



[2018] JMSC Civ 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV 00376

BETWEEN	KARIN MURRAY	CLAIMANT
AND	CLOUGH LONG AND COMPANY	DEFENDANT

Mr. Seyon T. Hanson instructed by Seyon T. Hanson and Co. for the Claimant

Mr. Donavon Malcolm instructed by Clough Long and Co. for the Defendant

HEARD: January 29, 2018

Bill of Cost – Retainer Agreement – Disputed attorney’s fees - Refusal by attorney to have bill of cost taxed – Whether court has jurisdiction to refer bill to Registrar of the Supreme Court for taxation after limitation period – Legal Profession Act Section 24(4)

PUSEY J. J (Ag.)

The Claim

[1] The claimant, a former client of the defendant company, a law firm, by a Fixed Date Claim seeks the following orders:

- I) That all Bills and Invoices with respect to work done by the said firm with respect to Karin Murray and George Murray from the 1st day of March 2013 to December 2014, be referred to the Taxing Master, the said Invoices being:
 - a. Solicitor and Client’s Bill of Cost dated 20th day of March 2013 in the sum of 1,571,893.46;
 - b. Solicitor and Client’s Bill of Costs dated 9th day of April 2013 in the sum of 1,426,084.99;
 - c. Solicitor and Client’s Bill of Cost dated

24 th day of January 2014 in the sum of	<u>2,750,961.13</u>
TOTAL	5,748,939.10

II) That the sum of Two Million Nine Hundred Thousand Dollars (\$2,900,000.00) paid by the Claimant on account of the said invoices be applied to the sum due in the event that the taxed amount on the bills is in excess of this sum. In the event the taxed amount is less than the sum of Two Million Nine Hundred Thousand Dollars, said sum to be repaid to the Claimant with interest at the rate of ten percent per annum;

III) Cost to the Claimant to be agreed or taxed.

INTRODUCTION

[2] The claimant and her late husband were clients of Jennifer Messado and Company, Attorneys-at-Law. The claimant resides in England and visits Jamaica periodically as she conducts substantial businesses here.

[3] The claimant and her late husband were involved in litigious matters in Jamaica and were referred by Jennifer Messado and Company to the firm of Clough Long and Company to act on their behalf in one of the litigations.

[4] The arrangement for the payment of fees to Clough Long, which is not disputed, was that bills were submitted to Jennifer Messado who settled those bills from moneys standing to the credit of the claimant in her possession.

[5] The financial arrangements for the services of the defendant company are contained in a Retainer, expressed in letter dated March 1, 2013. The Retainer stipulated that \$500,000.00 was to be paid and utilized to provide the service at specified rates per hour, disbursements were to be paid within 30 days of presentation of the bill and when the initial \$500,000.00 was exhausted, a further sum of \$500,000.00 was to be paid and utilized in the same way. Failure to pay any further \$500,000.00 sums would result in the retainer being terminated.

[6] Of significance to the issues before the court, the Retainer also provides;

Agreement

In the event that you do not accept our bill(s) presented to you, or should you for whatsoever reason terminate our retainer and/or services herein and do not accept our bill(s) presented as a consequence, it is agreed that the fees, amount payable, will be the amount as found to be due, owing and payable on A Bill of Cost taxed by the Registrar of the Supreme Court, under the Civil Procedure Rules.

The Bill of Costs so taxed shall be deemed to be our Bill to You; and the amount specified therein, plus the costs of its preparation and taxation shall be accepted by you as the amount due and payable to us by you.

- [7] Between March 1, 2013 and December 2014 two bills were tendered to Jennifer Messado and Company dated March 20, 2013 and April 9, 2013, which were paid without demur. A third bill dated January 24, 2014 was not paid.
- [8] The claimant alleges that she was never advised by Jennifer Messado and Company about the amounts of the first two bills. She learned about the extent of the bills in 2014 after the final bill was rendered and she raised her objections. In her opinion the bills were excessive and what was already paid (\$2,900,000.00) was sufficient to settle her obligations to the defendant. She asked that the bills be taxed pursuant to the Retainer agreement and the defendant has refused to go to taxation.
- [9] The claimant was absent from Jamaica for some time between 2014 - 2016 as Mr. Murray became terminally ill and subsequently died. The claimant contends that Mr. Murray's illness and the ongoing litigation absorbed her time and she was unable to deal with the issue of the bills until after Mr. Murray's death in 2016.
- [10] The matter for which Clough Long and Company was retained was not concluded in favour of the claimant. The Retainer was terminated by the claimant when the case ended at first instance, although it went on appeal. The defendant contends that this is the reason the claimant is disputing the bill.

