

BARBADOS

Suit No: 2002 of 1998

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

BETWEEN

RECARLO BROME - PLAINTIFF

AND

RICHARD SEALY - 1st DEFENDANT
BRIGADIER RUDYARD LEWIS - 2nd DEFENDANT
THE ATTORNEY GENERAL - 3rd DEFENDANT

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

Mr. Theodore Walcott, Q.C. for the Plaintiff
Ms. Rosalind Jordan for the Defendants

2007: August 20, 21, 23

2008: February 28, April 2, 14

DECISION

Background:

1. On August 20, 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 Plaintiff's Bill of Costs which was presented for taxation pursuant to the final Order of **Inniss J.** dated the 6th January, 2006 in which the Defendant was ordered "to pay the Plaintiff's costs fit for two attorneys-at-law to be agreed or taxed."

2. The Plaintiff's attorney-at-law, Mr. Theodore Walcott, Q.C. presented the following documents at the taxation, namely-
 - (i) PLAINTIFF'S BILL OF COSTS Summary document claiming total VAT, Professional Fees and Disbursements of \$1,875,859.12;
 - (ii) A 59-page TIME CHARGES & MARK-UP document;
 - (iii) COURT APPEARANCES document later amended on August 23, 2007;
 - (iv) An 8-page DISBURSEMENT Schedule;
 - (v) A 43-page TIME SHEET document.
3. The taxation was held over a period of three (3) days on August 20, 21 and 23, 2007 during which time detailed submissions were presented by Counsel for the Plaintiff, Mr. Walcott, Q.C. who sought to outline for my benefit his views on the appropriate approach to the taxation of costs. Submissions were also made by Ms. Rosalind Jordan on behalf of the Defendants.
4. Citing the 2006 High Court Decision of *Lauer v. Magson*, Mr. Walcott attempted to outline the correct principles which were to be applied by the Registrar in determining whether the amount claimed is "fair and reasonable" for purposes of **O. 62 r. 7** of the Rules of the Supreme Court, 1982.
5. Mr. Walcott also embarked on a detailed review of numerous decided cases in an effort to persuade the Registrar that time is the most important factor in the determination of costs.
6. Referring to **O.62 r. 7 RSC**, Mr. Walcott submitted that the Registrar has a discretion to award reasonable sums for expenses and time involved. Citing the factors to be taken into account, Mr. Walcott submitted:
 - (i) that the case was one which involved a claim for personal injuries;
 - (ii) that the case was very novel;
 - (iii) that the case was very complex
 - (iv) that the money-value involved was approximately \$1.6 million dollars;
 - (v) that the trial was essentially an assessment of damages which was blown into a full trial in which witnesses were called and cross-examined.

7. Referring to the figure of \$4,280.00 claimed for disbursements, Mr. Walcott submitted that details of the disbursements claimed for could be found in a list of disbursements which could be verified by reference to the Court file and which included stamp duty, filing fees and fees for serving documents. Mr. Walcott submitted that while he was not in a position to produce receipts for effecting service, the Registrar could take notice of the fact that documents can be served for \$45.00 in practice.
8. Mr. Walcott then referred to the TIME SHEETS which he had produced. He indicated that this document was the basic document which set out the time spent on the various items of work claimed for between the period 1998 to 2007. He submitted that in Lauer v. Magson, the Chief Justice had indicated that Time Sheets should be produced. He stated that the TIME SHEETS had been prepared by himself and two other employees using the history sheet prepared in his Office. He produced a blank sheet entitled "Client's History Sheet" which he stated he keeps for each client showing each client's 'name', 'address', 'date when the file was opened', 'telephone number', 'fees', 'disbursements' and 'court appearances'.
9. Mr. Walcott submitted that some of the information in the TIME SHEETS would have been obtained from Statements taken from clients and witnesses which would have borne the date and length of the interview. Additionally, other information would have been obtained from the Diaries with respect to appointments. Mr. Walcott pointed out that in this case, the client was in the habit of appearing to see him without an appointment and would wait until he was available to see him. In such cases, there would be no record of such visits.
10. Mr. Walcott also submitted that while the Registrar was not required to rely exclusively on the TIME SHEETS and could review the Court file and form her own view as to the length of time which various matters may have taken, the TIME SHEETS were still important since they set out the items of work claimed for and the amount claimed using an hourly rate of \$750.00.

