

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

3 **Cause No: 368/08**
4
5

6 **BETWEEN:**

7 **LATOYA BARRETT**

8 **PLAINTIFF**
9

10 **AND:**

11 **THE ATTORNEY GENERAL OF THE CAYMAN**
12 **ISLANDS**

13 **DEFENDANT**
14
15

16 **Appearances:**

17 **Mr. Christopher McDuff of Thorp Alberga for the**
18 **Plaintiff**

19 **Ms. Kirsten Houghton of Campbells for the**
20 **Defendant**
21

22 **Before:**

Hon. Justice Charles Quin

23 **Heard:**

27th July 2010
24

25 **RULING**
26
27

28 1. On the 1st June 2010 this Court found that the Defendant was liable for the loss,
29 injury and damage sustained by the Plaintiff in an accident which occurred on the
30 11th July 2008 at approximately 3:25a.m., and further, this Court ordered that
31 costs were follow the event and to be taxed, if not agreed.
32

33 2. Before this Court is the Plaintiff's Summons dated the 16th June 2010 seeking the
34 following relief:
35

- 1 i. *That the uplift figures of 33.3% and 33% in the CFAs between*
2 *Thorp Alberga and the Plaintiff, and between Thorp Alberga and*
3 *Mr. Richard Lynagh Q.C. (“Mr. Lynagh”), are reasonable;*
4 ii. *That the Defendant pays to the Plaintiff the uplift of 33.3% in*
5 *relation to the Plaintiff’s CFA with Thorp Alberga and 33% in*
6 *relation to the CFA with Mr. Lynagh;*
7 iii. *That Section 7.2 of Practice Direction 1 of 2001 entitled*
8 *“Guidelines relating to the taxation of costs” is not applicable to*
9 *this award of costs;*
10 iv. ...
11 v. *That the Defendant pays to the Plaintiff an interim payment of*
12 *the Plaintiff’s legal costs in the amount of CI\$50,000;*
13 vi. *That the costs of this application to the Plaintiff on the standard*
14 *basis are to be taxed if not agreed;*
15 vii. ...

17 3. For the time being the Plaintiff is not pursuing the remedies sought in paragraphs
18 iv and vii of her Summons dated the 16th June 2010.

20 4. By way of background I should note that on the 12th November 2008 I granted
21 the Plaintiff and her attorneys – then Myers & Alberga, now Thorp Alberga –
22 permission to enter into a conditional fee agreement, which allowed for an uplift
23 fee of 33.3 percent. And on the 7th December 2009 Henderson J., again hearing
24 counsel for both parties, permitted the Plaintiff and her attorneys to enter into a
25 conditional fee agreement with leading counsel, Mr. Lynagh, with an uplift of
26 33%.

- 1 8. The Defendant’s counsel submits that to allow paragraphs ii and iii of the
2 Plaintiff’s Summons would seek to “drive a coach and horses through the
3 legislative framework, both on its face and also in practical terms”, and thus
4 “would fetter inappropriately the exercise of the taxing officer’s discretion under
5 Order 62 rule 13(2).”
6
- 7 9. In this regard the Defendant urges this Court not to follow the Ruling of
8 Henderson J. in *Bennett v. Attorney General* Cause No. 512 of 2006, dated the
9 10th May 2010, and submits that the Court should strictly follow paragraph 7.2 of
10 the Practice Direction and prohibit conditional fee agreements.
11
- 12 10. Finally, and in any event, in relation to paragraph v of the Plaintiff’s Summons,
13 the Defendant submits that there is no rule permitting any interim payment on
14 account of costs.
15

16 **Relevant Legislative Framework**
17

- 18 11. I am grateful to both counsel for their helpful skeleton arguments and
19 submissions. I note that counsel for the Defendant stated, “The state of our
20 legislation and rules in relation to costs is far from straightforward, and indeed I
21 would go so far as to say, unnecessarily complex.”
22
- 23 12. In 2003 our Court of Appeal in *National Trust of the Cayman Islands v.*
24 *Humphreys (Cayman) Limited* [2003] C.I.L.R. 96 at page 201 described the
25 state of the law in the Cayman Islands in respect of conditional fee agreements as
26 “quite unsatisfactory” and “urged the Attorney General and through him, the

1 responsible executive and legislative authorities to give the matter urgent
2 attention.” Regrettably, the position remains the same today, as it was in 2003.

