

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 47 OF 2009 (AJJ)

1
2
3
4

BETWEEN:

RIAD TAWFIQ AL SADIK

Plaintiff

- and -

- (1) INVESTCORP BANK BSC
(2) INVESTCORP INVESTMENTS ADVISERS LIMITED
(3) SHALLOT IAM LIMITED
(4) BLOSSOM IAM LIMITED
(5) INVESTCORP NOMINEE HOLDER LIMITED
(6) INVESTCORP TRADING LIMITED

Defendants



5
6

REVIEW OF TAXATION - REASONS

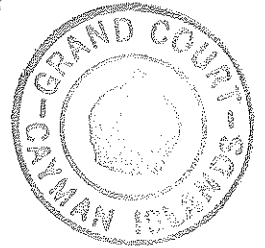
7
8
9

Introduction

- 10 1. This is an application made by Mr Al Sadik pursuant to GCR Order 62,
11 rule 30 for a review of Taxing Officer Foldat's decision that
12 US\$15,429,271.37 is properly payable to the Defendants ("Investcorp")
13 pursuant to the Order for Costs which I made against him on 16 July 2012.
14 The material part of the Order provided that Mr Al Sadik should pay
15 Investcorp's costs of the action to be taxed on the standard basis except
16 that the costs of work relating directly to the Plaintiff's first claim ("the
17 Guarantee Claim") which would not have been done in any event in
18 relation to the other pleaded claims, should be taxed on the indemnity
19 basis.
20
21 2. Investcorp's Bill of Costs was therefore divided into two parts. Part A sets
22 out details of the amount claimed on the indemnity basis in respect of the

1 Guarantee Claim and Part B sets out the amount claimed on the standard
2 basis in respect of the rest of the work done. The amount claimed under
3 Part A was US\$3,718,338.14, of which the Taxing Officer allowed
4 US\$3,248,441.74 compared with Mr Al Sadik's contention that he should
5 not have been required to pay more than US\$1,014,416.94. The amount
6 claimed under Part B was US\$15,858,637.93, of which the Taxing Officer
7 allowed US\$12,053,565.13, compared with Mr Al Sadik's contention that
8 he should not have been required to pay more than US\$6,829,165.22.
9 After taking into account the court fees payable in respect of the taxation
10 and setting off a sum of US\$42,863.61 due from the Defendants to the
11 Plaintiff, the total amount payable under the Final Costs Certificate issued
12 on 20 September 2013 is US\$15,429,271.37. Mr Al Sadik's position is
13 that he ought not to have been ordered to pay more than a total of
14 US\$7,800,718.55 plus court fees.
15

- 16 3. The taxation was conducted by Mr Valdis Foldats who was appointed as
17 an acting taxing officer specifically for the purposes of this case. He has
18 unrivalled experience in these matters and his appointment was made in
19 recognition of the fact that this was a lengthy, complex piece of litigation
20 which would give rise to an exceptionally large bill of costs.
21
- 22 4. The taxation was commenced in February 2013. The Taxing Officer was
23 provided with the following documents –
24
- 25 (a) The completed *Bill of Costs* comprising approximately 16,500 line
26 items, a substantial proportion of which were disputed by the Plaintiff;
 - 27 (b) The narrative *Introduction to the Bill of Costs* dated 12 September 2012
28 summarised the nature of the litigation in a clear and concise way. It
29 contained all necessary particulars of Investcorp's legal team together
30 with an explanation of the reasons for engaging both Cayman Islands
31 attorneys (Walkers) and English solicitors (Gibson, Dunn & Crutcher
32 LLP) ("GD&C"). It also contained what I consider to be a sensible and
33 well thought out rationale for the way in which the Defendants' costs
34 were apportioned between Parts A and B of the Bill;
 - 35 (c) Two narrative *Statements of Objections* dated 21 December 2012 and
36 11 January 2013 which comprise the Plaintiff's general explanation for
37 the objections itemised in Column 8 of the completed *Bill of Costs*.
38 The Plaintiff addressed Parts A and B of the Bill of Costs separately;
 - 39 (d) The Defendants' *Reply Submissions* dated 4 February 2013 comprised
40 a 70 page written submission which addressed each of the Plaintiffs'
41 general points of objection; and

