

**BARBADOS**

Suit No: 1484 of 2000

**IN THE HIGH COURT OF JUSTICE**

**CIVIL DIVISION**

**BETWEEN**

**ARCADIA PROPERTY LIMITED - PLAINTIFF**

**AND**

**INNOTECH SERVICES LIMITED - DEFENDANT**

*Before Ms. Maureen Crane-Scott, Q.C., Registrar of the Supreme Court*

*Mr. Bryan Weekes for the Plaintiff*

*Mr. Marcel El-Daher for the Defendant*

**2006: 24 May; 8 June; 26 July; 3 October**

**2007: 17 September**

**DECISION**

Background:

1. On May 24, 2006 I commenced the hearing of party and party taxation proceedings in this matter and embarked on a consideration, pursuant to Order 62 of the Rules of the Supreme Court, 1982, of the reasonableness or otherwise of the professional charges, disbursements and other expenses claimed in the Plaintiff's Bill of Costs which was presented for taxation pursuant to the final Judgment of Madam Justice Elneth Kentish dated the 27<sup>th</sup> October, 2005 in which the Plaintiff was ordered "*to have its costs of the action to be agreed or taxed.*"
2. At the hearing of the taxation and in accordance with Order 62 of the Rules of the Supreme Court, 1982 Counsel for both parties made submissions concerning, *inter alia*, the nature of the proceedings, its novelty and

complexity, the money value of the matters at stake in the case and the work done and the expense and time involved in preparing and presenting the Plaintiff's case. After reading the affidavit of Janet Keppel-Palmer sworn on March 13, 2006 which was produced in support of the Plaintiff's claim to recover first class air travel and accommodation expenses of two overseas witnesses to attend the trial and following my review of the Court file and having due regard to the factors set out in Order 62 of the Rules of the Supreme Court, 1982, I gave my decision on the taxation on June 8, 2006 and made the following award:

Summary of award on initial taxation

Items	Claim	Award
Disbursements -	\$ 1, 233.00	\$ 1, 233.00
Legal fees -	\$100,000.00	\$80,000.00
15% VAT on legal fee -	\$15,000.00	\$12,000.00
Quantity Surveyor's fee -	\$ 4, 587.00	\$ 4, 587.00
Witnesses expenses ( <i>travel &amp; accommodation</i> ) -	<u>\$144,393.00</u>	<u>\$144,393.00</u>
Total	<u>\$265, 213.00</u>	<u>\$242, 213.00</u>

The Request for Review:

3. By letter dated June 14, 2006, the Defendant applied in accordance with Order 62 rule 53 for a review of my decision. Order 62 Rule 53(1) provides that:

*“(1) Any party to taxation proceedings who is dissatisfied with the allowance or disallowance of **any item** by the Registrar, or with the amount allowed by [the Registrar] in respect of **any item**, may apply to [the Registrar] to review his decision in relation to **that item**.”*

4. Perusal of the Defendant's letter of June 14, 2006 requesting the review of the taxation will reveal that the Defendant was dissatisfied with the following items of my award, namely, (i) legal fees of \$80,000.00 plus 15% VAT

thereon of \$12,000.00 and (ii) witness expenses being travel and accommodation expenses of \$144,393.00.

5. The reasons for the Defendant's objections outlined in the letter and further amplified at the hearing of the review were in short (i) that the professional fees awarded of \$80,000 plus 15% VAT were excessive having regard to the nature and complexity of the matter; and (ii) that the disbursements and costs of \$144,393.00 claimed in connection with the attendance of witnesses, including travel and accommodation were excessive and not legitimately incurred.

Considerations leading to the initial award of legal fees of \$80,000 plus VAT:

6. In arriving at my initial award of legal fees of \$80,000.00 plus 15% VAT, regard was had to the principles and factors incorporated in O. 62 r. 7 of the Rules of the Supreme Court, 1982 which are relevant to the taxation of costs on a party and party basis. As regards '*the nature of the cause or matter*' (O. 62 r. 7(2)(a) RSC), both parties were agreed that the Plaintiff's case involved the interpretation of a construction contract and issues of frustration of contract, whereas the Defendant by way of its Defence and Counterclaim had raised issues of breach of contract and loss of profits.
7. There also appeared to be some acceptance by both Counsel of the fact that while the legal issues in the case were not '*novel*' (O. 62 r. 7(2)(a) RSC), the case nonetheless raised a degree of '*complexity*' (O. 62 r. 7(2)(a) RSC) particularly in relation to the Defendant's claim for loss of profits. The complexity of this issue was demonstrated by the fact that Counsel on both sides were of necessity required to seek the advice of professionals from other disciplines, namely quantity surveyors and accountants in order to come to grips with the intricacies of construction contract methodologies, accounts and profit percentages so as to properly prepare, present and argue the case.