11. On the question of court appearances, Mr. Walcott referred the Registrar to a document entitled COURT APPEARANCES. He submitted that the Clerk's notes, the Judge's Notebook and the Cause Lists would be of assistance to the Registrar in assessing the claim for court appearances.
12. On the question of the mark-up to be applied, Mr. Walcott submitted that according to the authorities, a minimum "mark-up" of 50% was the norm. He however submitted that the Registrar should consider a mark-up in this case of 70%.
13. Mr. Walcott then outlined for my benefit the key facts showing the nature of the case and the nature of the personal injuries which the Plaintiff had suffered. He pointed out that in addition to having his left patella removed, the Plaintiff was found to be suffering from chronic post-traumatic stress disorder, compensation neurosis and other ailments.
14. Turning once again to the TIME SHEET, Mr. Walcott referred to the various items of work and the time allegedly spent by him in respect of each item over the various years between 1998 and 2007 identified therein. For example, Mr. Walcott indicated that Items 1-6 represented a claim for six (6) interviews with the client between October 16 to 27, 1998 for which a total of 7 hours 33 minutes was claimed at the rate of \$750.00 per hour.
15. Questioned by the Registrar as to why it had been necessary for him to have taken so many hours and days to take instructions from the Plaintiff, Mr. Walcott submitted that due to the nature of the matter it had been necessary for him to take a full background to the accident, the Plaintiff's training, medical treatment and the various doctors who had been seen.
16. Mr. Walcott was requested to file an affidavit to support his claims to the various interviews set out in the TIME SHEET. Mr. Walcott also provided the Registrar with a file which he said contained correspondence relating to the the Plaintiff's claim. Ms. Jordan took a note of the items of correspondence contained in the file before same was handed over to the Registrar.
17. Mr. Walcott then referred to the legal documents which had been prepared by him and received by him in the legal proceedings. He submitted that perusal

of the exhibits attached to the affidavit of Theodore Walcott filed on January 4, 2004 would illustrate the volume of work which he had performed, the fact that he had been in correspondence with the various doctors and the Solicitor General's Chambers and the amount of legal research he had done based on the medical evidence.

18. In closing, Mr. Walcott submitted that perusal of the documents would confirm the large volume of work which he had performed over several years. He submitted that until *Lauer's case* was decided, the case of *Grovesnor v. The Barbados Advocate Co Ltd* had clearly stated that time sheets were unnecessary. He urged the Registrar not to hold the absence of contemporaneous time records against the Plaintiff on the taxation of his costs.
19. Mr. Walcott also informed the Registrar that his former Secretary, who he had instructed to keep a record of the time spent by him on various matters, had left his employment in December 2006 without handing over the relevant records.
20. In her reply, Ms. Rosalind Jordan stated that the issues in the case were neither novel nor complex. She submitted that the case was really about the assessment of damages for personal injuries. She argued that the mere length of a trial cannot be taken to mean that a matter is complex. Ms. Jordan also disputed the hourly rate of \$750.00 charged by Mr. Walcott and referred to *Lauer's case* in which the Chief Justice had observed that Mr. Walcott's hourly rate in 2006 was \$500.00.
21. Ms. Jordan took issue with Mr. Walcott's inclusion of a time charge for Junior Counsel as set out at page 57 of Mr. Walcott's TIME CHARGES AND MARK-UP document. She argued that there was no evidence that Junior Counsel had been retained in relation to the matter and questioned what work the Junior had been retained to do. Ms. Jordan stated that the TIME SHEETS submitted by Mr. Walcott suggest that the Plaintiff was always seen by Mr. Walcott and never by a Junior.