3
4 13. However, in order to adjudicate on the relief sought by the Plaintiff in her
5 Summons dated the 16th of June 2010, it is necessary to review and analyse the
6 relevant legislation and rules which are, as the Defendant’s counsel accurately
7 described, “far from straightforward.”

8
9 14. I begin with Section 24 of the Judicature Law which covers the question of costs
10 and states:

11
12 “24 (1) Subject to the provisions of this or any other Law and to rules of
13 court, the costs of and incidental to all civil proceedings in-
14 (a) the Court of Appeal; and
15 (b) the Grand Court,
16 shall be in the discretion of the relevant court.

17
18 (2) Without prejudice to any general power to make rules of court,
19 such rules may make provisions for regulating matters relating to the costs of
20 those proceedings including, in particular, the entitlement to costs, the
21 taxation of costs, the powers of taxing officers and the powers of judges to
22 review decisions of taxing officers.

23
24 (3) The Court shall have full power to determine by whom and to what
25 extent the costs should be paid...”
26

27 15. I turn now from the Judicature Law to the Grand Court Law and Section 19,
28 which states:

29 “19 (1) There shall be a Rules Committee, which shall consist of-
30 (a) the Chief Justice, who shall be the Chairman;
31 (b) the Attorney General; and
32 (c) two persons who are entitled to practice as legal
33 practitioners before the Court, who shall be appointed
34 by the Chief Justice after consultation with the Cayman
35 Islands Law Society.

36 ...
37

1
2
3
4
5
6
7

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

- (3) *The Rules Committee may, subject to this or any other law, make rules, to be called Rules of Court, for all or any of the following purposes-*
- (d) *prescribing the fees and costs of legal practitioners in contentious matters, and regulating their taxation...*

16. On the 1st January 2002 the Court Costs Rules 2001 which were gazetted on the 22nd October 2001 came into force. These rules revoked the old Grand Court (Taxation of Costs) Rules of 1995. The second Explanatory Note to the Court Costs Rules 2001 stated, “GCR O.62 is comprehensively amended and a detailed explanatory memorandum is scheduled hereto.” This note also adds that, “The new GCR O.62 should be read in conjunction with Practice Direction 1 of 2000.”

17. It is necessary to refer to this Explanatory Memorandum of the Court Costs Rules in order to fully understand how the new O.62 should be read and interpreted along with Practice Direction 1 of 2001.

18. The new O.62 effectively abolished the old adversarial procedure and stated that taxation would become an inquisitorial process, which will normally be completed without any oral hearing, by the taxing officer.

19. Paragraph 4 of the Explanatory Memorandum, which is not part of the Order, states that “Rule 4(2) is the key provision” and adds that “...the overriding objective is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the court.”

- 1 20. Paragraph 7(1) of the Explanatory Memorandum highlights that Rule 13(1) “puts
2 the onus on the successful party to establish the reasonableness of the amount
3 claimed, and any doubts are to be resolved in favour of the paying party.”
4 Paragraph 7 adds that Rule 13(2) imposes the concept of “proportionality” and
5 states that, “The amount of costs recoverable must be proportionate to the
6 amount of money involved, the importance of the case and the complexity of the
7 issues.”
8
- 9 21. Finally paragraph 12 of this Explanatory Memorandum confirms that “work done
10 by foreign lawyers, (in this case, leading counsel Mr. Lynagh), who have been
11 temporarily admitted, is recoverable on taxation.”
12
- 13 22. Paragraph 12 goes on to state, “The overriding principle is that a paying party
14 should not be required to pay more, because a successful party has engaged a
15 foreign lawyer, than he would be required to pay if the successful party had
16 employed only a local attorney. It follows, for example that, (1) travel expenses,
17 hotel expenses and work permit fees will be disallowed; and (2) If the result of
18 employing a foreign lawyer is that two lawyers appear in court when the hearing
19 could equally well have been conducted by one lawyer, one set of fees will be
20 disallowed.”
21
- 22 23. I turn now GCR O.62 and in particular GCR O.62 r.9(1) which the Defence relies
23 upon, and which states, “Subject to paragraph (2) the costs of any proceedings
24 shall not be taxed until the conclusion of the cause or matter in which the
25 proceedings arise.” However it is important to note that GCR O.62 r.9(2) states,

