 2016 were adjourned to January 2017.

General Background:

1. This case began in the Supreme Court as a civil claim for damages arising out of personal injury. The then Plaintiffs, Kate and James Thomson, were successful on the issue of liability and damages were later assessed by the learned Chief Justice, Ian Kawaley, in a hearing held 24-26 November 2014.

2. At the direction of the Chief Justice, three cases (*K. Thomson v J. Thomson and Colonial Insurance Co. Ltd 6/2012*; *Warren v Harvey 311/2008*; and *Argus Insurance v Somers Isles Insurance Co. Ltd / Harold Talbot*) were heard together.

3. The issue of the assessment of the appropriate discount rate for future loss was addressed by the Court extensively with the aid of expert evidence heard over the course of 2 days.

4. The Chief Justice, having to consider whether there should be a new Bermudian law position on discount rates, had regard to the UK and Hong Kong positions.

5. In respect of this case, the Chief Justice found that the appropriate discount rate should be -1.5% for the future loss of earnings claim which resulted in an award of $135,426.69 in addition to the provisional award under this head of loss for $138,123.09 based on a discount rate of 3%.

6. The Appellant, Colonial Company Insurance Ltd, appealed the decision of the Chief Justice. The appeal was heard on 16-17 March 2016 before Sir Scott Baker, President/Bell, JA/Riihiluoma, JA (Acting).

7. By judgment dated 1 April 2016, the Court of Appeal dismissed the Appellant's appeal and ordered costs to follow the event in favour of the Respondent, failing an application for costs within 21 days thereof.

8. No costs applications followed. Accordingly, the costs award affirmed was made on a *nisi* basis.

Preliminary Points:

9. A Notice of Motion was filed by Mr. Harshaw on 17 August 2017 for an application for leave to file an amended Bill of Costs. While the Notice of Motion had not been returned to Mr. Harshaw in advance of the 31 August 2016 hearing, no issue was taken by Counsel for CHW that it had not been formally served.

10. The Amended Bill of Costs was filed by Mr. Harshaw for him to effectively claim the increase on his hourly rate of fees in light of the new Guideline Rates under Circular No.

18 of 2016 wherein the President of the Court of Appeal increased the range of hourly rates chargeable by a successful party to an order for costs.

11. Further, no arguments were presented against the amended Bill of Costs and leave was so granted.

<u>Court of Appeal may order Costs to be fixed or taxed</u>:

12. The Rules of the Court of Appeal (RCA) 3/28 provide as follows:

"Where the Court makes any order for the payment of costs by any appellant or by any respondent, such costs may either be ordered to be taxed (in which event the provisions of Order 4 shall apply) or be fixed at the time when judgment is given."

13. Order 4/1 reads:

"Where the Court directs taxation of costs as between solicitor and client the Registrar[1] shall tax such costs in accordance with these rules and the scales in the Fourth Schedule."

14. The Court of Appeal did not expressly direct for costs to be taxed in this matter. However, no issue arises here between the parties. In any event, the Court of Appeal obviously intended that costs would be taxed by me if not agreed between the parties.

<u>Determination of commencement date for Guideline Rates (Circular 18 of 2016)</u>

15. The applicable hourly rates for Mr. Harshaw's fees was disputed. Mr. Rothwell's arguments on this point were repeated and relied on in his objections made in the taxation hearings in <u>*Tinee Harvey v Dennika Warren (Court of Appeal) Bda No. 13 of 2015*</u>. In both matters, Mr. Rothwell submitted that the hourly rate defined in the Fourth Schedule of the Rules of the Court of Appeal ("the RCA hourly rate") should be used in taxing the Respondent's costs as opposed to the newly issued guideline hourly rates outlined under Practice Direction 18 of 2016 ("the Guideline Rates").

16. Mr. Rothwell submitted that the Guideline Rates should only apply to fees incurred after 5 July 2015.

17. RCA 4/7: *"All bills of costs incurred in proceedings in the Court and in proceedings in the Supreme Court preparatory or incidental to, or consequential upon, proceedings in the Court shall be taxable according to the scales in the Fourth Schedule…"*

[1] '*Registrar*' means Registrar of the Court of Appeal: O.1/2 of the Rules of the Court of Appeal

18. The Fourth Schedule sets out the scale of fees payable to Barristers and Attorneys for civil causes and matters: *Unless otherwise specified, costs payable to attorneys shall be taxed at the rate of $250 to $350 per hour or any fraction thereof (hereinafter called the "Hourly rate")*.

19. Scale A in the Fourth Schedule lists from (1)-(11) various tasks by Counsel to be charged at either the Hourly rate or for a fixed fee.