22. Ms. Jordan submitted that a Junior was, however, always present in Court on the hearing dates and observed that the Order of **Inniss J.** had reflected this fact.
23. Ms. Jordan pointed out that Mr. Walcott had provided no evidence as to the hourly rate which the Junior attorney-at-law would have charged, nor was there any information provided regarding her years call as an attorney-at-law. Ms. Jordan also requested proof to be provided that Ms. Stuart was registered for VAT noting that no VAT had been claimed in respect of her Brief fee while VAT had been claimed in respect of her claim for refreshers.
24. Turning to the claim at page 57 of the TIME CHARGES AND MARK-UP document, Ms. Jordan questioned the absence of proof of the claim for unrecorded time. She submitted that time properly and reasonably spent is still a foundation of an attorney's Bill of Costs. Accordingly, records showing the tasks performed should always be kept.
25. Citing ***Re Frascati [1981]*** a case cited in Hoffman's text, "Cost Cases", Ms. Jordan submitted that the matter of unrecorded time being allowed depends on whether the claimant is able to satisfy the Costs Judge that it was impracticable for him to record the time claimed as unrecorded. Further, she stated, in matters occupying a substantial period of time, time should always be recorded. Referring to dicta in the cases of ***Johnson v. Reed Corrugated Cases Ltd, Brush v. Bower Cotton & Bower, Lauer v. Magson and Maltby v. D.J. Freeman***, Ms. Jordan submitted that without proper documentation, substantial amounts should not be awarded for unrecorded time.
26. Ms. Jordan submitted that there was nothing unusual about the present proceedings and urged the Registrar not to accept Mr. Walcott's submissions and the reasons advanced for his inability to produce contemporaneous notes and records of the items of work claimed for. According to her, the mere production of a TIME SHEET by itself was not enough to establish that the work was performed and even the affidavit of Theodore Walcott filed on August 22, 2007 was in her view insufficient.

27. Turning to the 70% uplift or mark-up claimed, Ms. Jordan argued that the proceedings were neither novel nor complex. She also submitted that Mr. Walcott's suggestion that the starting point was 50% was unreasonable and ought not to be favourably considered.
28. Ms. Jordan questioned the Brief Fee of \$50,000.00 claimed by Mr. Walcott. She submitted that in order to qualify for payment of a retainer, Mr. Walcott should produce evidence of a retainer of \$50,000.00 actually paid to him or agreed with him.
29. Returning to the TIME SHEET AND MARK-UP document presented by Mr. Walcott, Ms. Jordan submitted that examination of the document showed that the Plaintiff was interviewed and instructions taken by Mr. Walcott some 330 times. She observed that some of the time spent ranged between 30-45 minutes. She also pointed out that some of the interviews claimed for were held on the same day in some cases and two claims and charges were made for these items.
30. Ms. Jordan questioned whether the numerous interviews were necessary and whether the amount of time spent on interviews could be considered as reasonable for this type of case. She submitted that in the absence of contemporaneous notes, it was questionable whether all the interviews actually occurred. She categorized the interviews as "wildly extravagant" and urged that any award for them should be conservatively granted.
31. Ms. Jordan submitted that in the absence of contemporaneous records, much of the time claimed for would necessarily be at the Registrar's discretion.
32. I gave my initial decision on the taxation on February 28, 2008 and made the following award:

Summary of award on initial taxation

Item No:	Item	Amount claimed at taxation hearing	Amount allowed at taxation hearing
1	Brief Fee	\$50,000.00	disallowed
2	VAT at 15%	\$7,500.00	disallowed
3	Disbursements	\$4,280.00	\$4,070.00

4	VAT at 15%	\$642.00	disallowed
5	Time Charges for Senior Counsel	\$538,691.00	\$126,533.00
6	Uplift on Time Charges of Snr. Counsel (50%)	-	\$63,267.00
6A	VAT at 15% on Snr. Counsel's professional fees	\$80,803.65	\$23,470.00
7	Time Charges for Junior Counsel (half rate of Senior Counsel excluding VAT)	\$179,345.50	disallowed (not seen or substantiated)
8	Uplift on Time Charges of Jnr. Counsel		disallowed
9	VAT on uplift at 15%	\$83,878.22	n/a
10	Refreshers for Court Appearances: (a) Snr. Counsel VAT: (b) Jnr. Counsel (incl.VAT)	\$38,000.00 \$5,700.00 \$17,250.00	\$42,750.00 6,412.50 \$22,425.00
	TOTAL	\$1,565,278.47	\$230,660.00