1 “If it appears to the Court when making an order for costs that all or any part of
2 the costs are to be taxed at an earlier stage it may order accordingly.”

3
4 24. The basis of taxation is set out in GCR O.62 r.13 which states, “On a taxation of
5 costs on the standard basis there should be allowed a reasonable amount in
6 respect of all costs reasonably incurred and any doubts which the taxing officer
7 may have as to whether the costs were reasonably incurred or were reasonable in
8 amount shall be resolved in favour of the paying party; and in these rules the
9 term “the standard basis” in relation to the taxation of costs shall be construed
10 accordingly.” Furthermore GCR O.62 r.13(2) states, “Where the amount of costs
11 is to be taxed on the standard basis, the taxing officer will only allow costs which
12 are not only reasonable but are also proportionate to the matters in issue having
13 regard to (a) the amount involved; (b) the importance of the case; and (c) the
14 complexity of the issues.”

15
16 25. GCR O.62 r.16 deals with the amount of costs and states, “The amount of costs
17 to be allowed on taxation shall (subject to r.17 and to any order of the court
18 fixing the costs to be allowed) be in the discretion of the taxing officer.”

19
20 26. GCR O.16 r.2 states, “In exercising his discretion the taxing officer shall have
21 regard to the Guidelines issued by the Rules Committee pursuant to paragraph 3,
22 to all relevant circumstances and in particular to (a) the circumstances of the item
23 or of the cause or matter in which it arises and the difficulty or novelty of the
24 questions involved; (b) the skill, specialised knowledge and responsibility
25 required of, and the time and labour expended by, the attorney; (c) the number

1 and importance of the relevant documents (however brief) properly prepared or
2 perused; (d) where money or property is involved, its amount or value.”

3
4 27. For the purposes of this hearing my attention is drawn to GCR O.62 r.18(1)
5 which states, “Work done by foreign lawyers may be recovered on taxation under
6 these rules on the standard basis provided that (a) the foreign lawyer has been
7 temporarily admitted as an attorney; and (b) the work was done after he was
8 admitted.”

9
10 28. Having reviewed Section 24 of the Judicature Law, Section 19 of the Grand
11 Court Law, the Court Costs Rules 2001, GCR O.62, I now finally turn to Practice
12 Direction 1 of 2001 which was made pursuant to GCR O.62 r.17 and came into
13 force on the 1st January 2002.

14
15 29. Section 7 is the relevant paragraph in relation to the matter before this Court. The
16 Defendant relies on 7.2 which states, “Amounts claimed on the basis of brief
17 fees, refreshers, lump sums, percentages, conditional fee agreements,
18 contingency agreements, or any basis other than hourly rates will be disallowed.”

19
20 30. Section 7.3 lays out the hourly rates to be applied for attorneys in the cases of
21 taxation on the standard basis and states that they are maximum rates.

