



[2018] JMCC COMM 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013CD00107 (FORMERLY CLAIM NO 2007HCV01483)

BETWEEN	MOSSELL (JAMAICA) LIMITED	CLAIMANT
AND	CABLE & WIRELESS JAMAICA LIMITED	DEFENDANT

IN CHAMBERS

Michael Hylton QC, Kevin Powell and Melissa McLeod instructed by Hylton Powell for the Mossell (Jamaica) Limited

Paul Beswick and Georgia Buckley instructed by Ballantyne Beswick and Company for the Ballantyne Beswick and Company

May 18, 2016 and January 9, 2018

CIVIL PROCEDURE – COSTS APPEAL – WHETHER COSTS ORDER CAN BE USED AS BASIS TO CLAIM ATTORNEY AT LAW AND OWN CLIENT COSTS

SYKES J

The issue

[1] The main issue in these appeals is whether a judicial order awarding costs to one party against the other party can be used as the basis of determining costs

between an attorney at law and his client in circumstances where there is a written agreement between the attorneys at law and his client which sets out the terms and conditions under which fees will be quantified and paid.

The retainer and Digicel's arrangement with BBC

- [2] Mr Richard Fraser, then head of Legal and Regulatory Affairs of Digicel states that he had the main responsibility of dealing with BBC. He swore that for a number of years BBC acted for Digicel in a number of matters. He said that it was agreed that BBC would send 'render invoices on the basis of the time actually and reasonably spent doing work for Digicel, at agreed hourly rates.' He states further that all bills rendered by BBC and approved would be paid by Digicel. Mr Fraser indicated that it was never agreed that bills would be presented on the basis that BBC would charge a brief fee or 'on the basis of time wasted or thrown away or on any basis related to the amount at stake or the outcome of the proceedings.'
- [3] Mr Fraser says that BBC would not charge or be reimbursed for 'common attendances' such as filing and serving documents on other attorneys, photocopying or binding. He adds that none of the bills was ever rendered by BBC and approved and paid by Digicel on any of these bases.
- [4] Mr Fraser exhibited copies of 16 bills relating to these proceedings submitted by BBC and paid by Digicel. These covered the period January 2007 to March 2013. He says that in respect of the BBC's bill of costs for two chamber applications in October 2011 and March 2013 and two adjournments of the trial. In respect of that bill there is a line item for submissions but he says that Digicel has never received any such submissions despite repeated requests for them.
- [5] Digicel formally asked for BBC to produce a bill for work done and has stated that it will be all reasonable bills but instead of producing the bill, the firm has insisted that it be allowed to tax the costs which the court ordered to be paid to Digicel.

Mr Fraser surmises that BBC may wish to keep those costs once they are collected from C & W.

- [6] Digicel took the view that any entitlement to fees is based on the agreement with Digicel and based on that view Digicel refused to allow the firm to proceed as proposed. Digicel insisted that a bill be rendered in accordance with the agreement.
- [7] Counsel Miss Georgia Buckley swore an affidavit to which was exhibited the terms of the retainer agreement dated April 30, 2002 entered into between Digicel and BCC. She states that several of the matter required additional counsel and payments for these were negotiated. A letter dated November 17, 2002 is attached. She says that she has been informed by her managing partner that during one of the negotiations on fees, Digicel said it preferred an increase in senior counsel' rates and a decrease in junior counsel's rates. Various bills dated June 2, 2014 and December 3, 2014 were sent to Digicel.
- [8] In direct response to Miss Buckley's affidavit Mr Fraser's second affidavit stated that he had never seen the retainer before but he is not contesting its authenticity. On the issue of the increase in senior counsel's rates and reduction in junior counsel's rates, Mr Fraser states that he has never expressed such a view and it is unlikely that anyone else would have done so. He insists that what he said about the agreement is correct.
- [9] The retainer agreement is dated April 30, 2002. It states that the BBC agrees to represent Digicel in relation to current regulatory issues raised by the OUR 'as well as in relation to any other general corporate legal matters which you may instruct [BBC] on.'
- [10] The billing rate was said to be US\$300.00/hr 'chargeable in 0.5 hour increments or part thereof.' The letter added that the 'rate will apply to all conference, office and meeting attendances, documentation and necessary administrative preparatory work, research, care and management of your matter as well as for

appearances in Chambers and before administrative tribunals such as the [OUR].’ In respect of court appearances the letter said that **‘for appearances in the Supreme Court on motions or open court hearings a separate brief fee and daily refreshers will be charged which will be indicated and agreed before the appearance’** (emphasis added).