20. The said fixed fees apply to Counsel's attendance at the Registry for filing the notice of appeal/cross-appeal/notice of motion and service thereof. It also applies to Counsel's attendance at the Registry to pay fees for the settling of the record. The preparation of an appeal bond (and filing and service thereof) also carries a fixed fee in Scale A.

21. Both parties agreed that the Guideline Rates effectively replaced the RCA hourly rate. No challenge was made by either party to suggest that the President of the Court of Appeal lacked sufficient authority to issue new rates under section 9 of the Court of Appeal Act 1964 by way of a Practice Direction. While Mr. Rothwell queried the absence of a formal amendment to the Rules of the Court of Appeal and even commented that this should be done, he did not go so far to ground an objection on the absence of an amendment to the Rules for alignment with the Guideline Rates.

22. The basis for Mr. Rothwell's objection to the application of the Guideline Rates was based purely on the question of fairness in giving retroactive effect to the Guideline Rates. He drew a distinction between the effect of the Guideline rates on the Supreme Court and Court of Appeal procedures. Mr. Rothwell argued that the Registrar already possessed discretionary powers in the Supreme Court prior to the introduction of the Guideline Rates. This means that litigants would have already known to expect that the rates employable by the Registrar were variable on account of such discretionary powers. By way of contrast, Mr. Rothwell submitted that the hourly RCA hourly rate, being a fixed rate with no allowance for the discretionary exercise of the Registrar's powers, offered litigants the comfort of certainty on what the neighborhood of costs consequences would be if they were to be burdened by a Costs order against their favour.

23. The issue for determination by me is thus whether the Circular applies to an assessment of fees incurred prior to 5 July 2016.

24. Commenting briefly on the RCA hourly rate, in the same language as I did in the taxation ruling for *Tinee Harvey v Dennika Warren (Court of Appeal) Bda No. 13 of 2015*, I share my observation and opinion that the RCA hourly rate was obviously antiquated and starved for review.

25. The RCA hourly rate allowed for only a $100 difference to distinguish the varying rates between all Counsel and their levels of experience/expertise in the various areas of practice.

26. Further, the ceiling of the RCA hourly rate paralleled the former and outdated guideline rates of the lower Court. (See the rates applicable to Counsel of 1-3 years post-qualified experience under the Supreme Court Practice Direction No. 11 issued by the then Chief Justice, Richard Ground, in 2006).

27. On 5 July 2016 the new Guideline Rates for the scale of fees payable to barristers and attorneys in respect of appeals in civil and commercial cases were issued by the President of the Court of Appeal under Circular 18 of 2016:

> *By section 9(1)(i)-(j) of the Court of Appeal Act 1964, the President of the Court of Appeal hereby issues the below guideline rates for the scale of fees payable to barristers and attorneys in respect of appeals in civil and commercial cases.*
>
> | | |
> |---|---|
> | *1-3 years post qualification experience* | *- $350 - $450 per hour* |
> | *4-9 years post qualification experience* | *- $400 - $550 per hour* |
> | *10+years post qualification experience* | *- $550 per hour and upwards* |

28. On the 'fairness' point, Mr. Rothwell argued that when a party decides whether or not to pursue an appeal, it is reasonable for the probable cost consequences in the event of defeat to be considered and factored into that decision. On Counsel's argument, the Respondent could not have anticipated that a new Circular would be issued and that the costs envisaged would likely increase.

29. Mr. Rothwell directed me to tab 6 of his bundle to Halsbury extracts of Benion Statutory Interpretation[2] which concerned the retrospectivity of enactments:

"*Dislike of ex post fact law is enshrined in the United States Constitution*[3] *and in the constitutions of many American states, which forbid it. The true principle is that lex prospicit non respicit (law books look forward not back)*[4]*. Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.*[5] *The basis of the true principle against retrospectivity 'is no more than simple fairness, which ought to be the basis of every legal rule... It was held that the principle of fairness would be*

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[2] See Tab 6 Page 10 of Respondent's binder at Section 97

[3] Bennion Footnote 245: "*It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication*."

[4] Bennion Footnote 246: "*In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears.*"

[5] Bennion Footnote 247: "*Phillips v Eyre (1870) LR 6 QB 1, per Willes J at 23…*"

infringed if it were found that the Social Security Act 1986 s 53 (repealed) was retrospective, since in some circumstances it would render third parties liable to make reimbursement in respect of past payments when they are not so liable under the previous law. It would also remove a defence previously available…"

30. Mr. Rothwell referred me to *Robert Mai v Bermuda Cablevision Limited No. 458 of 1986*. In that action, the issue for determination was whether the taxation of costs was to be made under the Supreme Court Rules 1985 (1985 Rules) or the Supreme Court Rules 1965 (1965 Rules).