22
23 31. Paragraph 1 of the Plaintiff’s Summons is no longer an issue because the
24 Defendant accepts that the uplift figures of 33.3% and 33% in the CFAs between
25 Thorp Alberga and the Plaintiff, and between Thorp Alberga and the Plaintiff’s
26 leading counsel, are reasonable. This mirrors the approach taken by myself and

1 Henderson J. on the 12th November 2008 and the 7th December 2009
2 respectively.

3
4 32. As a result of the Chief Justice’s decision in *Quayum and six others v. Hexagon*
5 *Trust Company (Cayman Islands) Limited* [2002] C.I.L.R. 161 (“*Quayum*”)
6 these uplifts must receive the approval of the Court. And, for the avoidance of
7 doubt, I confirm that I find the uplifts as between the Plaintiff and the attorneys,
8 and as between the attorneys and their leading counsel to be reasonable in all the
9 circumstances of this case.

10
11 33. I now wish to take paragraphs ii and iii of the Plaintiff’s Summons together.

12
13 34. The Chief Justice in *Quayum* stated at paragraph 62(c):

14
15 *“In the present matter – and in others, as a matter of discretion, where there*
16 *is to be an enhanced fee – a requirement for submission to taxation on the*
17 *solicitor and own client basis will be imposed, and if appropriate, a cap may*
18 *be placed upon the quantum of fees recoverable.”*
19

20 The Chief Justice went on to add at 62(d):

21 *“In an appropriate case the court, as a matter of the exercise of its*
22 *discretion, can disallow the whole or such part, as it sees fit, of any*
23 *enhanced fee from the amounts which, upon taxation, the unsuccessful*
24 *opponent may be required to pay. That is, the fee will be limited to what is*
25 *reasonable in the circumstances. In this way the potential risk of unfairness*
26 *to such an opponent can be avoided.”*
27

28 35. The case before this Court is very similar to the case of *Bennett v. Attorney*
29 *General of the Cayman Islands* Cause 512 of 2006 where, in the Judgment of
30 Henderson J dated the 10th May 2010 the learned judge also addressed Sections

1 7.2 and 7.3 of Practice Direction 1 of 2001 and stated at paragraph 18 in
2 reference to the Chief Justice’s Ruling in *Quayum*:

3
4 *“Although the passages quoted are obiter dicta, they appear in a judgment in*
5 *which all aspects of conditional fee agreements were examined thoroughly.*
6 *In light of these passages section 7.2 of the “Guidelines” cannot be taken to*
7 *prohibit the recovery and costs of an uplift. The purpose of section 7.2 is to*
8 *forbid the assessment at taxation of costs on any basis other than by a*
9 *consideration of hourly rates and the number of hours spent doing the work.*
10 *Its focus is the method of assessment. The older approach to taxation – that*
11 *is, assessment of a fee which is fair and reasonable in all of the*
12 *circumstances – often paid little, if any, attention to hourly rates or hours*
13 *worked. Indeed, it is a relatively recent development for attorneys, and*
14 *particularly for barristers, to even have hourly rates and to keep a record of*
15 *their hours worked on behalf of a client. Section 7.2 makes the hourly rate*
16 *approach the only permissible manner of taxation. It does not prohibit uplifts*
17 *which are themselves calculated on an hourly-rate basis.”*
18

19 Henderson J. went on to state at paragraph 19:

20
21 *“I am satisfied that the taxing officer may assess the costs here on the footing*
22 *that the appropriate hourly rates are those which include the uplifts. He does*
23 *not have to do so because the decision in *Quayum* provides clearly that it is*
24 *a matter for his discretion.”*
25

26 36. I concur with Henderson J and state that the Plaintiff is entitled to make the case
27 that the Defendant pays to the Plaintiff the uplift figures of 33.3% in relation to
28 the Plaintiff’s CFA with Thorp Alberga and 33% in relation to the CFA with Mr.
29 Lynagh.