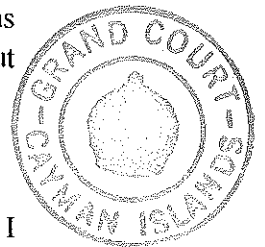


1 (e) The parties' written submissions in respect of the claim for experts'
2 fees made in response to the Taxing Officer's enquiry dated 25 March
3 2013.
4

5 5. Taxation is an inquisitorial process. The Taxing Officer is required to
6 inquire into disputed items in whatever way appears to him to be
7 appropriate having regard to the circumstances of the case. He initially set
8 aside two months (February and March 2013) in which to conduct his
9 inquiry. In the event the initial period of two month's intensive full-time
10 work continued in a less intensive way over the following four months.
11 Since a high proportion of the work reflected in the *Bill of Costs* had been
12 performed by GD&C, its hard copy files were brought to Grand Cayman
13 by a small team of lawyers and paralegals who were available during the
14 initial period, alongside Walkers' lawyers, to answer the Taxing Officer's
15 inquiries. During the course of this exercise the Taxing Officer was
16 provided with approximately 35,000 GD&C e-mails and 12,000 Walkers'
17 e-mails. In addition to reviewing this electronic material, he visited
18 GD&C's temporary office in order to inspect their hard copy files. He
19 issued over 100 specific requests for information and/or explanations
20 relating to both the Defendants' claims and the Plaintiff's objections, some
21 of which invited substantive submissions from the parties on points of
22 principle. He consulted with the parties about the possibility of an oral
23 hearing but they agreed that it would be unnecessary. Before completing
24 his inquiry, the Taxing Officer gave the parties a final opportunity to make
25 written submissions on any topic which they wanted to address, but neither
26 party took up this invitation. It seems to me that the Taxing Officer
27 conducted a thorough inquiry, the nature and extent of which was
28 commensurate with the sum in issue which was about US\$11.7 million out
29 of the US\$19.5 million claimed.

30 **The materials reviewed**

31 6. In addition to the documents referred to at paragraphs 4(b) – (e) above, I
32 have read and considered the Plaintiff's *Application for Review of*
33 *Taxation* dated 20 September 2013, but I did not find it necessary, nor
34 would it have been helpful, to conduct a line by line review of the
35 Appendices. Instead, I merely referred to the Appendices to the extent that
36 it enabled me to gain a proper understanding of the arguments advanced
37 on behalf of the Plaintiff. I read and considered the Defendants'
38 *Submissions in Response* dated 1 November 2013, but I did not consider it
39 necessary to read or re-read all of the enclosures. Having read and
40 considered all these materials I was able to reach a decision without the
41 need for further written or oral submissions.
42

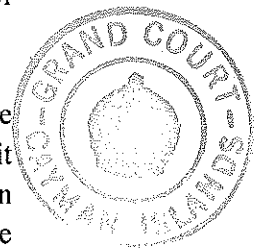


1 **Review of the Taxing Officer's decision in respect of Part A**

2 7. The overall objective of every *inter partes* order for costs made in
3 adversarial proceedings is that the successful party should recover from
4 the opposing party the reasonable costs incurred by him in conducting the
5 proceeding in an "economical, expeditious and proper manner". As I
6 explained in paragraphs 5 and 6 of my Ruling on Costs dated 16 July
7 2012, the distinction between an order for costs to be taxed on the
8 "indemnity" basis and one taxed on the "standard" basis is that, in the case
9 of an indemnity taxation, the paying party is deprived of certain
10 protections which would otherwise apply. First, the burden of proof is
11 reversed. In the case of a taxation on the indemnity basis the burden is on
12 the paying party, in this case Mr Al Sadik, to establish that the fees
13 actually paid by Investcorp to their lawyers should be disallowed because
14 they were unreasonably incurred or unreasonable in amount. Second, the
15 proportionality test contained in Order 62, rule 13(2) does not apply.
16 Third, the hourly rate caps set out in the Guidelines issued by the Grand
17 Court Rules Committee do not apply. It follows that the receiving party is
18 entitled to recover his costs at whatever hourly rates have been agreed with
19 his attorneys and foreign lawyers, unless the paying party can establish
20 these rates are unreasonably high in all the circumstances of the case.
21 Finally, Order 62, rule 18 does not apply with the result that the receiving
22 party can recover the fees paid for work done by foreign lawyers who have
23 not been temporarily called to the Cayman Islands bar for the purposes of
24 the proceedings in question.