[11] The defendant wrote to the claimant to settle its fees and when she objected the defendant filed suit in the Parish Courts to recover the fees. The claimant is defending that action. The matter has been stayed pending the outcome of this matter.

THE ISSUES

[12] The issues to be decided are;

- Does the court have jurisdiction to refer these Bills of Cost to the Taxing Master for taxation, after 12 months have elapsed since the presentation of the Bills pursuant to the Legal Profession Act
- Whether part-payment of the bill, 'on account' from time to time when presented, exclude the operation of the Legal Profession Act or the Retainer

[13] The Legal Profession Act ('the Act') sets out the circumstances in which a Bill of Cost should be referred for taxation to the Taxing Master. It provides,

22 (2) *Subject to the provisions of this Part, any party chargeable with an attorney's bill of fees may refer it to the taxing officer for taxation within one month after the date on which the bill was served on him.*

(3) *If application is not made within the period of one month aforesaid a reference for taxation may be ordered by the Court either on the application of the attorney or on the application of the party chargeable with the fees, and may be ordered with such directions and subject to such conditions as the Court thinks fit.*

(4) *An attorney may without making an application to the Court under subsection (3) have the bill of his fees taxed by the taxing master after notice to the party intended to be charged thereby and the provisions of this Part shall apply as if a reference for such taxation has been ordered by the Court.*

24. *No reference shall be directed upon application made by the party to be charged after judgment has been obtained in any suit for the recovery of the fees of the attorney or after expiration of twelve months after the bill has been served except under special circumstances to be proved to the satisfaction of the Court to which application for reference has been made.*

Emphasis mine

[14] The Bills of Cost in this matter were rendered from time to time and according to the claimant, the first 2 bills came to her attention more than 12 months after they were rendered. The court therefore, has to examine the circumstances of the claimant to see if they amount to 'special circumstances', within the meaning of section 24 of the Act, that could allow the Bills of Cost to be referred.

[15] The defendant company has not exercised any right under the Legal Profession Act quoted above. It refused to have the bills taxed pursuant to the Retainer. Instead, it made demand for payment and upon non-payment, it filed suit in the Parish Court for the Corporate Area seeking to recover its fees.

THE CLAIMANT'S SUBMISSIONS

[16] In written submissions, the claimant argues that there is no dispute that the defendant was retained by the claimant after having been engaged by Jennifer Messado and Company and that bills submitted to Mrs. Messado were settled. They however, question the reasonableness of the bills tendered on the basis that were excessive. They argue that the bills, in keeping with the terms of the Retainer should be submitted to the Registrar for taxation as they are disputing the bills and the services of the defendant were terminated. These two factors, they contend, trigger the provisions of the Retainer regarding taxation, quoted above.

[17] It is the refusal of the defendant to abide by this agreed process that has given rise to this action. In addition, the defendant has filed a suit in the Parish Court for the Corporate Area to recover its bill, which the claimant argues is pre-mature.

[18] The claimant argued that Section 22 and 24 of the Act (set out above), is relevant as to how the matter is to be treated by the court.

- [19] Counsel argued that section 22(3) of the Act preserves the court's jurisdiction to refer a matter for taxation even after the time limited by section 22(2) has elapsed. He further contends that even without the Retainer, the defendant would be well within its right to submit the bill to the Taxing Master pursuant to Section 22(4), as it imposes no time limit on the defendants to act.
- [20] In the instant case however, five years had elapsed since the Bills of Cost came to the attention of the claimant and she is only now seeking to have them taxed. The question which arises is whether the court has jurisdiction to grant such an application.
- [21] Counsel directed the court to Section 24 of the Act which, he argues, gives the court jurisdiction to refer the Bill for taxation.
- [22] He referred the court to *Turner & Co. (a Firm) v O. Paloma S.A.* [2000] 1 WLR 37 dealing with a provision of the Solicitor Act 1975 similar to section 24 of the Legal Profession Act. The case supports his contention that the claimant is entitled to challenge the reasonableness of the bill of cost, even after the time for reference to taxation under the Act has expired and the bill has been settled. This is in the ordinary, common jurisdiction of the court and if it is established that special circumstances exists that should cause the court to refer the matter.
- [23] Counsel further contends that the 'special circumstances' referred to in the *Turner* case and Section 24 of the Act exists in this matter in so far as;
- the bills were submitted directly to Mrs. Messado and paid by her without reference to the claimant;
 - the bill is excessive as it makes reference to at least three attorneys dealing with the matter yet the defendant's affidavit speaks to only 2 attorneys;
 - there is express provisions in the Retainer for reference to the Taxing Master where a dispute arises;
 - an examination of the bill reveals that the total on the first and second bills were carried over to subsequent bills without allowance for any sums being settled, thus elevating the bill; and