8. As regards *'the interests, money or the value of the property involved'* (O. 62 r. 7(2)(a) RSC), Counsel for the Plaintiff submitted that the Registrar should consider the amounts involved in the matter, namely the Plaintiff's claim for damages and the award of \$310,000.00 and the amount of \$222,000.00 at stake in the Counterclaim. Mr. Weekes further submitted that the starting point for costs should be 15% of the money values or a figure of approximately \$75,000.00. He however, submitted that given the amount of work carried out in this matter, a fee of \$100,000.00 plus VAT would be a fair award.
9. Quite apart from the legal work carried out by Mr. Weekes between the approximately five (5) and a half years between his taking instructions on April 7, 2000 and October 27, 2005 when judgment was handed down, the Plaintiff's Bill of Costs also contained a claim for legal fees for legal work which had been performed by Mr. Roger Forde who had been the Plaintiff's previous attorney-at-law between 1998- 1999 *prior to* the commencement of the High Court action. According to Mr. Weekes, Mr. Forde had been paid approximately \$30,000.00 to \$35,000.00 and that the amount could be substantiated by the production of receipts. Mr. El-Daher objected to the inclusion in the Bill of Costs of a claim for recovery of the legal fees paid to Mr. Forde. Ultimately, in the absence of receipts substantiating the payment by the Plaintiff to Mr. Forde of amounts for legal fees, the claim to recover fees paid to Mr. Roger Forde was disallowed.
10. Although Mr. Weekes was invited for purposes of (O. 62 r. 7(2)(c)-(g) RSC) to give an indication of *'the time involved'* in the various items of work claimed for, this, evidently, proved not to be possible. Indeed, apart from Mr. Weekes' estimate that he had spent approximately six (6) to eight (8) hours researching the case over the period of one (1) week, no further submissions were made by him regarding the time spent on any of the other items of work claimed for in the Bill. Ultimately, in the absence of any indication from Mr.

Weekes as to the time spent on the work claimed for, it was left to me, as taxing master to rely on my own experience and to make my own assessment from the file as to what time could have been spent by Mr. Weekes in performing the various items of work claimed for in the Bill. For his part, Counsel for the Defendant, Mr. El-Daher suggested that according to his estimates, Mr. Weekes could have spent approximately sixty-five (65) hours in preparing the case for trial.

11. In arriving at my initial award to the Plaintiff of legal fees of \$80,000.00 plus 15% VAT, I took note of the fact that the legal work performed by Mr. Weekes spanned a period of approximately five (5) and a half years between April 7, 2000 and October 27, 2005 and that the interests, money or the value of the property involved on the Claim and the Counterclaim totaled some \$532,000.00. Additionally, relying on my own experience and after reviewing the Court file and the various items of work claimed for in the Bill of Costs, I made an assessment of the approximate number of hours that may have been spent by Mr. Weekes in performing the various items of work claimed for in the Bill.
12. Taking into account also the complexity in the case which required Counsel for the Plaintiff to delve into the intricacies of construction contract methodologies, accounts and profit percentages so as to properly prepare for and defend the Counterclaim, I also allowed an amount to reflect the considerable effort which would have had to be made by Mr. Weekes in prosecuting and defending the Plaintiff's interests and conducting the case. I accordingly awarded the Plaintiff legal costs of \$80,000.00 plus 15% VAT.