25
26 8. The application of these rules means that the amount recoverable by the
27 Defendants under Part A of their bill of costs is significantly higher than it
28 would have been if taxed on the standard basis. There are two main
29 reasons for this result. First, a significant proportion of the work was done
30 in London by non-admitted foreign lawyers employed by GD&C. The cost
31 of this work is recoverable on taxation on the indemnity basis, except to
32 the extent that the Plaintiff can establish that engaging two firms has
33 resulted in an overall increase in cost which is unreasonable. Second, the
34 scale of hourly rates applicable to work done prior to 1 June 2011 was
35 significantly lower than the market rates then prevailing in both London
36 and the Cayman Islands, which inevitably means that the amount
37 recoverable by the Defendants under Part A will be higher than it would
38 have been if the scale applied.

39
40 9. The principles applied by Investcorp's lawyers for the purposes of
41 deciding how to allocate work done between Parts A and B of the Bill of
42 Costs are described in paragraph 9 (pages 18-21) of their *Introduction to*
43 *the Bill of Costs*. The overall work done is categorised under seven general



1 headings, namely (i) pleadings and correspondence, (ii) discovery, (iii)
2 custodians and witnesses, (iv) experts, (v) case management, (vi) work
3 undertaken in preparation for and during the trial and (vii) attendance at
4 trial. A percentage of the total work done under each heading, except for
5 general case management, has been apportioned to Part A. It seems to me
6 that the methodology adopted by Investcorp's lawyers and their rationale
7 for the various percentage allocations is sensible and well thought out. Mr
8 Al Sadik's submission to the Taxing Officer did not question the
9 allocation methodology or the scope of the workstreams associated with
10 the Guarantee Claim. Instead, he focused on the proposition that Part A
11 reflected the performance of unnecessary work resulting from the
12 engagement of an excessively large legal team and duplicated work
13 resulting from the engagement of foreign lawyers.
14

15 10. Mr Al Sadik's *Application for Review of Taxation* puts his case in a bold
16 and somewhat superficial way. He says that it is "impossible" to see how
17 the Taxing Officer could ever have regarded US\$3,248,441.74 as a
18 reasonable amount to have spent on the Part A work. It is said to be so
19 obviously excessive – three times the amount which Mr Sadik was
20 prepared to agree - that something must have gone badly wrong in the
21 Taxing Officer's decision making. I disagree. The Taxing Officer was
22 quite right to accept that it was reasonable for Investcorp's legal team to
23 have undertaken all the workstreams described in paragraph 10.4 of its
24 *Reply Submission*. Based upon my review of Part A (which comprises
25 about 3,400 line items), I think that he was right to accept that it was
26 reasonable for Investcorp's lawyers to have to undertake this work. The
27 Taxing Officer reduced that amount claimed by about US\$470,000 which
28 equates to 12.6% of the total claim. This reduction resulted almost entirely
29 from the fact that the Taxing Officer considered that the amount of time
30 spent on certain items of work was excessive. Many line items were
31 reduced by 5% or 10%. The number of line items disallowed in total was
32 negligible. In conclusion, I consider that the amount allocated to Part A of
33 Investcorp's Bill of Costs was conservative. I have found no merit in Mr
34 Sadik's broad brush complaints and I am satisfied that the Taxing
35 Officer's decision should be confirmed.



36 **Review of the Taxing Officer's Decision in respect of Part B**

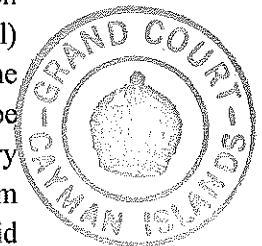
37 Mr Al Sadik's complaint about the Taxing Officer's decisions in respect of
38 Part B is dealt with under various separate headings, as follows.