- the claimant was overseas tending to her dying husband and was unable to see the bills, which were sent to her attorney and her Jamaican business address.

DEFENDANT'S SUBMISSION

- [24] Counsel for the defendant company argued that Jennifer Messado was the agent of the claimant and collected and settled bills on her behalf. Two bills were settled. The final bill submitted has been questioned by the claimant, possibly because she was unsuccessful in the matter in which the defendants appeared. The payments made were partial payments of the whole Bill of Cost. Twelve months have elapsed without the bill being settled and pursuant to the Act, it cannot be referred for taxation. No special circumstances exist to allow for this referral.
- [25] He relied for his contention on the decision in *Harrison and another v Tew* [1990]2 WLR 210, a case in which the solicitors had money in their possession to the credit of the client and applied those sums to settle the Bill of Cost and the client sought a referral after 12 months had elapsed. The court held that the statute, with similar provisions to the section 24 of the Act, displaced the court's inherent jurisdiction to allow taxation after the expiration of 12 months and therefore no referral could be made to the taxing officer after the time had elapsed under the Act.
- [26] He further argued that in order for the claimant to rely on the **Turner** case she had to show 'special circumstances' that would allow section 24 to be invoked.
- [27] The Bills of Cost were sent to the claimant's agent. All the bills were sent to the claimant's address of business by courier in 2014. The claimant's first challenge to the defendant's bill, he argued, was on the 6th February 2017, when this Fixed Date Claim was filed.
- [28] The claimant cannot advance lack of knowledge of the quantum of the Bill of Cost as a circumstance that should be used to invoke the proviso in the statute, as the claimant's agent was aware of the quantum and settled some

of the bill. In addition from 2014 the entire bill was sent to the claimant's business address.

- [29] Counsel argued that the time to challenge a bill is very important.
- [30] The circumstance of the claimant being abroad with an ailing husband, he argued, cannot be cited as a special circumstance and while he empathises with the illness and subsequent death of her husband, she waited four years too late to act.
- [31] He further contends that there was never an issue with the Bills of Cost until a particular stage in the proceedings, (when the case was lost). The firm even received some payment after the objection to the bill was raised.
- [32] The defendant's counsel submitted further that a distinction must be drawn between a settled bill and a bill that is partially paid. If the defendant sends a bill and there is partial payment, it takes the matter outside of the provisions of the Retainer in question, as the Retainer does not contemplate partial payment. It follows naturally that partial payment effectively acts as a bar to the claimant seeking taxation, he argued, on the construction of the Retainer.
- [33] For those reasons, counsel submitted, the application for referral for taxation should be refused.

DISCUSSION AND ANALYSIS

- [34] I will first analyse the Retainer, then examine the law related to section 24 of the Legal Profession Act.
- [35] I am grateful to counsel on both sides for their helpful submissions.
- [36] The Retainer, which governs the contractual relationship between the parties, can be divided into three segments. The Introduction, which confirms the engagement and the proposed terms of payments being, *inter alia*, an advanced payment of \$500,000 to be utilized by hourly rates and when exhausted, a further payment of \$500,000.00 to be advanced and if not

advanced the Retainer would automatically terminate. The second section headed 'Terms of Business' sets out factors that could lead to the termination of the Retainer. The final section headed 'Agreement', quoted above, deals with taxation of the Bills of Cost.

- [37] Two bills were sent to Mrs. Messado who paid them without demur. These Bills, exhibited in the affidavit of the claimant as KM1 'A' and 'B' shows **'Amounts now owing on account'**. The final Bill of Cost showing a balance of \$748,939.13, was not settled in the usual way by Jennifer Messado and Company as the claimant objected to it as being excessive.

