IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Henderson.
10/5/210

Cause No: 512/06

BETWEEN:	**DANIEL ALEXANDER BENNETT**	**Plaintiff**
AND:	**THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**	**Defendant**

Appearances: **Mr. Christopher McDuff of Thorp Alberga instructing Mr. Richard Lynagh Q.C. for Mr. Daniel Alexander Bennett, the Plaintiff**

Mr. Hector Robinson and Mr. Murali Ram of Mourant du Feu & Jeune for the Attorney General, the Defendant

Before: **Hon. Justice Henderson**

Heard: **May 10th, 2010**

RULING

1. At the conclusion of a four-day hearing, I have found that the plaintiff has succeeded in proving liability on the part of the defendants. A number of costs issues now fall to be determined.

The facts are set out in some detail in my previous oral judgment. I will not repeat them.

2. The first request by the plaintiff is for an award of indemnity costs. That is based largely upon the fact that the defendant Andrews gave a statement at the time of the accident which refers to a single boulder but nevertheless testified at trial that there were three large boulders blocking access from the marl path to Jefferson Street. In the result, I found as a fact that the evidence of the plaintiff and his witnesses, to the effect that there was only one large boulder blocking access, is to be preferred. That, in turn, supported and led to my ultimate decision on liability, as both parties approached the issue on the footing that, if three boulders rather than one were the impediment to access, it is likely that the plaintiff attempted to turn around at the last moment as described by the defendants' witnesses. PC Andrews' is witness statement referring to the presence of three boulders was signed years after the events in question. The defendants also called Detective Sergeant Jones, who first gave a witness statement several years after the fact and said that he too recalled three boulders present at the location. This was bolstered, to a degree, by the evidence of a civilian witness, Gerry Gould, who testified to the presence of two large boulders.

Finally, Constable Miller, who investigated the accident, described the scene as having one boulder and two smaller rocks blocking access; however, Miller's contemporaneous diagram of the accident scene shows only one large boulder and makes no reference to the rocks.

3. In this context, the plaintiff argues that indemnity costs should be awarded on the basis that "a number of the defendants' witnesses cannot have had a genuine belief in the matters which they urged the Court to find to be the truth". In support, the plaintiff cites the decision of Kellock, Ag.J., of this court, in *Nike Real Estate Limited v. Debruyne and Others* 2002 CILR 31. That decision contains a quote from Justice Mance concerning two witnesses who gave what was described as *"'generally unsatisfactory evidence' as to matters ... not within their knowledge which was 'heavily shaped by the issues'"*.

4. He awarded indemnity costs against the party who called those two witnesses.

5. In the Cayman Islands, an award of indemnity costs is governed by O.62, r.4(11) which reads as follows:

> *"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently".*

6. The same language is picked up and repeated in O.62, r.11 (2), (3) and (4) pertaining to wasted costs orders. Those also may be awarded where the Court determines that anything has been done or omitted in a proceeding improperly, unreasonably or negligently.

7. If indemnity costs were to be awarded, the hourly rate for taxation purposes would be that actually agreed upon with the client. That appears from Practice Direction No. 1/01 entitled "Guidelines Relating to the Taxation of Costs". Section 7.4 of the Practice Direction provides that:

> *"In the case of taxations on the indemnity basis, hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable."*

8. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisors that the claim or defence is likely to fail, prefer to have that determination made by the Court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisors which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis.

9. The principle is described well in a recent decision of the Technology and Construction Court in *Fitzpatrick Contractors Limited v. Tyco Fire and Integrated Solutions (UK) Limited* [2008] EWHC 1391. At paragraph 3, Justice Coulson set out his summary

1 of the principles relating to an award of indemnity costs in the
2 United Kingdom. Item 5 is pertinent:

3–20 *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realized was hopeless) will lead to such an order. In both Wates Construction Ltd. v. HGP Greentree Allchurch Evans Ltd. [2006] NLR 45, and EO Projects Ltd. v. Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realized that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v. Bradley & Another [2007] EWHC 3161 the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by the party may be thought to have been unreasonable."*

22 10. I agree with and adopt that statement of principle, to which I would
23 add the following from *Kiam v. MGN Ltd. (2)* [2002] EWCA Civ
24 66, at paragraph 12:

25–34 *"I for my part, understand the Court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under rule 44 (unlike one made under part 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory."*

11. The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial. In the present case, the Attorney General must have realized that his witnesses could be challenged on the ground that their evidence was contradicted by their own contemporaneous statements. He would not have understood that the defence was hopeless. Mr. Lynagh, when asked to assess the probability of success for the purpose of fixing the uplift in his fee agreement, put the estimate at fifty percent. There is no reason to expect any greater degree of prescience from the Attorney General. For these reasons, I award to the plaintiff his costs on the standard basis only.