31. The Rules of the Supreme Court 1985 applied forthwith to all proceedings when they came into force on 4 January 1988, save specified exceptions. The proceedings in *Mai v Cablevision* commenced prior to the operative date for the 1985 Rules.

32. The exception under consideration in *Mai v Cablevision* was in Order 1 Rule 2(5) which provided that the Rules did not apply to any proceedings in any cause or matter which was pending immediately before the commencement. Such proceedings under the description of Rule 2(5) were to be continued to final determination under the 1965 Rules.

33. Costs had been awarded to the Plaintiff up until the date of a payment into Court. However, costs after that date were awarded to the Defendant, which led to a dispute on the applicable Rules for the taxation of the Defendant's costs.

34. At page 2 of the judgment of Hull, J:

"*Order 62 Rule 32(1) of the 1985 Rules ("Rule 32(1)) is couched in the following terms:*
"(1) Subject to the foregoing rules, the scale of costs contained in the Schedule to this order, together with the notes and general provisions contained in that Schedule, shall apply to the taxation of all costs incurred in relation to contentious business done after the commencement of these rules."

35. Hull, J found that the taxation of costs was a "proceeding" in the action within the meaning of Rule 2(5). He referred to it as a "step within the action itself".

36. Hull J held in the penultimate paragraph of his judgment,

"*Accordingly, my opinion is that Rule 32(1) has the meaning for which the Defendant contends, by way of an exception to Rule 2(5). Whether or not a cause or matter was pending at commencement, the costs incurred in contentious business done on or after commencement are in my opinion to be taxed under the present rules…*"

37. The case of *Mai v Cablevision* is somewhat unhelpful in deciding the issue in the present case, in my view, because it centers on the interpretation of a rule specifying when the former or latter regime will apply. In the present case, I am to determine the issue without the assistance of a specification as to when the new Guideline Rates are to take effect.

38. Mr. Harshaw argued that changes in the law are given immediate effect where the change is merely procedural. Mr. Rothwell did not challenge this principle of law and he accepted that taxations fall within the procedure category. Mr. Harshaw referred to an extract in Benion Statutory Interpretation which concerned the retrospectivity of enactments:

    Comment on Code S 99:
    "*Lord Mustill referred to this section of the Code in a 1994 case (L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486 at 526. Cf Code s 397) Some of the most difficult problems concerning retrospectivity concern enactments that turn on events occurring over a period. If the enactment comes into force during that periodis it retrospective or not? Little guidance can be given beyond saying that it is necessary to look at the substance of the matter as indicated in this section. The problem ought never to arise, because the drafter should have included transitional provisions that make clear the intention (See Code s 101) It is necessary to bear in mind that '...the presumption against retrospective legislation does not necessarily apply to an enactment merely because "a part of the requisites for its action is drawn from time antecedent to its passing" '… "*

    Section 100. Retrospective operation: delegated powers
    The same principles apply to a question as to the retrospective operation of delegated legislation as apply to Acts. However in the case of delegated legislation not only must the wording of the instrument itself be considered, but that of the Act under which it was made. Furthermore the doctrine of ultra vires needs to be taken into account. Similar considerations apply to the exercise of non-legislative delegated powers."

39. Having referred me to *R v Dunwoodie and others [1978] 1 ALL ER*, Mr. Harshaw also referred to the case of *Wright v Hale (1860) 158 ER 94* in support of his submission that procedural matters are retrospectively applicable.

40. In *Wright v Hale* Pollock, C.B. held:

    "*I do not think that our decision will interfere with the great constitutional principle to which the plaintiff's counsel have referred. There is a considerable difference between new enactments which affect vested rights and those which merely affect procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts. If an act of parliament were to provide that in matters of mere opinion no more than three witnesses shall be called, after that no*

person would be entitled to call more than three witnesses on such points in any pending suit, because it would be a mere regulation of practice. Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing the suit. The Act (was) passed on the 28th of August, and contains a provision that it shall come into operation on the 10th of October. The 34th section enacts that where the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury not less than 5l.; he shall not be entitled to recover any costs if the Judge certifies to deprive him of costs. That is an act to be done at the trial, which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an ex post facto law does not arise. The rule must be discharged…"

41. Mr. Rothwell did not challenge the applicability of *Wright v Hale* but maintained that my discretionary powers were sufficient for me to depart from the position taken in *Wright v Hale* on the basis of a lack of fairness.