On the construction of the Retainer, should the Bill of Cost be taxed?

- [38] Counsel for the defendant submitted that the payments by Messado and Company are partial payments. The Retainer does not contemplate partial payment. Consequently if a partial payment is made, the Retainer is breached and so the provision for taxation dies with the breach.

Are the sums advanced by the claimant partial payments?

- [39] 'Partial payments' denotes the supply of a bill and the payee paying a portion of the bill leaving a balance. I agree with the defendant that that is really not provided for in the Retainer.
- [40] To interpret the Retainer, the ordinary meanings of the words are instructive. According to the words of the Retainer, advanced payments were required of the claimant, failing which the Retainer would terminate. Whatever Bills are rendered, are an accounting for the use of sums advanced. In point of fact, if the defendants had lived true to the Retainer, there should be no balances outstanding at any time because, as soon as funds advanced are exhausted, a payment should be made by the client or the Retainer would terminate.
- [41] Payments by Jennifer Messado and Company cannot therefore abrogate the right to refer the bill for taxation. The Retainer provides for this method of payment for a single bill rendered from time to time.

- [42] The section of the Retainer headed 'Agreement,' specifically provides for disputes. The clear, ordinary meaning of it denotes that a reference should be made to the Taxing Master once there is objection to the bill or when the services of the defendant are terminated. There is no ambiguity. There is no time limit. There is nothing about partial payment.
- [43] If I am not correct in this interpretation of the Retainer, I examined the law concerning reference of Bills of Costs for taxation.
- [44] The Act makes provision for either party to refer a Bill of Cost for taxation before the Registrar of the Supreme Court within a month of the bill being rendered.
- [45] Section 24 provides that the party to be charged shall not refer the bill for taxation after the expiration of 12 months of the bill being served, except there are special circumstances to be proved to the satisfaction of the court to which an application for reference has been made.
- [46] Neither party referred the bill before the expiry of a month. More than 12 months has ensued since the bills were rendered. The claimant is here seeking to invoke the provisions of section 24 to have the bills referred for taxation after 12 months has elapsed because, she advances that there are special circumstances for it to be referred.
- [47] Counsel for the defendant Mr. Malcolm referred to the decision of the House of Lords in **Harrison v Tew** (*Supra*) which held that on a true construction of section 70(4) of the 1974 Solicitor Act (equivalent to section 24 of our Act) the court's inherent jurisdiction to refer a matter after the expiry of 12 month had been displaced by the Act. Consequently the court has no jurisdiction to refer the matter for taxation after the expiration of 12 months.
- [48] Counsel for the claimant referred the court to the decision in **Turner and Company (A Firm) v Palomo S.A.-** (*Supra*) in which the court held that in its common law, ordinary jurisdiction, a court can make an order for the matter to be referred for taxation.

[49] In handing down the decision in the *Turner* case, Evans L.J. discussed the leading authorities and distinguished the decision in *Harrison v Tew*. That case held that the court's inherent jurisdiction' to refer the matter for taxation has been displaced by the statute. Evans L.J. decided that the issue as to whether section 24 displaced the ordinary jurisdiction of the court to refer a matter for taxation, was not discussed in *Harrison v Tew*. Consequently the court's ordinary, common law jurisdiction was not excluded by that decision. It is therefore open to a court to rely on its common law, ordinary jurisdiction as opposed to its inherent jurisdiction, to refer a bill for taxation. A litigant should not be forced to accept a bill rendered by a solicitor that he believes is unreasonable. The client has a common law right to challenge the bill he is to pay in the ordinary jurisdiction of the court, despite the limitation period provided in the Act having elapsed. In his conclusion Evans L.J. said,

The Court of Appeal has held three times, that the common law or "ordinary jurisdiction" of the court is not excluded, and these judgements are not in any way inconsistent, in our view, with the decision of the House of Lords in Harrison v Tew.

[50] It follows that the court can refer this Bill for Taxation to the Registrar in its common law or ordinary jurisdiction. The claimant must, however, show special circumstances that warrant the invocation of this right where the application is made more than 12 months after the bill was rendered.

Do special circumstances exist in the case at Bar?

[51] The claimant has outlined five factors that should qualify as special circumstances, namely:

- i) The bills were sent to an agent of the claimant
- ii) The agent would normally pay the bills without query or discussion with the claimant
- iii) When the claimant became aware of the quantum of the bills they refused to authorize any further payments
- iv) The claimant has taken issue with the reasonableness and fairness of the bills and are of the view that the bills are excessive
- v) The claimant wishes to have the bills taxed as provided for in the Retainer.