12. The second question has to do with approval of the uplift in the conditional fee agreement. Uplifts of 33 percent and 33.3 percent have been agreed between solicitor and client and between solicitor and barrister. Such uplifts must receive the approval of this Court as a result of the Chief Justice's decision in *Quayum and Six Others v. Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161. I am satisfied these uplifts are reasonable as

1 between solicitor and client and as between barrister and solicitor.
2 In the circumstances, I give approval to them.
3
4 13. The third issue concerns whether the defendants should be liable in
5 costs to pay the uplifts. The defendants concede they are liable to
6 an award of costs on the standard basis. They say that means that
7 the plaintiff's attorneys will be paid their costs on the basis of the
8 hourly rates set out in the Practice Direction to which I have
9 referred earlier. Section 7.3 of that Practice Direction provides a
10 scale of hourly rates which is based upon the post-qualification
11 experience of the persons engaged. The highest category of hourly
12 rate, which would apply here to Mr. Lynagh, is for those who have
13 practiced for more that 15 years. The rate provided is up to a
14 maximum of CI $300 or US $365.
15
16 14. The defendants argue that Section 7.2 of the Practice Direction
17 probibits the recovery of any uplift which would exceed the
18 maximum set out in section 7.3. Section 7.2 contains this
19 language:

20 *"Amounts claimed on the basis of brief fees, refreshers, lump sums,*
21 *percentages, conditional fee agreements, contingency agreements*
22 *or any basis other than hourly rates will be disallowed."*
23

15. That Practice Direction was issued October 22nd, 2001 and came into effect on January 1st, 2002. It is signed by the Chief Justice.

16. The decision of the Chief Justice in *Quayum* was released July 5th, 2002, so naturally the Practice Direction takes no account of the extensive analysis contained in that decision. At page 179, and again at page 187, the Chief Justice uses language which presupposes that uplifts may, in appropriate circumstances, be a component of an award of costs and paid by the losing party. At page 179(b) the Chief Justice said:

> *"If subject of taxation by the court, it will not necessarily (in the case even of an uplift arrangement) increase the potential liability for costs of the client's litigation opponent, should the opponent in due course be ordered to pay the costs of the litigation. This is because, on taxation, the court may well allow only the normal fee rate."* (underlining added)

17. Obviously that language contemplates that there will be cases where the uplift, in whole or in part, is awarded as a costs item. At page 187(d) the Chief Justice said:

> *"In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances. In this way the potential risk of unfairness to such an opponent can be avoided."* (underlining added)

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

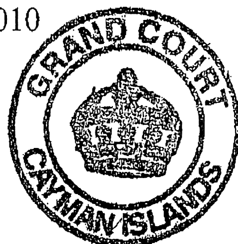
19. I am satisfied that the taxing officer may assess the costs here on the footing that the appropriate hourly rates are those which include the uplifts. He does not have to do so, because the decision in *Quayum* provides clearly that it is a matter for his discretion.

20. The fourth issue has to do with travel and hotel expenses incurred by Mr. Lynagh in traveling here from the United Kingdom for the trial. The Practice Direction in section 9.4 prohibits the recovery on taxation of "traveling and hotel expenses paid to foreign lawyers." For these purposes, a foreign lawyer is a lawyer who has not, at the time the expenses were incurred, been called to the Bar of the Cayman Islands or admitted as a solicitor here.

21. The plaintiff relies upon my own judgment in *Sagicor General Insurance (Caynan) Limited and another v. Crawford Adjusters (Cayman) Limited and Six Others* [2008] CILR 482 for the proposition that I can and should direct that section 9.4 of the Practice Direction will have no application in the present case. In Sagicor, there were particular and unusual circumstances which are entirely absent here. The case before me now is simply the typical case of a plaintiff who elects to retain, through his local solicitors, a foreign barrister. To set aside the requirement here would be tantamount to reading it out of existence, and that I cannot do. I am not lacking in sympathy for the plaintiff. The Practice Direction requires a foreign barrister to travel to the Cayman Islands at the very outset of his retainer expressly for the purpose of ensuring that his fees will be recoverable as costs.

22. The fifth and final issue has to do with the plaintiff's request for an interim payment in the amount of $50,000. The defendants have offered to make such a payment in the lesser amount of $40,000. I am satisfied that is reasonable. I award such an interim payment now. I extend to the plaintiff liberty to apply for a further payment should circumstances demand that.

Dated this 10th day of May, 2010



Henderson, J.

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Judge of the Grand Court