- [11] The letter declares that Digicel will be billed separately for any expenses and/or miscellaneous costs such as ‘Xerox charges, search charges, etc.’ It states further that other than Xerox charges, if these other charges were less than JA\$1,000.00 BBC will assume it has the authority to disburse or incur the charges and if greater then the disbursement will only be made with Digicel’s direct approval.
- [12] There was a second letter of April 30, 2002 signed by both BBC and Digicel. That was a letter in which BBC sought to retain its exemption from the accounting rules. That letter does not concern this appeal.
- [13] The bill of costs filed by BBC were pursuant to orders of Beckford J and McDonald-Bishop J (now Justice of Appeal) made on October 24, 2011 and March 28, 2012 respectively. There is written memorandum indicating that Digicel refused to have the costs taxed and therefore the bills were presented on an attorney at law, own client basis with the client as the paying party and the attorneys at law the receiving party.
- [14] Digicel’s present attorneys objected to the first bill of costs filed by BBC on the ground that it was not submitted to the claimant. BBC filed a second bill of costs which was taxed and it’s from the taxation of the second bill that appeals arose.
- [15] Digicel states that it is prepared to pay any reasonable sum to BBC once the sum accords with the agreement between the parties.

The assessment

- [16] The Registrar issued her final costs certificate on February 8, 2016. She awarded taxed costs in the sum of US\$7,040.85 with interest from October 24, 2011 and continuing and US\$32,737.50 with interest from March 28, 2012 and continuing. These sums were awarded to Ballantyne Beswick & Co ('BBC').

The circumstances that led to the assessment

- [17] Claim No 2007HCV01483 later became 2013CD00107 (**Mossell v Cable and Wireless Jamaica Ltd**) and Claim No 2002HCV00472 later 2013CD00108 (**Digicel (Jamaica) Limited v Cable and Wireless Jamaica Ltd (t/a Lime)** ('C&W')) began life as two separate cases. They were later consolidated and heard in a single trial between March 31, 2014 and July 21, 2014. By the time of the trial Digicel was represented by Grant Stewart Phillips & Company and not BBC which represented Digicel until April 2013.

- [18] The taxation was done pursuant to costs orders. The costs order was made in Claim 2007HCV01483 (2013CD00107). Kay Beckford J made the first costs order on October 24, 2011. C&W had applied to file supplemental a witness statement and a supplemental list of documents. The application was dated October 21, 2011 and heard on October 24, 2011. The trial dates of October 26 and 27, 2011 were vacated and new dates of March 29 and 30, 2012 were set. The costs order was:

Costs of this application and one day's trial costs to the claimant to be taxed if not agreed. Taxation authorised.

- [19] C&W was still not ready for trial in March 2012. On March 27 and 28, 2012 C&W made another application. It was to amend its defence and counterclaim. This meant that the trial dates of March 29 and 30, 2012 were vacated and the trial was set for nearly one year later on March 18 – 22, 2015 for five days. McDonald-Bishop J (now Justice of Appeal) granted the application on March 28, 2011 and made the following costs order:

Costs of the application, with special costs certificate and costs thrown away to the claimant to be agreed or taxed. Taxation authorised.

Digicel's appeal

[20] Digicel had made three challenges to the Registrar's decision. Digicel's first challenge is to the item described as "counsel's trial costs, 1 day, 26/10/2011' at page 9 of the bill of costs. The Registrar awarded US\$1,950.00 for senior counsel and US\$1,350.00 for junior counsel. The basis of the challenge is that these amounts were not (a) payable under the agreement between Mossell and the firm of BBC and (b) in relation to any work done by the attorneys.

[21] The second challenge is to the item described as 'counsel's fees for trial costs thrown away, 2 days; 29.3.2012 – brief fee and 30/3/2012 – refresher fee' at page 10 of the bill of costs for which the Registrar awarded US\$8,125.00 and US\$1,950.00 for brief fee and refresher fee respectively to senior counsel and US\$6,570.00 and US\$1,350.00 for brief fee and refresher fee respectively for junior counsel. The grounds were the same as those in respect of the first challenge but with two additional grounds. These are (a) the Registrar acted on orders which granted costs thrown away to Mossell to be paid by C&W and were not relevant to fees payable by Mossell to the attorneys; and (b) the sums awarded were excessive and unreasonable in the circumstances.

