The Court of Appeal for Bermuda

REGISTRAR'S CHAMBERS

Civ Appeal No. 13 of 2015

Between:

TINEE HARVEY

Appellant/ Paying Party

And

DENNIKA WARREN

Respondent/ Entitled Party

BEFORE: **REGISTRAR, SHADE SUBAIR WILLIAMS**

Appearances: Craig Rothwell, Cox Hallett Wilkinson Ltd (CHW) for Appellant/Paying Party
Jai Pachai, Wakefield Quin Ltd (WQ) for Respondent/Entitled Party

Date of Hearing: 27 September 2016 and 6 October 2016
Date of Decision: 20 February 2017

RULING ON TAXATION

Delay in Delivery of this Decision:

Regrettably, this decision is delivered after months of delay attributable to the displacement of the Supreme Court Registry from 113 Front Street on account of mold contamination. (See Supreme Court Circulars 21-25 issued between 18 October 2016 and 17 November 2016). Barring particularly urgent matters, chambers hearings listed before the Registrar in November and December 2016 were adjourned to January 2017.

General Background:

1. This case began in the Supreme Court as a civil claim for damages arising out of personal injury. The Plaintiff, Dennika Warren, was successful on the issue of liability and damages were later assessed by the learned Chief Justice, Ian Kawaley, in a hearing held 24-26 November 2014.

2. At the direction of the Chief Justice, three cases (*Warren v Harvey 311/2008*; *Thomson v Thomson / Colonial Insurance Co. Ltd 6/2012*; and *Argus Insurance v Somers Isles Insurance Co. Ltd / Harold Talbot*) were heard together.

3. The issue of the assessment of the appropriate discount rate for future loss was addressed by the Court extensively with the aid of expert evidence heard over the course of 2 days.

4. The Chief Justice, having to consider whether there should be a new Bermudian law position on discount rates, had regard to the UK and Hong Kong positions.

5. In respect of this case, the Chief Justice found that the appropriate discount rate should be -1.5% for the future loss of earnings claim which resulted in an award of $135,426.69 in addition to the provisional award under this head of loss for $138,123.09 based on a discount rate of 3%.

6. The Appellant, Tinee Harvey, appealed the decision of the Chief Justice. The appeal was heard on 16-17 March 2016 before Sir Scott Baker, President/Bell, JA/Riihiluoma, JA (Acting).

7. By judgment dated 1 April 2016, the Court of Appeal dismissed the Appellant's appeal and ordered costs to follow the event in favour of the Respondent, failing an application for costs within 21 days thereof.

8. No costs applications followed. Accordingly, the costs award affirmed was made on a *nisi* basis.

Court of Appeal may order Costs to be fixed or taxed:

9. The Rules of the Court of Appeal (RCA) 3/28 provide as follows:

   "Where the Court makes any order for the payment of costs by any appellant or by any respondent, such costs may either be ordered to be taxed (in which event the provisions of Order 4 shall apply) or be fixed at the time when judgment is given."

10. Order 4/1 reads:

> *"Where the Court directs taxation of costs as between solicitor and client the* Registrar[1] *shall tax such costs in accordance with these rules and the scales in the Fourth Schedule."*

11. The Court of Appeal did not expressly direct for costs to be taxed in this matter. However, no issue arises here between the parties. In any event, the Court of Appeal obviously intended that costs would be taxed by me if not agreed between the parties.

Determination of commencement date for Guideline Rates (Circular 18 of 2016)

12. The first point of contention arose in respect of the applicable hourly rates for Mr. Pachai's fees. Mr. Rothwell submitted that the hourly rate defined in the Fourth Schedule of the Rules of the Court of Appeal ("the RCA hourly rate") should be used in taxing the Respondent's costs. Mr. Pachai, however, argued that the higher guideline hourly rates issued under Practice Direction 18 of 2016 ("the Guideline Rates") are operative and applicable to the taxation in this case.

13. RCA 4/7: *"All bills of costs incurred in proceedings in the Court and in proceedings in the Supreme Court preparatory or incidental to, or consequential upon, proceedings in the Court shall be taxable according to the scales in the Fourth Schedule…*"

14. The Fourth Schedule sets out the scale of fees payable to Barristers and Attorneys for civil causes and matters: *Unless otherwise specified, costs payable to attorneys shall be taxed at the rate of $250 to $350 per hour or any fraction thereof (hereinafter called the "Hourly rate"*).