Considerations leading to the initial award of \$144,393.00 for witness travel and accommodation expenses:

13. Counsel for the Plaintiff submitted that the Plaintiff company was entitled to recover the cost of air fares to Barbados, accommodation, subsistence, taxis, car rental and other expenses of the Plaintiff's witnesses, Mr. and Mrs. James

Keppel-Palmer and Mr. Marc Hadrill who are ordinarily resident in the United Kingdom. Copies of receipts substantiating the various items of travel, accommodation and subsistence claimed were produced. Additionally, an affidavit sworn by Janet Keppel-Palmer was adduced to substantiate Counsel's submission that Mrs. Keppel-Palmer had back problems and also suffered from a stress related condition which resulted in her preference for first-class air travel.

14. At the taxation hearing, Counsel for the Defendant, Mr. El-Daher indicated that while he could not agree to the claims for first class travel, he was nevertheless prepared to offer the sum of \$40,000.00 which he considered a reasonable sum for witness travel and accommodation.
15. In the absence of any significant legal argument at the initial hearing in relation to the reasonableness of the Plaintiff's claim for travel and accommodation, I was satisfied that having regard to O. 62 r. 22 RSC, I had the necessary legal authority to award the Plaintiff's reasonable witness expenses. I accordingly, awarded the Plaintiff's witness expenses as claimed of \$144,393.00.

The Review hearing:

16. The review hearing took place before me on July 26, 2006. Mr. El-Daher made two points in support of his objection to my award to the Plaintiff of professional fees of \$80,000.00 plus 15% VAT. Firstly, he submitted that the proceedings were neither novel nor complex and that there was an abundance of case law on this area of law which involved issues of contract and frustration. In the circumstances, Mr. El-Daher submitted that the level of the award for professional fees was excessive and unreasonable and that a reasonable remuneration for the work done would have been in the region of \$75,000 including VAT (being professional fees of \$65,000.00 plus 15% VAT- i.e: \$9,750.00.)

17. Secondly, Mr. El-Daher submitted that the Registrar's award for legal fees of \$80,000.00 plus 15% VAT was unreasonable in that it failed to take into account that a party and party Bill of Costs should not be taxed on a full indemnity basis.
18. At the review hearing, Counsel for the Plaintiff, Mr. Weekes relied on the written submissions which he had presented at the taxation hearing and did not address me further on the matter of the award of legal fees.
19. After hearing the arguments of both Counsel and after re-examining the Court file together with the relevant provisions of Order 62 r.7 of the Barbados Rules of the Supreme Court, I was satisfied that I had over-estimated the award for the Plaintiff's professional fees which I had made at the initial taxation of costs in these proceedings. Indeed, my initial award had even exceeded the \$75,000.00 fee based solely on a 15% of money value which Mr. Weekes had suggested was the proper starting point for costs in these proceedings.
20. Following the review hearing, I re-assessed downwards the approximate number of hours that I had originally determined might have been spent by Mr. Weekes in performing the various items of work claimed for in the Bill. I thereafter applied a percentage mark-up of 60% to reflect the considerable effort which would have had to be made by Mr. Weekes in prosecuting and defending the Plaintiff's interests and conducting this case. I accordingly revised my award for the Plaintiff legal costs downwards to \$65,000.00 plus 15% VAT of \$9,750.00 which I consider to be reasonable remuneration for the work done by Mr. Weekes in advancing the Plaintiff's case and defending the counterclaim over the period of just over five (5) years during which he was involved in the matter.

21. Turning to the award for travel and accommodation for witness expenses, Mr. El-Daher initially argued that the amounts claimed and awarded for witness travel, accommodation and subsistence had not been legitimately incurred. He pointed out that the witnesses were the principals of the Plaintiff company and further, were not expert witnesses. During the course of his submissions on the review, Mr. El-Daher later conceded that the items claimed for were properly incurred but submitted that the amounts allowed were excessive and unreasonable.
22. Mr. El-Daher then referred me to the following three (3) decided cases which in his view provided guidance on the types of disbursements and expenses which can legitimately be recovered on a taxation:
- (i) *Allto-Imports, A. Larson v. Fairbanks & Fairbanks (1991)*
  - (ii) *Attorney General of Canada v. Br. Columbia Ferry Corporation (1981)*
  - (iii) *W.F. Marshall v. Barnes (1953) 1 All ER*
23. For his part, Counsel for the Plaintiff, Mr. Weekes justified his claim for witness expenses of travel and accommodation and subsistence by reference to Order 62 r. 22 of the Barbados RSC and further, Order 62 r. 37 which provide as follows:

“2. Special Allowances and General Regulations

*Order 62. r. 22- “As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed.”*

*Order 62 r. 37 – “ on every taxation, the Registrar shall allow all such costs, charges and expenses as appear to him to have been necessary or*

*proper for the attainment of justice or for defending the rights of any party but, save as against the party who incurred the same, no costs shall be allowed which appear to the Registrar to have been incurred or increased through over-caution, negligence or mistake or by the payment of special fees to an attorney-at-law or special charges or expenses to witnesses or other persons or by other unusual expenses.”*

24. Mr. Weekes submitted that the amounts claimed for travel, accommodation and subsistence of the Plaintiff’s witnesses were “*just and reasonable charges and expenses*” within the meaning of Order 62 r. 22 RSC and further, that having regard to Mrs. Keppel-Palmer’s affidavit, that the claim for first class air travel would qualify as an “*unusual expense*” which was properly incurred by reason of the special condition of one of the Plaintiff’s witnesses and should be allowed under Order 62 r. 37 of the Barbados Supreme Court Rules.
25. Turning now to an examination of the cases cited by Mr. El-Daher. In the case of *Allto-Imports, A Larson v. Fairbanks & Fairbanks (1991)*, the Nova Scotia Supreme Court (Appeal Division) dismissed an appeal by the appellant, a Swedish corporation which had sought to recover (a) travel expenses of the appellant’s principals being airfare and accommodation for four (4) trips in connection with the various phases of the action and (b) long distance telephone calls from Sweden by the principals to their solicitor in Nova Scotia. The costs/disbursements were disallowed by the taxing master, resulting in the appeal.
26. In arriving at its decision, the Nova Scotia Supreme Court had before it tariffs under the Costs and Fees Act, 1989 and the Civil Procedure Rules of Nova Scotia.
27. The appellant’s claim for travel expenses was based on Rule 63.36 of the Nova Scotia Civil Procedure Rules which permits as a special allowance

“...any just and reasonable charge and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses.”

28. In dismissing the appeal, the Nova Scotia Supreme Court Appeals Division found that:

*“Testifying on one’s own behalf of a company of which he is principal, is not a matter requiring the outlay of funds by one’s own solicitor which can be claimed back as a disbursement.”*

29. The Supreme Court further stated:

*“The appellant’s claim for travel expenses is based largely on Rule 63.36. However, instances will be rare when a solicitor must incur disbursements to procure the attendance of his own client, or the principals of a client company. When the expenses have been incurred by the client and do not represent disbursements of funds by the solicitor, they are not “just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses.”*

30. In dismissing the appeal the Nova Scotia Supreme Court took the exceedingly narrow view that only expenditures made and charged for by the solicitor could qualify as taxable disbursements. The appellant’s claim for long distance telephone calls under the ‘Special Provisions’ of the costs and Fees Act were also disallowed on the basis that as the expenses were those of the appellants and not their lawyer, they were not taxable.

31. While Rule 63.36 of the Nova Scotia Civil Procedure Rules which was under consideration in the *Larson Case* corresponds almost exactly to Order 62 r.22 of the Barbados Rules of the Supreme Court, the decision is otherwise unhelpful and should be distinguished from the situation under review since it does not also discuss any provision or rule corresponding to Order 62 r. 37 of

the Barbados Rules of the Supreme Court on which Mr. Weekes also based his claim for travel and expenses..

32. In the case of *Attorney General of Canada v. British Columbia Ferry Corporation et al (1981)*, the British Columbia Court of Appeal dismissed an appeal by the Crown against a decision of the Supreme Court which had upheld an award by the Registrar disallowing the Crown's claim on taxation for the wages paid by the Crown to an employee during his investigation of various aspects of the case during the preparation for trial. In arriving at its decision, the British Columbia Court of Appeal had before it Rule 57(4) of the British Columbia Supreme Court Rules, 1976.