33. In arriving at my decision on the initial taxation, I kept firmly in mind the factors which I am mandated to take into account when taxing costs on the party and party basis pursuant to **O. 62 r. 7** of the Rules of the Supreme Court.
34. As required by **O. 62 r. 7 (2)(a)** of the Rules, I took note of the fact that the “*nature of the cause or matter*” was that which involved a personal injury claim which required Counsel for the Plaintiff to establish negligence on the part of the Defendants and to establish injury, loss and damage suffered by the Plaintiff in consequence thereof.
35. As regards ‘*the interests, money or the value of the property involved*’ [**O. 62 r. 7(2)(a) RSC**], I took note of the fact that the Plaintiff’s claim and the award of damages in these proceedings exceeded \$1.3 million dollars. I also took

note of the fact that in certain cases where the money value of a claim is considered an important factor, an appropriate percentage ranging between 12.5% and 15% of the money value awarded may be utilized as a gauge in determining the reasonableness of the amount of costs to be awarded.

36. In this case, however, I took note of the fact that it was Mr. Walcott who had elected to produce to the Registrar for purposes of **O. 62 r. 7(2)(c)-(g) RSC** TIME SHEETS and a TIME CHARGES AND MARK-UP document by which he sought to give details of '*the time involved*' in the various items of work claimed for. Following the approach recommended by the Honourable Chief Justice in *Lauer v. Magson*, I embarked on a detailed and painstaking examination of the over 500 items of work claimed for by Mr. Walcott in his TIME CHARGES AND MARK-UP document. Based on my experience and knowledge of what are reasonable charges such legal work in the Barbados jurisdiction, I costed each item of work claimed for in the document, disallowing items not seen on the Court file or items of correspondence not produced for my inspection.
37. I explained to both Counsel that following the approach and methodology recommended by the Honourable Chief Justice in *Lauer's Case*, I had arrived at the Mr. Walcott's professional fee (excluding Court appearance fees) by applying a percentage uplift figure of 50% (the Part B figure) to his total time charges fee (the Part A figure) arrived at by costing the items of work claimed for in his TIME CHARGES AND MARK-UP document which Mr. Walcott had submitted for use by the Registrar in the taxation.
38. I also informed both Counsel that I was satisfied for purposes of **O. 62 r. 7 (2)(a) RSC** that the issues at stake in the case were neither novel nor complex in that no new or complex legal issues had arisen in the case. Further, while admittedly, Mr. Walcott may have had to come to grips with medical terminology in order to understand the nature and extent of the Plaintiff's injuries and medical condition, this was very usual in personal injury cases and could not, and should not be regarded as having added to the complexity of the case.

39. In view of my findings that the proceedings were neither novel nor unduly complex, I informed Counsel that I had applied a percentage uplift of 50% to the award which I had made for the items of work claimed for in his TIME CHARGES AND MARK-UP document. I considered an uplift of 50% a reasonable amount to be added to Mr. Walcott's time charges to take account of imponderables such as his unrecorded time and the degree of effort (care and conduct) which Mr. Walcott would reasonably have brought to the case on the Plaintiff's behalf.

The Taxation Review:

40. By letter dated February 29, 2008, the Plaintiff's attorney-at-law, Mr. Walcott wrote to the Registrar indicating that he intended to apply in accordance with **O. 62 r. 53** for a review of my decision. He requested the reasons for my initial taxation decision showing the basis on which I arrived at my assessments.
41. By letter dated March 4, 2008, Mr. Walcott was advised that the Registrar was under no obligation to provide him with a written decision at the initial stage of the taxation proceedings. However, both Mr. Walcott and Ms. Jordan were provided with photocopies of the Registrar's working copy of the TIME CHARGES AND MARK-UP document and a hand-written Summary showing the items which I allowed and disallowed and the methodology employed in arriving at the award. My hand-written notations on the TIME CHARGES AND MARK-UP document also clearly indicated my comments on each item of work claimed for and the reasons why no allowance was made for certain items of work claimed for.
42. **Order 62 r. 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**.”*