1 Discovery

2
3 11. Investcorp claimed US\$5,647,157 for some 46,000 hours of paralegal
4 work done in respect of its discovery exercise which continued over a
5 period of about 27 months from January 2010 to February 2012.
6 Practically all of this work was done in London by a team of paralegals
7 (some of whom were actually lawyers) engaged by GD&C. It is
8 misleading to say that this team comprised 40 people. The number of
9 paralegals engaged at any one time is helpfully set out in the *Workflow*
10 *Chart*. For the purposes of the taxation, the parties agreed that it was
11 appropriate for this work to have been done in London and that the
12 paralegal team should be viewed as “an extension of Walkers” who were
13 Investcorp’s local Cayman Islands attorneys. There was no dispute about
14 the hourly rates charged – US\$110 per hour up to 31 May 2011 and
15 US\$175 thereafter. The issue for the Taxing Officer to decide was whether
16 the number of hours worked was reasonable and proportionate in all the
17 circumstances of this case, any doubts being resolved in favour of Mr Al
18 Sadik. He reduced a high proportion of the line items by 5% or 10%, with
19 the overall result that he allowed 44,350 hours of paralegal work for a total
20 cost of US\$5,375,817. Mr Al Sadik contends that it was neither reasonable
21 nor proportionate for Investcorp to have spent this amount of time on its
22 discovery exercise.

23
24 12. The search protocol agreed with Mr Sadik’s lawyers resulted in Investcorp
25 identifying over 211,000 potentially discoverable documents (representing
26 over 3 million pages of material) which needed to be reviewed, of which
27 under 40,000 documents (representing about 850,000 pages of material)
28 were actually produced on discovery. Mr Al Sadik now contends that “the
29 Defendants would appear to have fundamentally misunderstood the scope
30 of their disclosure obligations”. It is said that by conducting the discovery
31 exercise in a way which was “oppressive” Investcorp’s paralegal team
32 spent a huge amount of time reviewing documents unnecessarily. It is said
33 that a proper allowance would be no more than US\$2,280,323. In other
34 words, it is said that Investcorp’s lawyers caused its paralegal team to do
35 more than double the amount of work which was reasonably required to
36 comply with its discovery obligations. In my view the Taxing Officer was
37 right to reject this contention.

38
39 13. In any case such as this, the scope of the parties’ document review work is
40 largely driven by the identification of the “search terms” and the
41 “custodians” whose electronic files will be searched. Initially, Investcorp
42 proposed 27 search terms and 33 custodians designed to deal with all the
43 issues reflected in the amended statement of claim which included the
44 allegation that Investcorp Bank B.S.C. had suffered a liquidity crisis in late



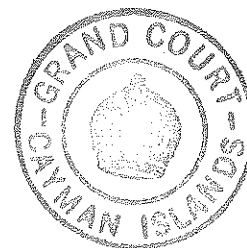
1 2007 and early 2008. Ultimately this was extended to 89 search terms and
2 42 custodians. Enlarging the number of custodians and search terms
3 inevitably enlarges the number of documents identified, which then need
4 to be reviewed. The correspondence between the parties' lawyers reflects
5 that it was Mr Sadik, not Investcorp, who insisted upon enlarging the
6 scope of Investcorp's work. It is untrue to say that Investcorp adopted an
7 "oppressive" approach towards discovery. To the contrary, Investcorp
8 resisted Mr Al Sadik's attempts to enlarge the scope, and therefore the
9 cost, of the work. The fact that relatively few of the documents identified
10 and reviewed by the paralegal team found their way into the trial bundles
11 does not suggest to me that Investcorp carried out unnecessary work. In
12 my view there is no merit in Mr Sadik's complaints about the cost of the
13 discovery exercise and I am satisfied that this aspect of the Taxing
14 Officer's decision should be confirmed.
15