42. I am guided by the principles outlined in *Wright v Hale* and I am satisfied that a taxation of costs is a procedural matter. In the absence of a specification that the new Guideline Rates under Circular 18 of 2016 do not apply to pending taxations, I think it is correct to operate on the basis that it applies to all taxations on the question of the effective commencement date.

<u>Amended Bill of Costs filed by Canterbury Law Ltd</u>

43. Having granted leave to rely on the Amended Bill of Costs, I also allow the hourly rate charged by Mr. Harshaw at $550 per hour.

44. I have had regard generally to *Part II Division I to Order 62* and particularly to:
    (i) Complexity of this matter;
    (ii) Skill and specialized knowledge required;
    (iii) Volume and importance of documentation prepared;
    (iv) The likely importance of this matter to Ms Warren;
    (v) The amount of money involved in damages; and
    (vi) Any other legal fees and allowances payable which resulted in the reduction of work which would otherwise have to have been done.

45. I do not think that Mr. Harshaw's hourly charges are out of sync with current market rates for this kind of case. I am also of the view that these hourly charges are compatible with the Guideline Rates.

46. Turning to the form of the Amended Bill of Costs, Mr. Harshaw did not include a column in his Bill of Costs specifying the time spent on each task. Fair to say, the Rules of the Court of Appeal (R.4/14) do not require him to do so. However, the assessment of fees is necessarily with regard to the time spent on each task. This calculation is unavoidable. It is, therefore, preferable that Bills of Costs are structured in such detail.

47. In any event, I have carefully considered the Amended Bill of Cost and the Appellant's table of objections on a line by line basis. My decisions are as follows:[6]:

FEES CHARGE BY CANTEBURY LAW		
ITEM	**REGISTRAR'S DECISION**	**CATEGORY OF TASK**
2	$715 to $300	Peruse and consider draft Notice of Appeal
34	$165 to $110	Correspondence from CHW and consideration of previous correspondence
37	$330 to $110	Consideration of correspondence received and note (David Westcott QC)
39	$1,210 to $550	Consider Note (David Westcott QC) and Respondent's Notice
54	DISALLOWED	Peruse files
94	$165 to $110	Correspondence from WQ and CHW
108	$220 to $110	Correspondence from CHW re QC
130	DISALLOWED	Peruse CHW skeleton and docs
135	DISALLOWED	Considering evidence and ruling for submissions
142	DISALLOWED	Amend submissions
152	DISALLOWED	Annotation of 'Gil Russell' cases and preparation of note
158	DISALLOWED	Amend submissions
162	DISALLOWED	Finalizing skeleton
164	DISALLOWED	Consider Notice of Appeal & arguments
172	$935 to $550	Consider law (authorities)
179	$1,320.00 to $1000	Prepare for appeal
186	DISALLOWED	Finalizing note on skeleton
190	DISALLOWED	Consider submissions to be made and prepare for appeal
196	DISALLOWED	Consider submissions to be made and prepare for appeal
199	DISALLOWED	Consider submissions to be made and prepare for appeal
203	DISALLOWED	Consider and prepare authorities for appeal
204	DISALLOWED	Consider submissions to be made and prepare for appeal
206	$3,520 to $1,650	Consider interest issue and prepare submissions and authorities
211	$3,520 to $1,100	Consider submissions to be made and prepare for appeal
230	DISALLOWED	Prep BOC re taxation of costs
232	$2640 to $1,100	Prep BOC re taxation of costs
237	DISALLOWED	Prep BOC re taxation of costs
244	DISALLOWED	Prep BOC re taxation of costs
246-255	DISALLOWED	Delivery Charges
258	DISALLOWED	Delivery Charges
260-269	DISALLOWED	Delivery Charges
271-279	DISALLOWED	Delivery Charges
283	DISALLOWED	Delivery Charges
285-287	DISALLOWED	Delivery Charges
291	DISALLOWED	Delivery Charges

[6] Where I have allowed the fees charged (notwithstanding an objection) I have omitted reference to the charge from the table of amendments required for the Bill of Costs.

48. The above deductions were made so to allow only a reasonable amount of all costs reasonably incurred. Necessarily, I resolved all doubts on whether the costs were reasonably incurred in favour of the paying party.

49. In taxing down fees which were incurred through review and consideration of the law, I followed the principle stated by Ground CJ in *Golar LNG Ltd v World Nordic SE No. 163 of 2009 (Commercial List) (para 13-14*) in his citation and approval of Cook on Costs Butterworths 2004, p. 230: "*Time spent considering the law and procedure is usually non-chargeable- and the higher the expense rate, the more law and procedure the fee earner is expected to know*…" In this case there were nuances of law which justified reductions in the fees charged as opposed to complete disallowances.