[22] The third challenge is in relation to the dates from which interest ran. The Registrar awarded interest from the date of the orders dated October 24, 2011 and March 28, 2012. It is said that the interest awarded was from the date of the orders to the date of payment instead of from the date of the attorney's invoice. The proposition is that the date of the orders is not the relevant starting point.

BBC's appeal

[23] BBC has also filed an appeal. The firm has raised four challenges. These are:

- (1) Preparation for and attendance at hearing of defendant's application to vacate trial date and file supplemental witness statement on the 24/10/2011

Senior counsel – 4 hrs

- (2) Counsel's trial costs, 1 day, 26/10/2011:

Senior counsel – 6 hours

Junior counsel – 6 hours

- (3) Counsel's fees on attendance at defendant's notice of application for court orders for leave to amend counterclaim (special costs certificate awarded)

27/03/2012 – brief fee

Senior counsel – 6 hours

Junior counsel – 6 hours

28/3/2012 – refresher fee

Senior counsel – 6 hours

Junior counsel – 6 hours

- (4) Counsel's fees for trial costs thrown away, 2 days

29/3/2012 – brief fee

Senior counsel – 25 hours

Junior counsel – 30 hours

30/3/2012 – refresher fee

Senior counsel – 6 hours

Junior counsel – 6 hours

[24] The grounds of appeal are these

(1) The learned Registrar erred in awarding the sum for:

(a) item 1 as there was a failure to properly take into account the volume of work which was required to properly prepare for this hearing;

(2) items 2, 3 and 4 was on an hourly basis and not on a brief and refresher fee basis reflecting inter alia the responsibility and care which counsel were bound to undertake in preparation for trial.

The submissions

[25] Digicel advances the proposition that the Registrar failed to recognise the distinction between party and party costs on the one hand and attorney at law and own client costs on the other. Digicel's point is that party and party costs which arose from the costs orders cannot be used to meet attorney and own client costs because party and party costs are for Digicel and not the attorney. Digicel goes further to say that the costs order created no right in BBC to claim those costs for its own use and benefit.

[26] According to Digicel, the Registrar erred in law when she awarded trial costs and brief fees on the basis of the costs orders because the bills were presented to her as attorney at law and own client costs and not party and party costs.

[27] Finally, Digicel says that no brief fee or refresher fee was owed to BBC because those fees were regulated by the retainer. The retainer agreement said that the brief fee and refresher fee to be charged would be indicated and agreed before any court appearance. This was a condition precedent to liability which was not met and therefore the Registrar had no basis for making the awards that she did.

[28] Miss Georgia Buckley submitted that the firm did not bill Digicel because of the costs orders. The firm wrote to Digicel's new attorneys, the firm of Hylton Powell, seeking permission to have the costs taxed but Digicel declined permission to do so.

- [29] Miss Buckley's submission then went on to speak to the complexity of the matters in which the firm represented Digicel over a prolonged period of time. Learned counsel also submitted that the sums awarded by the Registrar were inadequate for the preparation and attendance of counsel.
- [30] It was also said that over the course of the attorney at law client relationship between Digicel and BBC the terms of the retainer were not strictly followed and that there was a long standing relationship which was based on the understanding that brief fees would be payable.
- [31] It was also submitted that over the course of relationship there were amendments to the terms of the retainer based on the type of matter and its complexity.
- [32] Lastly it was submitted that work was done and therefore attorneys at law were entitled to brief fees.

The fundamentals

- [33] Excluding other areas of the law of obligations such as equity and tort the relationship between the lawyer and the client is based on contract. The lawyer's right to payment arises because of the contractual arrangements between himself and the client. That relationship may be influenced by the legal and regulatory framework within which the lawyer operates. The client may agree to pay the lawyer with any costs he may recover but that does not mean that costs are the lawyer's. The costs are for the client and the client may be contractually bound to hand over those costs to the lawyer but in the absence of any such agreement, assuming of course that such an agreement is permissible under the law regulating the legal profession, the lawyer is not entitled to the costs awarded to any party.
- [34] Costs are not damages. Costs are the sums of money that become payable by the paying party to the receiving party if the court makes an order for costs. No litigant has any right to costs. The receiving party's claim to costs rests solely

upon a judicial order unless there is a statute or rules of court providing for costs in circumstances other than a judicial order.

