

BARBADOS

Suit No: CV 598 of 2006

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

**IN THE MATTER OF DOCTORS BENEFIT
INSURANCE COMPANY LTD**

**AND IN THE MATTER OF THE EXEMPT
INSURANCE ACT, CAP. 308A**

**AND IN THE MATTER OF THE
COMPANIES ACT, CAP. 308 OF THE
LAWS OF BARBADOS**

BETWEEN

LESLIE BUCK - APPLICANT

AND

DOCTORS BENEFIT INSURANCE COMPANY LTD - RESPONDENT

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

Sir Richard Cheltenham, Q.C. and Mr. Alrick Scott for the Applicant

Mr. Garth Patterson, Q.C. for the Respondent

2007: March 30; June 14;

2008: February 26; April 14

DECISION

Background:

1. On March 30, 2007 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 Applicant's Bill of Costs which was presented for taxation pursuant to the final Order of **Richards J.** dated the 27th September, 2006 in which it was ordered, *inter alia*, that the Respondent company "do pay to the Applicant the costs of the application certified fit for two Counsel to be agreed or taxed"

2. During the course of his submissions in support of the fees claimed, Sir. Richard outlined the factual background which had given rise to the Applicant filing a Notice of Motion seeking relief following the Respondent having obtained an Order on May 8, 2006 for the Court supervised liquidation and dissolution of the Respondent company.
3. Sir Richard drew my attention in particular to the facts set out in the affidavits of Leslie Buck, Miriam Fisher and Sir Richard Cheltenham which had been filed in support of the Notice of Motion. It would appear that the Applicant had become concerned about the effect which an Agreement that had been entered into between the Respondent company and the IRS in September 2005 would have on the Respondent company's pre-existing binding legal obligation to indemnify him in respect of all legal fees, costs and expenses associated with any civil or criminal investigation of the company by any government agency.
4. My attention was also directed to paragraphs 9 and 12 of Sir Richard's affidavit which indicated that the "Buck Indemnities" were duly honoured by the Respondent company until September 2005 when the Agreement between the IRS and the Respondent company was made. Since then payments under the indemnity had been refused and the applicant's legal costs and expenses were increasing.
5. Sir Richard submitted that the Applicant had to seek the relief claimed in the Notice of Motion in order to ensure that the funds and assets of the Respondent company to be preserved so that his just claims against the Respondent for payment of his legal fees, costs and expenses might be satisfied. The Applicant was also fearful that unless the liquidation order were

set aside or modified, the effect of the ex parte order was that it might “dissipate the funds of the Respondent company without any lawful adjudication of the Applicant’s claims on those funds”.

6. Following argument before **Richards J.**, the Applicant obtained an Order for payment to him of the sum of US\$252,937.23 on account of his fees and expenses due under his Indemnity agreement with the Respondent which remained unpaid since November 2005.
7. The applicant also succeeded in having the sum of US \$1 million set aside by the Liquidator to be held in a separate account for the purpose of meeting any future claims by the applicant for indemnification pursuant to the Sale of Stock and Indemnification Agreement dated June 13, 2994 between himself and the Respondent company.
8. Sir Richard urged me to have regard to the money value of the Order which the applicant had obtained and to take this into account in the determination of a reasonable fee for work performed by him on the Applicant’s behalf in connection with the proceedings.
9. While no contemporaneous records of recorded time were produced at the hearing, Sir Richard drew attention to the Bill of Costs and the breakdown of time spent by him in preparing for the proceedings. He submitted that the total time spent in preparing for the proceedings was approximately 140 hours. He also stated that his hourly rate for US clients was US\$500.00 or Bds\$1,000.00 per hour.
10. In his submissions regarding novelty and complexity of the issues at stake in the case, Sir. Richard stated that the key point in the case related to the legal effect of the Sale of Stock and Indemnification agreement. He pointed out that the case was novel in the context of Barbados adding that there was no Barbadian or West Indian authority on point. Furthermore, in view of the Canadian origins of the Barbados Companies Act, Cap. 308, there were no English authorities on the point. According to Sir Richard, a number of Canadian authorities had been cited during the legal arguments, dealing with the meaning of the term “indemnify” and the question of whether the right to

indemnification is limited to a right of indemnification only or would allow advances.

11. In resisting the quantum of costs claimed in the Bill, the Respondent's attorney-at-law, Mr. Garth Patterson, Q.C. urged me to have regard to what costs were actually incurred by the Applicant in prosecuting the case.
12. Mr. Patterson urged me to use as a starting point in the taxation, what bills had actually been rendered to the Applicant by his attorney-at-law which he had either paid or was liable to pay. He suggested that this approach was the only way that one could determine whether what was claimed was reasonable.
13. Mr. Patterson submitted that a fee of \$300,000 in party v. party proceedings was exorbitant in the extreme. He suggested that using time spent as a guide, and estimating a minimum of 80 hours and a maximum of 120 hours, a reasonable fee would be in the region of \$60,000.00 and \$90,000.00.
14. Alternatively, if a money value approach were used, Mr. Patterson suggested that a fee of 10% of the amount recovered would be acceptable.
15. Mr. Patterson also submitted that the case was not a complex one and was merely a question of interpretation. Mr. Patterson submitted that if there was complexity in the case, it was due to the number of peripheral issues which the Applicant had raised. According to Mr. Patterson those costs should properly be paid for by the Applicant. He added that the Respondent as the losing party, was only liable to pay what was reasonable. In closing, Mr. Patterson submitted that a total fee of \$90,000 to \$100,000 would be a reasonable recovery of costs in this matter.
16. Before making my award, I necessarily had regard to **O.62 r. 7 RSC** and the factors which must guide me in this matter. I took note of the fact that the legal proceedings commenced by the Applicant ultimately led to his obtaining an order for the recovery of monies due under the Indemnification Agreement and for the setting aside of a separate account of a sum of money for the purpose of meeting any future claims for indemnification which he might have to make against the Respondent company pursuant to the Indemnification Agreement of June 13, 2004.