33. The British Columbia Court of Appeal stated, *inter alia*, that:

*“The heart of this case lies in the meaning that should be given to the words “disbursements or expenses” where they appear in the Rule. In their ordinary meaning those words have a very general breadth. They can, in any particular case, have attributed to them shades of meaning that narrow their applicability. What they may mean in a taxation statute might be quite different from what they mean in a rule relating to costs. What may be included as a disbursement and not an expense and what may be included as an expense and not as a disbursement depends on the finer shades of meaning that the context requires.”*

34. The British Columbia Court of Appeal held that “the wages of \$1,542 do not come within either word in the meaning that should be given to the two words in the rule.” Finally, the Court held

*“...both the word “disbursement” and the word “expenses” must be qualified so that they are limited to an outlay which is in its character as an outlay, specifically referable to the particular litigation in which the*

*costs are being taxed. On the basis of that meaning the wages or salary paid to Mr. Zackodnik [the Crown witness] would not qualify.”*

35. Turning to the present proceedings, notwithstanding the narrow interpretation in the *Larson Case* of the Canadian Rule which corresponds to Order 62 r. 22 RSC, I am satisfied that it is permissible for me to allow “...*such just and reasonable charges and expenses as appear to [me] to have been properly incurred in procuring evidence and the attendance of the Plaintiff’s witnesses.*” However under the Rule, I must be satisfied that the claim is “*just and reasonable*”.
36. I am equally satisfied that it is permissible for me under Order 62 r. 37 RSC to allow “*all such ...charges and expenses as appear to me to have been necessary or proper for the attainment of justice...*” I am, however, also cognizant of the fact that Order 62 r. 37 expressly forbids the Registrar from allowing costs which appear to the Registrar to have been incurred or increased by reason, *inter alia*, of “*special charges or expenses to witnesses or other persons or by other unusual expenses*”.
37. In the present case, after hearing the arguments of both Counsel and after examining the decided cases cited to me together with the relevant provisions of the Barbados Rules of the Supreme Court, I was satisfied that it was “*necessary and proper*” for the Plaintiff company in advancing its case and defending the counterclaim to secure the attendance of its witnesses who reside overseas physically present in Barbados to give evidence and to attend the trial when required.
38. I have also reviewed the affidavit of Janet Keppel-Palmer sworn on March 13, 2006 and produced in support of the Plaintiff’s claim for Mrs. Keppel-Palmer to recover first class travel for herself on British Airways, as well as for her husband, James Keppel-Palmer. No independent medical evidence was

exhibited with the affidavit which would have satisfied me as to the extent of Mrs. Keppel-Palmer's medical condition. In the absence of such corroboration and following the review of this item of the Bill of Costs, I found the affidavit to be self-serving and was not satisfied that there was sufficient evidence before me to justify my allowing what was essentially a claim for special and unusual expenses for the Plaintiff's witnesses.

39. As indicated above, Order 62 r. 37 expressly forbids the Registrar from allowing costs which appear to the Registrar to have been incurred or increased by reason, *inter alia*, of "*special charges or expenses to witnesses or other persons or by other unusual expenses*". I therefore reduced the award for travel and accommodation expenses from the figure of \$144,393.00 as claimed in the Bill to what I now consider to be the more reasonable figure of \$40,000.00 suggested by Mr. El-Daher which had been worked out using the cost of economy airfares and reduced amounts for accommodation. I also allowed the figure of \$2,858.00 for subsistence as claimed in the Bill which brought the total award for the Plaintiff's witness expenses to \$42,858.00.
40. Taking all relevant matters into consideration, my award of costs following the review hearing was as follows:

Summary of award following Review hearing

Items	Original Award	Revised Award
Disbursements -	\$ 1, 233.00	\$ 3, 543.00
Legal fees -	\$80,000.00	\$65,000.00
15% VAT on legal fee -	\$12,000.00	\$ 9,750.00
Quantity Surveyor's fee -	\$ 4, 587.00	\$ 4, 587.00
Witnesses expenses ( <i>travel &amp; accommodation</i> ) -	<u>\$144,393.00</u>	<u>\$42,858.00</u>
Total	<u>\$242, 213.00</u>	<u>\$125, 738.00</u>

41. The disbursements claimed in the Bill were also increased consequentially to reflect payment of the required stamp duty on the Bill of Costs of \$450.00 and on the Judgment of \$1,860.00.
42. The foregoing are the reasons for my award of costs in these proceedings.

Registrar of the Supreme Court