- [52] The claimant contends, and the defendant cannot take objection to the fact that she was unaware of the quantum of the bills settled by Messado and Company. It was common knowledge that the claimant lives overseas so the bills were sent to Messado and Company and latterly, to her Jamaican business address by the defendant. It is probable and very likely that she may not have learned of the content of the bills until she arrived in Jamaica after the death of her husband in 2016. This to my mind is not the normal course of doing business with a client with whom there is a Retainer executed by the client. To me, this is a special circumstance.
- [53] The claimant's unfortunate situation with her husband terminally ill overseas and her undoubted attention to this family crisis, are circumstances that are unusual, unpredictable and understandable. Coupled with that, she was still involved with other litigations involving substantial financial interests with other counsel. These issues must have weighed heavily on her mind at the time. It is noteworthy that she is not unwilling to settle the bill. There is evidence that the defendant received sums even after the objection was made. In light of that, I find that her situation qualifies as a special circumstance.
- [54] The Retainer expressly states that disputes concerning the bill should be settled by taxation. I do not agree with Mr. Malcolm that the payments made breached the agreement as, as I said earlier, the payments were part of the schema of the Retainer. This to my mind qualifies as a special circumstance as it is provided for by agreement and is being avoided by the defendants.
- [55] Accordingly, special circumstances are evident in this matter to invoke the proviso in section 24 of the Act and have the matter referred for taxation by the Registrar of the Supreme Court.

CIVIL PROCEDURE RULES 2002 AS AMENDED IN 2006 ('CPR') PART 65

- [56] Counsel for both parties made reference to CPR Part 65, which deals with the procedure for taxation by the Registrar of the Supreme Court. This rule cannot aid either party in the matter at bar dealing with the court's jurisdiction to refer a matter for taxation. The CPR are rules of procedure. As the Privy Council

said in **Beverley Lopez v Ken Sales and Marketing Ltd**, Privy Council Appeal No. 87 of 2006 delivered January 24, 2008,

*The Civil Procedure Rules 2002, which came into effect in 2003, contains Rules relating to the making of charging orders **but while rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction.***

Emphasis mine

Should the portions of the bill that had been settled by Messado and Company be included in the taxation?

[57] The schema of the Retainer does not contemplate partial payment as mentioned before. It speaks to advanced payments and the bills rendered are in accordance with the schema. The inclusion in the bill of the term 'payment on account' does not change the provisions of the Retainer and the bill is therefore really one bill for the work done, submitted when the attorney is out of funds held to the credit of the client. The phenomenon of balances being brought forward also denotes one continuous bill. Accordingly, the entire bill has to be taxed.

Regarding whether the sum already paid by the claimant, (\$2,900,000.00) should be applied to the bill on taxation and any balance repaid with interest.

[58] As the purpose of taxation is to determine the excessive nature of the Bill of Cost, any overpayment after taxation logically belongs to the claimant. The claimant seeks interest of 10% on any overpaid amounts but has not advanced a basis on which the claimant is entitled to the interest claimed.

CONCLUSION

[59] The claimant having not applied to the court for the Bill of Cost to be referred for taxation before the expiration of 12 months is not precluded from successfully making the application. The court, in its common law or ordinary jurisdiction can make the order for the referral of the bill for taxation, as special circumstances exist that warrants the referral, although the 12 months limitation period has elapsed.

[60] In addition the Retainer provides for referral for taxation if a dispute arises or the services of the defendants it terminated. These issues arose in the instant case and therefore the bill ought to be referred for taxation in accordance with the Retainer.

[61] The court therefore orders:

- I) All Bills and Invoices with respect to work done by the defendant for Karin Murray and George Murray from the 1st day of March 2013 to December 2014, be referred to the Taxing Master for taxation.
- II) That the sum of Two Million Nine Hundred Thousand Dollars (\$2,900,000.00) paid by the claimant on account of the said invoices be applied to the sum due in the event that the taxed amount on the bills is in excess of this sum. In the event the taxed amount is less than the sum of Two Million Nine Hundred Thousand Dollars, said sum to be repaid to the claimant.
- III) Cost to the claimant to be agreed or taxed.