17. Broadly, the proceedings were essentially about money and the money value or interest at stake was US\$1,252,937.25 or Bds\$2,480,815. Using as a gauge and for purposes of comparison only, the usual 15% percentage applied for debt recovery under the **Legal Profession (Remuneration for Non-Contentious business) Rules, 1997**, I noted that a reasonable fee based on percentage of money value would be in the region of Bds\$372,122.25. This figure provided a general guide in arriving at a reasonable fee for the Applicant's attorneys-at-law in prosecuting the Applicant's case.
18. Adopting the methodology suggested by the Honourable Chief Justice in the case of *Lauer v. Magson*, I then assessed the Applicant's Bill based on the time charges for Senior Counsel set out in the Bill. Using the hourly rate of Bds\$1,000.00 claimed by Sir Richard and the 140 hours claimed for the work outlined in the Bill. This gave me a fee for Sir Richard of BDS\$140,000.00 to which I then added an uplift of 40% or Bds\$56,000.00 in recognition of the novelty of the proceedings in the Barbados jurisdiction and other imponderables such as the care and attention and skill which would have been required of his attorney in advancing the Applicant's case. I rounded off the fee for Senior Counsel at \$200,000.00.
19. I also disallowed the sums claimed by the Applicant for Refreshers for Senior and Junior as I was of the view that total fees for both Counsel of Bds\$300,000.00 was reasonable remuneration for the work performed including all Court appearances.
20. In keeping with the long standing practice in Barbados of taxing the fees of the Junior Counsel at 50% of the fees of Senior Counsel, I awarded fees to Junior Counsel of Bds\$100,000.00.
21. After considering the nature of the case, its novelty and complexity, the time spent on the various items of work identified in the Bill and the work which would have been necessary to properly conduct the case, I am satisfied that a reasonable award of costs for both Counsel including Court appearances is \$300,000.00 as summarized below.

Summary of award on initial taxation hearing

Items	Claim	Award
Disbursements -	\$2,080.00	\$ 2,080.00
Legal fees (Snr. Counsel)	\$200,000.00	\$200,000.00
Legal fees (Jnr. Counsel)	\$100,000.00	\$100,000.00
Refreshers (Snr. Counsel)	\$11,500.00	disallowed
Refreshers (Jnr. Counsel)	\$5,750.00	disallowed
15% VAT on legal fees -	<u>\$45,000.00</u>	<u>\$45,000.00</u>
Total	<u>\$364,330.00</u>	<u>\$347,080.00</u>

The Review hearing:

22. The Respondent company applied in accordance with **Order 62 rule 53** for a review of my decision. The Review hearing took place before me on February 26, 2008. **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**.”*

23. Perusal of the Respondent company’s Application for Review will reveal that contrary to the requirements of **O. 62 r. 53**, Mr. Patterson did not specifically identify his dissatisfaction with my allowance or disallowance of specific items. The Application rather, took objection to the methodology employed and made general allegations that the Registrar had applied wrong principles and made errors of law.
24. In short, rather than specifying his dissatisfaction with the award made in relation to specific **items** of work claimed for, the six (6) grounds of dissatisfaction identified in the application suggest that the Mr. Patterson was

dissatisfied with the award in its entirety having regard to the methodology which I applied.

25. The Respondent's objections related to the methodology which I employed on the taxation. Having regard to the nature of the review hearing as envisaged by **O. 62 r. 53**, I consider such objections to be more appropriately made to a High Court Judge on an appeal. Furthermore since the Respondent's Review application failed to identify for my review any specific **item or items** of my initial award with which the Respondent was dissatisfied, I am unconvinced that I should make any change to the award which I made in this matter on June 14, 2007.
26. I therefore state that the award following the Review hearing should remain as set out below:

Summary of award following Review hearing

Items	Claim	Award
Disbursements -	\$2,080.00	\$ 2,080.00
Legal fees (Snr. Counsel)	\$200,000.00	\$200,000.00
Legal fees (Jnr. Counsel)	\$100,000.00	\$100,000.00
Refreshers (Snr. Counsel)	\$11,500.00	disallowed
Refreshers (Jnr. Counsel)	\$5,750.00	disallowed
15% VAT on legal fees -	<u>\$45,000.00</u>	<u>\$45,000.00</u>
Total	<u>\$364,330.00</u>	<u>\$347,080.00</u>

27. The foregoing are the reasons for my award of costs in these proceedings.

Registrar of the Supreme Court

April 14, 2008