16 Preparation of trial bundles

17 14. Mr Al Sadik submits that in December 2011 Investcorp attempted, and
18 failed, to impose a "new" or "alternative" trial bundle which was never
19 actually used. It is submitted that this was a wholly unnecessary and
20 wasteful exercise for which Mr Al Sadik should not bear the cost, which is
21 said to be about US\$400,000. Having read the correspondence, I conclude
22 that Mr Al Sadik's submission is based upon a mischaracterisation of what
23 actually happened in October, November and December 2011. A problem
24 arose because Mr Al Sadik's lawyers created the first draft of the
25 chronological index in reliance upon the metadata alone, without having
26 conducted any manual review, thus resulting in frequent errors. It was not
27 unreasonable for Investcorp's paralegal team to conduct their own review
28 and produce a corrected version of the index. Nor was it unreasonable for
29 them to conduct an exercise to remove duplicate documents from the
30 Court bundles. By doing so, the bundles were reduced by 2,500 pages
31 which equates to at least eight ring binders. The evidence does not support
32 the contention that Investcorp's team wasted time doing unnecessary work
33 in connection with the preparation of the trial bundles.
34

35 Costs attributable to an issue allegedly abandoned on appeal

36
37 15. By an e-mail sent to the Taxing Officer on 2 September 2013 (by which
38 time the taxation process was practically completed), Mr Al Sadik's
39 attorneys sought to argue that Investcorp should not be allowed to recover
40 any costs in respect of an issue raised in the trial and subsequently
41 abandoned on appeal. Whether or not the issue in question was abandoned
42 before the Court of Appeal is disputed, but I shall assume for present



1 purposes that Mr Al Sadik's interpretation of what took place is correct. I
2 accept Investcorp's argument (set out in an e-mail sent on 4 September
3 2013) that the Taxing Officer has no jurisdiction to disallow part of the
4 costs comprised in my Order of 12 July 2012 on the basis of what
5 subsequently took place in the Court of Appeal.
6

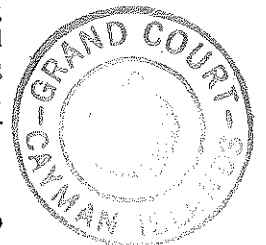
7 Time charges in respect of Mr Philip Rocher
8

9 16. Investcorp claimed US\$677,340 under Part B in respect of 753 hours'
10 work done by Mr Philip Rocher, an English qualified solicitor and partner
11 of GD&C. The claim is limited to work done after 2 December 2011
12 which was the date upon which he was temporarily admitted as a Cayman
13 Islands attorney. Mr Al Sadik contended (in paragraph 5 of his *Statement*
14 *of Objections* relating to Part B) that the whole of this claim should be
15 disallowed for two reasons. First, it was contended that Mr Rocher's role
16 was duplicative of the role performed by the Walkers' attorneys, namely
17 Ms Colette Wilkins as supervising partner and Ms Shelley White as
18 associate. In this regard the Plaintiff relied upon GCR Order 62, rule
19 18(3), (5) and (7). This rule establishes the principle that a paying party
20 should never be required to pay more to a successful party who has
21 engaged a foreign lawyer than he would have been required to pay if the
22 successful party had engaged only local attorneys.
23

24 17. The argument put forward in the Plaintiff's *Application for Review of*
25 *Taxation* (paragraphs 28-30) is slightly different. It is said that the role
26 undertaken by Mr Rocher was unreasonable. His role during the relevant
27 period is described in paragraph 21.4 of the *Reply Submissions* as follows:-
28

29 "Liaising with and taking instructions from the client throughout trial; Managing case
30 strategy in conjunction with Leading Counsel; Conducting witness interviews for the
31 production of three further witness statements from Mr Gurnani, Mr Franklin and Mr
32 Kapoor; Reviewing drafts of, and finalising the second witness statements of Messrs
33 Kapoor, Gurnani and Franklin; Leading witness preparation for all witnesses during trial
34 and supervising associate work in this respect; Conducting client meetings regarding
35 discrete and complex factual issues arising during trial, and overseeing discovery and
36 correspondence in respect of the same; The instruction of Professor Stowell and liaising
37 with Cornerstone in respect of his Report as well as preparation for evidence generally.
38 Where possible, this work was delegated to an associate but with oversight from Mr
39 Rocher; and Reviewing and drafting sections of Investcorp's closing submissions."
40

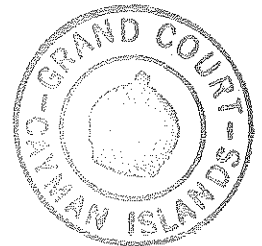
41 The Plaintiff contends that it was neither reasonable nor proportionate to
42 allow the cost of such a role to be performed by someone at the senior
43 partner rate. It is not suggested that this work was unnecessary. The
44 suggestion is that some of this work could have been performed by a
45 senior associate at a lower hourly rate and that some of it could have been
46 performed by leading counsel, who is also a partner of GD&C.
47