43. A formal Application for Review under **O. 62 r. 53** was filed by Mr. Walcott, Q.C. on March 11, 2008. On March 27, 2008, Ms. Jordan filed on behalf of the Defendants, an Answer to Objections generally supporting the Registrar's approach to the taxation and in answer to each ground raised in Mr. Walcott's Review Application. The Review hearing was fixed for hearing before me on April 2, 2008.
44. Perusal of Mr. Walcott's Application for Review will reveal that contrary to the requirements of **O. 62 r. 53**, Mr. Walcott did not specifically identify his dissatisfaction with the disallowance of specific items. The Application rather, took objection to the methodology employed and made general allegations that the Registrar acted unreasonably, applied wrong principles and made errors of law. In short, rather than specifying his dissatisfaction with the award made in relation to specific items of work claimed for, the nine (9) grounds of dissatisfaction identified in the application suggest that the Mr. Walcott was dissatisfied with the award in its entirety.
45. At the Review hearing, Mr. Walcott proceeded to amplify each of the nine (9) grounds of objection outlined in his Application for Review. On several occasions, I was obliged, in the interests of seeking clarity, to interrupt Mr. Walcott's submissions and to request him to provide specific instances which would support the very generalized allegations he was making about the methodology which I had employed in taxing his Bill.
46. In support of his objection that the Registrar had applied wrong principles (ground 1), Mr. Walcott indicated, for example, that in finding that the proceedings personal injury proceedings were neither novel nor complex, I had failed to take note of (i) the severe nature of the Plaintiff's injuries and the large number of medical practitioners who had treated the Plaintiff; (ii) the level of the award (Bds \$1,625,206.71) paid to the Plaintiff; (iii) the number of attorneys-at-law who had argued the case on both sides; (iv) the fact that the assessment of damages involved a claim for future loss of earnings and the application of a multiplier and multiplicand.

47. For her part, Ms. Jordan supported the Registrar's approach to the taxation and the award made. She reiterated her earlier view that the proceedings were neither novel nor complex. Ms. Jordan also submitted, *inter alia*, that Mr. Walcott had failed to place before the Registrar either at the initial taxation or at the Review hearing, the several items of correspondence and the "missing" Court documents which would support his claims in the TIME CHARGES AND MARK-UP document for work performed by him. She supported the Registrar's disallowance of these items and submitted that Mr. Walcott should not be given any more time to produce the "missing" documents.
48. Addressing the issue of the "missing" documents which were not produced to the Registrar at the initial taxation and in respect of which no award was made, Mr. Walcott undertook to provide the Registrar with photocopies of the "missing" items of correspondence and certain Court documents which were not located on the Court file and which were disallowed by me as indicated in my comments on the working copy of the TIME CHARGES AND MARK-UP document.
49. On or about April 9, 2008, I received from Mr. Walcott a large bundle of photocopied letters and Court documents in support of the following items of work claimed for in the TIME CHARGES AND MARK-UP document and which were disallowed by me as they were either not produced at the taxation proceedings or were "missing" from the Court file, namely, Items 144, 338, 355, 358, 367, 384, 391, 392, 394, 396, 404, 410, 414, 424, 425, 429, 430, 431, 432, 438, 440, 442, 445, 452, 459, 462, 467, 471, 472, 473, 477, 478, 481, 482, 485, 486, 490, 492, 496, 500, 502, 503, 504, 505, 506, 507, 508, 510, 512, 514, 516, 517, 519, 520, 521, 523, 530, 533, 537, 545, 528 and 566.
50. Following presentation by Mr. Walcott of photocopies of the "missing" documents identified above, I examined each letter and each Court document and in accordance with **O. 62 r. 7** and the approach suggested by the Honourable Chief Justice in the *Lauer Case*, made my own assessment as to the reasonableness of the fee claimed by Mr. Walcott in his TIME CHARGES AND MARK-UP document in relation to that item of work.