50. In my view, Mr. Harshaw's hourly rate is in the range preserved for senior attorneys. Thus, reductions to the charges allowed in respect of his review of law and procedure is attributable to the expectation and presumption of his knowledge of the law. The presumption, however, did not reach so far as to disentitle him from recovery of his fees for research on the areas of particular complexity in this case.

51. I also disallowed fees where there appeared to be duplicity of the fees charged. Where I considered fees to be excessive charges for review of documents previously read and considered, I also taxed those costs down.

52. Where objections were made on the ground of 'overhead', I distinguished allowable disbursements from purely administrative tasks which I did not allow.

53. I did allow 2 hours for the preparation of the taxation proceedings. Item 12 under the Fourth Schedule reads, "*Where no costs are specified by these Rules in respect of any matter or thing the Registrar may allow the costs applicable to such matter or thing as is laid down in the rules in force in the Supreme Court*".

54. Accordingly, I turned my mind to the Rules of the Supreme Court 1985 Part II Division II Item 5 which allows for Costs in respect of taxation. This may include the preparation of the bill, preparing for and attending the taxation and travelling and waiting time.

Objection to Fee notes for Overseas Counsel

55. At item 290 of the Bill of Costs, the fee note of David Westcott QC of Outer Temple Chambers is charged as a disbursement in the total sum of £55, 125 (at $1.6 to £1.00). The fees for Stewarts Law LLC are listed at item 289 in the sum of £50, 046.23 (at $1.6 to £1.00).

56. This produces a total charge of £105, 171.23 for overseas Counsel's fees.

57. Mr. Rothwell objected to the hourly rate and brief fee of David Westcott QC and to all charged by Stewarts Law LLC.

58. The basis of Mr. Rothwell's objection to David Westcott QC's rate is the same as that which was made to Mr. Harshaw's hourly rate. Thus I will summarily state, in reliance on my reasons outlined above in this ruling, that I will allow his rate to exceed the $350 p/h ceiling defined in the Fourth Schedule.

59. Mr. Rothwell did not submit that Mr. Wescott QC's rate or fees were generally excessive for the work carried out or his level of post-qualification experience. I do not propose to interfere with his hourly rate[7] or the number of hours charged in any event as I did not find it excessive. Further, I am not persuaded that the current exchange rate (£1.00 to $1.24) should be used in place of the exchange rate charged. The fees charged should reflect the sums due when they were incurred.

60. Mr. Rothwell's objection to the retainer of Stewarts Law LLC was more compelling. I was reminded of Ground CJ's *ratio* in Re Extraordinary Mayoral Election (Taxation of Costs Review) [2008] Bda LR 28, "*while the third respondent may have had good reasons of her own for talking to two sets of lawyers, the losing party should not be obliged to pay for that, even on a taxation of an indemnity basis. One set of these costs should, therefore, be disallowed.*"

61. I do not see the justification for allowing this additional set of fees under an award of costs made on a standard basis. Accordingly, I disallow them entirely.

Conclusion

62. The effective commencement date for the Guideline Rates under the President of the Court of Appeal's Practice Direction No. 18 of 2016 is the date of its issuance, namely 15 July 2016. It therefore applies to all fees for taxation hearings listed 15 July 2016 and onwards.

63. Mr. Harshaw's hourly rate charged in the Bill of Costs at $550p/h is allowed. His fees were allowed subject to the above table outlining my line by line decisions where I interfered with the charges in the Bill of Costs. Where I omitted reference to any particular item number in the Bill of Costs, I have purposefully refrained from reducing or disallowing such costs charged.

64. I have allowed all of the fees charged by David Westcott QC in the sum of £55, 125 (at $1.6 to £1.00). However, I disallowed all fees incurred for services rendered by Stewarts Law LLC.

[7] Hourly rate calculable from the Fee Note is £500 per hour

65. I will hear Counsel, if necessary, on the terms of the Certificate to be drawn up. Otherwise, an agreed amended Bill of Costs and Certificate giving effect to this Ruling may be filed for my signature.

66. Unless either party applies within 14 days by letter filed in the Registry to be heard on costs of the taxation hearings or on interest on the costs award:

    (i) Costs for the Respondent/Entitled Party for the preparation of the taxation proceedings as stated above by my decision on Item 232 of the Bill of Costs.

    (ii) Costs for the Respondent/Entitled Party summarily assessed at $500.00 for attendance at the taxation hearings, and

    (iii) Interests at the statutory rate on the award for costs of the taxation.

Monday 20 February 2017

SHADE SUBAIR WILLIAMS
REGISTRAR FOR THE COURT OF APPEAL