15. Scale A in the Fourth Schedule lists from (1)-(11) various tasks by Counsel to be charged at either the Hourly rate or for a fixed fee.

16. The said fixed fees apply to Counsel's attendance at the Registry for filing the notice of appeal/cross-appeal/notice of motion and service thereof. It also applies to Counsel's attendance at the Registry to pay fees for the settling of the record. The preparation of an appeal bond (and filing and service thereof) also carries a fixed fee in Scale A.

17. Both parties agreed that the Guideline Rates effectively replaced the RCA hourly rate. No challenge was made by either party to suggest that the President of the Court of Appeal lacked sufficient authority to issue new rates under section 9 of the Court of Appeal Act 1964 by way of a Practice Direction. While Mr. Rothwell queried the absence of a formal amendment to the Rules of the Court of Appeal and even commented that this should be done, he did not go so far to ground an objection on the absence of an amendment to the Rules for alignment with the Guideline Rates.

[1] '*Registrar*' means Registrar of the Court of Appeal: O.1/2 of the Rules of the Court of Appeal

18. The basis for Mr. Rothwell's objection to the application of the Guideline Rates was based purely on the question of fairness in giving retroactive effect to the Guideline Rates. He drew a distinction between the effect of the Guideline rates on the Supreme Court and Court of Appeal procedures. Mr. Rothwell argued that the Registrar already possessed discretionary powers in the Supreme Court prior to the introduction of the Guideline Rates. This means that litigants would have already known to expect that the rates employable by the Registrar were variable on account of such discretionary powers. By way of contrast, Mr. Rothwell submitted that the hourly RCA hourly rate, being a fixed rate with no allowance for the discretionary exercise of the Registrar's powers, offered litigants the comfort of certainty on what the neighborhood of costs consequences would be if they were to be burdened by a Costs order against their favour.

19. The issue for determination by me is thus whether the Circular applies to an assessment of fees incurred prior to 5 July 2016.

20. Commenting briefly on the RCA hourly rate, I share my observation and opinion that the RCA hourly rate was obviously antiquated and starved for review.

21. The RCA hourly rate allowed for only a $100 difference to distinguish the varying rates between all Counsel and their levels of experience/expertise in the various areas of practice.

22. Further, the ceiling of the RCA hourly rate paralleled the former and outdated guideline rates of the lower Court. (See the rates applicable to Counsel of 1-3 years post-qualified experience under the Supreme Court Practice Direction No. 11 issued by the then Chief Justice, Richard Ground, in 2006).

23. On 5 July 2016 the new Guideline Rates for the scale of fees payable to barristers and attorneys in respect of appeals in civil and commercial cases were issued by the President of the Court of Appeal under Circular 18 of 2016:

> *By section 9(1)(i)-(j) of the Court of Appeal Act 1964, the President of the Court of Appeal hereby issues the below guideline rates for the scale of fees payable to barristers and attorneys in respect of appeals in civil and commercial cases.*
>
> | | |
> |---|---|
> | *1-3 years post qualification experience* | *- $350 - $450 per hour* |
> | *4-9 years post qualification experience* | *- $400 - $550 per hour* |
> | *10+years post qualification experience* | *- $550 per hour and upwards* |

24. On the 'fairness' point, Mr. Rothwell argued that when a party decides whether or not to pursue an appeal, it is reasonable for the probable cost consequences in the event of

defeat to be considered and factored into that decision. On Counsel's argument, the Respondent could not have anticipated that a new Circular would be issued and that the costs envisaged would likely increase.

25. Mr. Rothwell directed me, *inter alia*, to Halsbury extracts of Benion Statutory Interpretation[2] which concerned the retrospectivity of enactments:

"*Dislike of ex post fact law is enshrined in the United States Constitution[3] and in the constitutions of many American states, which forbid it. The true principle is that lex prospicit non respicit (law books look forward not back)[4]. Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.[5] The basis of the true principle against retrospectivity 'is no more than simple fairness, which ought to be the basis of every legal rule...*"

26. Mr. Rothwell also referred me to <u>*Robert Mai v Bermuda Cablevision Limited No. 458 of 1986*</u>. In that action, the issue for determination was whether the taxation of costs was to be made under the Supreme Court Rules 1985 (1985 Rules) or the Supreme Court Rules 1965 (1965 Rules).