51. I have accordingly adjusted the time charges for Senior Counsel to reflect an increase of \$34,032.00. The total time charge for Senior Counsel is therefore now \$160,565.00 instead of the initial award of \$126,533.00 made on February 28, 2008.
52. Consequent on the increased time charge for Senior Counsel identified above, I also applied the 50% uplift to the increased total time charges for Senior Counsel of \$160,565.00 and now award an increased uplift of \$80,283.00 in place of the figure of \$63,267.00 awarded on February 28, 2008.
53. I therefore award total professional fees for Senior Counsel (excluding Court appearances) of \$240,848.00.
54. As a result of the increased award, there will also be a consequential increase in the amount of VAT payable on the increased professional fees for Senior Counsel. I find the VAT payable on the total professional fees for Senior Counsel (excluding Court appearances) of \$240,848.00 to be \$36,127.00 instead of the figure of \$23,470.00 awarded on February 28, 2008.
55. As no TIME CHARGE AND MARK-UP documents were provided to support the claim for work which Mr. Walcott said was performed by a succession of Junior attorneys-at-law who, according to him, were associated with the case over the entire ten years of these proceedings, I was unable to assess the reasonableness of Mr. Walcott's claim for an award of 50% of his professional fee to be made to the Junior attorney-at-law. The Court record, however, clearly supports Mr. Walcott's contention that a Junior attorney-at-law, Miss. Stuart, attended each Court hearing on the dates specified in the COURT APPEARANCES document. In the circumstances, I have had no difficulty in awarding reasonable Court appearance fees for a Junior attorney-at-law.
56. In my view, what holds true for all other civil proceedings also applies to taxation proceedings, namely he who alleges must prove. Costs must be reasonable and it cannot be assumed that a Junior Attorney-at-law would necessarily have performed every item of work claimed for in Mr. Walcott's TIME CHARGES AND MARK-UP document. In the absence of a similar

document clearly outlining the items of work performed by the Junior attorney-at-law and the time spent in relation thereto, I am unable to find that a fee corresponding to 50% of Mr. Walcott's professional fee would be reasonable in this case.

Summary of Award following Review Hearing:

57. Taking all relevant matters into consideration, my award of costs following the review hearing is as follows:

Item No:	Item	Amount claimed at taxation hearing	Amount allowed at taxation hearing	Amount allowed following review hearing
1	Brief Fee	\$50,000.00	disallowed	disallowed
2	VAT at 15%	\$7,500.00	disallowed	disallowed
3	Disbursements	\$4,280.00	\$4,070.00	\$4,315.00 [N.B.includes \$245.18 for photocopying "missing" documents following the taxation review]
4	VAT at 15%	\$642.00	disallowed	disallowed
5	Time Charges for Senior Counsel	\$538,691.00	\$126,533.00	\$160,565.00 [N.B.includes additional time charges totaling \$34,032.00 allowed after a review of "missing" documents submitted following the taxation review]
6	Uplift on Time Charges of	-	\$63,267.00	\$80,283.00

	Snr. Counsel (50%)			
6A	VAT at 15% on Snr. Counsel's professional fees	\$80,803.65	\$23,470.00	\$36,127.00
7	Time Charges for Junior Counsel (half rate of Senior Counsel excluding VAT)	\$179,345.50	disallowed (not seen or substantiated)	disallowed (not seen or substantiated)
8	Uplift on Time Charges of Jnr. Counsel		disallowed	disallowed
9	VAT on uplift at 15%	\$83,878.22	n/a	n/a
10	Refreshers for Court Appearances: (c) Snr. Counsel VAT: (d) Jnr. Counsel (incl.VAT)	\$38,000.00 \$5,700.00 \$17,250.00	\$42,750.00 6,412.50 \$22,425.00	\$42,750.00 6,412.50 \$22,425.00
	TOTAL	\$1,565,278.47	\$230,660.00	\$352,878.00

58. As the above Summary shows the Disbursements claimed in the Bill were also increased consequentially to reflect payment of the sum of \$245.18 being the photocopying costs incurred by Mr. Walcott in producing the "missing" documents for inspection by the Registrar for purposes of the Review.
59. The foregoing are the reasons for my award of costs in these proceedings.

Registrar of the Supreme Court

April 14, 2008