[35] Even if the client has rights against third parties from whom recovery is expected and out of what is recovered the lawyer's fees are to be paid, that does not mean that the lawyer has any claim against the third party. The lawyer must look to his client and his client alone for payment.

[36] The other fundamental point is capture by Denning LJ in **Griffiths v Evans** [1953] 2 All ER 1364, 1369:

On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it: see Crossley v Crowther, per Sir George J Turner V-C; Re Paine, per Warrington J. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.

[37] It is necessary to state this because Miss Buckley referred to what happened over a long period of time during the professional relationship between Digicel and BBC. From this court's perspective the law is clear. If the client is standing on the written retainer and the attorney at law is saying that over the years the practice varied then it is up to the attorney to prove that to the satisfaction of the court.

[38] The manner in which this difference arose made it difficult to accept BBC's position. It was not a contested trial where the cases were set out in pleadings and evidence heard. It was a taxation which by its nature does not lend itself to resolving disputes between attorney at law and client regarding the terms of the retainer if the terms being relied on by the lawyer are not captured in writing. Miss Buckley said that the retainer was altered over time but there is no written evidence of that and there is no evidence that Digicel agrees with Miss Buckley's

position. This inevitably means that the court has to accept Digicel's position which is that the relationship between Digicel and BBC was governed by the written retainer.

The resolution

- [39] The law of contract governs the relationship between attorney and client subject to any statutory or regulatory addition. As in all contracts the terms are interpreted having regard to the background and matrix of facts in which the parties were when the contract was concluded. The retainer agreement in this case does speak to brief and refresher fees. The proposition advanced that brief fees or refresher fees are based on the right to be represented by counsel cannot avail BBC because the terms of the contract set out the condition precedent for them to be incurred. The condition precedent to the recovery of brief and refresher fees is stated: the parties are to agree brief fee and refresher fee before the appearance. This means that as between BBC and its former client Digicel it is only entitled to payment on the basis of what was agreed between them.
- [40] This means that those items of the Registrar's final costs certificate that were based on brief fees and refresher fees are not permitted. The express terms of the agreement are that for appearances on motion or open court a separate brief fee and daily refreshers **'will be charged which will be indicated and agreed before the appearance.'** There is no evidence that Digicel and BBC agreed the brief fee or refresher fee in advance. This was a condition precedent to liability and it was not met, therefore no liability for Digicel arose.
- [41] The court orders cannot be used as a basis to determine the sums payable to as between attorney and client because those orders were directed to party and party costs. The party and party costs are not for BBC's benefit but for Digicel and if Digicel decide not to pursue those costs then there is no legal foundation for BBC to use those orders to recover its fees. BBC's only lawful source of payment is the retainer agreement between itself and Digicel.

[42] It is not unknown for attorney to agree with this client that the taxed costs will be his fees but that does not mean that the party and party costs are his. They are still for the client who is expected to pay the lawyer with the taxed costs. Even in this context the legal position at the two stages must not be conflated. Party and party assessment of costs stands on an independent and separate footing from attorney and own client fees.

[43] The court will regard BBC's appeal against the Registrar's decision as one in which it is being said that the Registrar was wrong because she took irrelevant matters into account namely the costs orders made by the two judges.

Interest

[44] The final point on appeal is whether the Registrar was correct to award interest from the date of the court orders on the sums awarded to BBC. Digicel contends that the date of the court orders should not be used as the basis for an award of interest against them because those orders relate to party and party costs and not attorney and own client costs. Digicel accepts that interest can be awarded.

[45] The court agrees that interest cannot run from the date of the costs orders because those orders did not create any right in BBC to costs from Digicel. The court is of the view that interest runs from the date of the attorney at law's invoice.

Disposition

[46] Digicel's appeal is allowed. BBC's appeal is allowed. Digicel's appeal against the award of interest is allowed. The orders of the Registrar are set aside. No order as to costs of this appeal. The matter is remitted to the Registrar for her to re-hear the matter afresh taking into account the principles outlined in these reasons for judgment.