30
31 37. For the avoidance of doubt I confirm that I follow Henderson J’s Ruling in
32 *Bennett v. Attorney General* and find that Section 7.2 of the Practice Direction
33 does not prevent the taxing officer ordering the Defendant to pay to the Plaintiff
34 the uplift in accordance with my Ruling dated the 1st June 2010.
35

1 38. I find that it is reasonable and common practice for two attorneys to appear in
2 matters such as the case before me in the Grand Court, and frequently it is the
3 case that leading counsel is instructed. I should also add that it would be perfectly
4 reasonable and common practice for leading counsel to be instructed in a case of
5 this nature before the High Court of England and Wales. We must remember that
6 the Plaintiff was faced with a claim where Police Constable (PC) St. Jacques had
7 been found, rather surprisingly, not guilty of careless driving. There was
8 complicated evidence from accident reconstruction experts and it is my view that
9 it was perfectly reasonable for the Plaintiff to instruct her attorneys to retain
10 leading counsel who specialises in personal injury road traffic accidents of this
11 rather complex and unusual nature.

12
13 39. Finally I turn to paragraph v. of the Plaintiff's Summons which seeks an interim
14 payment of the Plaintiff's legal costs in the amount of CI\$50,000.00.

15
16 40. The Defendant's response to this is that there is no rule permitting such an
17 interim order for costs to be made in the Cayman Islands.

18
19 41. On the 1st June 2010, having found the Defendant liable for the Plaintiff's loss
20 and damage, I ordered that the costs are to follow the event and are to be taxed if
21 not agreed.

22
23 42. Counsel for the Defendant has helpfully assisted the Court by confirming that no
24 appeal against my order has been filed and that she has not received any
25 instructions to appeal my Ruling of the 1st June 2010.

26

1 43. I now revert to Section 24 of the Judicature Law in relation to my discretion on
2 costs. Section 24(1) states: “Subject to the provisions of this or any other law and
3 to rules of court, the costs of and incidental to all civil proceedings in the Grand
4 Court shall be in the discretion of the relevant Court.” And Section 24(3) states
5 that: “The Court shall have full power to determine by whom and to what extent
6 the costs are to be paid.”

7
8 44. To examine this issue I turn to GCR O.62 r.4(2) and remind myself of its
9 “overriding objective” which is that “a successful party to any proceeding should
10 recover from the opposing party the reasonable costs incurred by him in
11 conducting that proceeding in an economical, expeditious and proper manner....”

12
13 45. GCR O.62 r.4(7)(f) states that: “Orders which the Court may make under this
14 rule include an order that a party must pay costs relating only to a distinct part of
15 the proceedings”, and indeed, GCR O.62 r.4(7)(g) states: “The court may order a
16 party to pay interest on costs from or until a certain date including a date before
17 judgment.”

18
19 46. These provisions of GCR O.62. r.4(7) seem to support the Plaintiff’s case that
20 she should be entitled to an interim order for costs but, GCR O.62 r.9 seems to
21 put the matter beyond doubt. GCR O.62 r.9(1) states: “Subject to paragraph (2),
22 the costs of any proceedings shall not be taxed until the conclusion of the cause
23 or matter in which the proceedings arise” and then the important provision
24 appearing at GCR O.62 r.9(2) which states: “If it appears to the Court when
25 making an order for costs that all or any part of the costs ought to be taxed at an
26 earlier stage it may order accordingly.”

1 47. In light of the stated overriding objective of O.62, Plaintiff's limited economic
2 means, and in light of the fact that she may have to wait a significant time before
3 the issue of quantum is finally resolved, I find that it is in the interests of justice
4 to allow her the relief she seeks in paragraph v. of her Summons.

5
6 48. Accordingly, I order that the Defendant pays an interim award for costs in the
7 sum of CI\$50,000.00.

8
9 49. Furthermore, as stated in the Plaintiff's Supplementary Note at paragraph 5, such
10 an order will, of course, be communicated in the bill of costs for taxation so that
11 there is no prejudice to the Defendant in any event.

12
13 50. I order that the costs of this application are to be awarded to the Plaintiff in any
14 event and to be taxed if not agreed.

15
16
17
18
19

20 **Dated this the 7th day of September 2010**

21
22

23 **Quin J.**
24 **Judge of the Grand Court**