1 18. In summary, the Plaintiff's original objection was "duplication of work"
2 and the review application focused on "failure to delegate". The former
3 would result in items of work being disallowed, whereas the latter would
4 result in the item being allowed but at a lower hourly rate. Having regard
5 to the important role played by Mr Rocher and the contention that the
6 whole of his time charges under Part B (US\$677,330) should be
7 disallowed, the Taxing Officer investigated the subject in detail. He
8 requested tranches of Mr Rocher's e-mails for certain periods. He also
9 attended at GD&C's local temporary office and inspected Mr Rocher's
10 notebooks and work product. He disallowed about 20% of Mr Rocher's
11 time under Part B. Those items in the *Bill of Costs* relating to Mr Rocher
12 have been extracted and put into a separate schedule for ease of reference.
13 An analysis of this schedule reveals that the time spent on most of the
14 items of work has been allowed in full but many have been reduced,
15 sometimes by as much as 50%. In conclusion, it seems to me that the
16 Taxing Officer has given careful consideration to the work done by Mr
17 Rocher and I am satisfied that his decision should be confirmed.

18
19 Experts' fees and expenses

20
21 19. By an order for directions made on 11 October 2010 the parties were given
22 leave to adduce expert evidence on in relation to "the field of hedge funds"
23 and in relation to the quantum of damages. Pursuant to this order, which
24 was actually made by consent, Investcorp instructed Professor David
25 Stowell and Mr Stuart Opp whose various reports were admitted in
26 evidence and they were both cross-examined at trial. I subsequently gave
27 the Investcorp leave to put in evidence a forensic technology report
28 prepared by Mr John Holden. He was not cross-examined. Investcorp
29 claimed US\$3,513,164 in respect of the total cost of this expert evidence,
30 including the two witnesses' costs of attending at trial. Mr Al Sadik
31 initially conceded that Investcorp was entitled to recover US\$1,211,349 in
32 respect of these fees and expenses. On 25 March 2013 the Taxing Officer
33 invited the parties to make further written submissions in the light of
34 various statements which had been made by Investcorp's counsel in his
35 Written Closing Submission at trial and in the light of certain observations
36 about the expert evidence contained in my judgment. Investcorp served
37 further submissions on 12 April 2013. In his reply submission served on 6
38 May 2013, Mr Al Sadik then changed his position and argued that the
39 whole of the claim for experts' fees should be disallowed. On 5 June 2013
40 Investcorp served a further submission in response. The Taxing Officer
41 allowed US\$1,901,290 a decision which I consider to be unimpeachable.



1 20. The mere fact that the expert evidence was admitted, without any
2 challenge to admissibility, pursuant to an order for directions which was
3 agreed by both parties, tends to suggest that *something* ought to be
4 recoverable on taxation. The Plaintiff seeks to avoid this conclusion by
5 arguing that the reasonableness of the decision to engage experts and
6 adduce their evidence should be determined retrospectively, having regard
7 to the outcome of the case. In my judgment, this approach is plainly
8 wrong. The reasonableness of a litigant's decision to undertake an item of
9 work or incur a disbursement has to be judged at the date when that
10 decision is taken (and the cost is incurred) having regard to the state of the
11 litigation as at that time. On any view Investcorp is entitled to recover
12 *something* in respect of the costs of engaging experts, adducing their
13 reports in evidence and making them available at trial for cross-
14 examination. In my judgment Mr Al Sadik has not raised any ground upon
15 which I can properly interfere with the Taxing Officer's decision that the
16 experts' fees and expenses in the sum of US\$1, 901,290 were reasonably
17 incurred and reasonable in amount.

18 **Conclusion**

19 21. For these reasons I have come to the conclusion that the Taxing Officer's
20 decision should be confirmed.

21

22 DATED this 21st day of May 2014

23

24

25

26 **The Hon. Mr Justice Andrew J. Jones QC**
27 **JUDGE OF THE GRAND COURT**