27. The Rules of the Supreme Court 1985 applied forthwith to all proceedings when they came into force on 4 January 1988, save specified exceptions. The proceedings in *Mai v Cablevision* commenced prior to the operative date for the 1985 Rules.

28. The exception under consideration in *Mai v Cablevision* was in Order 1 Rule 2(5) which provided that the Rules did not apply to any proceedings in any cause or matter which was pending immediately before the commencement. Such proceedings under the description of Rule 2(5) were to be continued to final determination under the 1965 Rules.

29. Costs had been awarded to the Plaintiff up until the date of a payment into Court. However, costs after that date were awarded to the Defendant, which led to a dispute on the applicable Rules for the taxation of the Defendant's costs.

30. At page 2 of the judgment of Hull, J:

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[2] See Tab 6 Page 10 of Respondent's binder at Section 97

[3] Bennion Footnote 245: "*It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication*."

[4] Bennion Footnote 246: "*In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears."*

[5] Bennion Footnote 247: "*Phillips v Eyre (1870) LR 6 QB 1, per Willes J at 23…"*

"*Order 62 Rule 32(1) of the 1985 Rules ("Rule 32(1)) is couched in the following terms:*
"(1) Subject to the foregoing rules, the scale of costs contained in the Schedule to this order, together with the notes and general provisions contained in that Schedule, shall apply to the taxation of all costs incurred in relation to contentious business done after the commencement of these rules."

31. Hull, J found that the taxation of costs was a "proceeding" in the action within the meaning of Rule 2(5). He referred to it as a "step within the action itself".

32. Hull J held in the penultimate paragraph of his judgment:

"*Accordingly, my opinion is that Rule 32(1) has the meaning for which the Defendant contends, by way of an exception to Rule 2(5). Whether or not a cause or matter was pending at commencement, the costs incurred in contentious business done on or after commencement are in my opinion to be taxed under the present rules…*"

33. The case of *Mai v Cablevision* is somewhat unhelpful in deciding the issue in the present case, in my view, because it centers on the interpretation of a rule specifying when the former or latter regime will apply. In the present case, I am to determine the issue without the assistance of a specification as to when the new Guideline Rates are to take effect.

34. Mr. Pachai argued that changes in the law are given immediate effect where the change is merely procedural. Mr. Rothwell accepted that submission to be correct as a matter of law. Both Mr. Rothwell and Mr. Pachai readily agreed that a taxation of costs is a procedural matter.

35. Mr. Pachai relied mostly on the case of *Wright v Hale (1860) 158 ER 94* in support of his position.

36. In *Wright v Hale* Pollock, C.B. held:

"*I do not think that our decision will interfere with the great constitutional principle to which the plaintiff's counsel have referred. There is a considerable difference between new enactments which affect vested rights and those which merely affect procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts. If an act of parliament were to provide that in matters of mere opinion no more than three witnesses shall be called, after that no person would be entitled to call more than three witnesses on such points in any pending suit, because it would be a mere regulation of practice. Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing the suit. The Act (was) passed on the 28th of August, and contains a provision that it shall come into operation on the 10th of October. The 34th section enacts that where the plaintiff in any action*

for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury not less than 5l.; he shall not be entitled to recover any costs if the Judge certifies to deprive him of costs. That is an act to be done at the trial, which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an ex post facto law does not arise. The rule must be discharged…"

37. Mr. Rothwell did not challenge the applicability of *Wright v Hale* but maintained that my discretionary powers were sufficient for me to depart from the position taken in *Wright v Hale* on the basis of a lack of fairness.

38. I am guided by the principles outlined in *Wright v Hale* and I am satisfied that a taxation of costs is a procedural matter. In the absence of a specification that the new Guideline Rates under Circular 18 of 2016 do not apply to pending taxations, I think it is correct to operate on the basis that it applies to all taxations when dealing with the question of the effective commencement date.

Appellant's Alternative Submission that Hourly Rates employed were Excessive

39. As an alternative argument to Mr. Rothwell's submissions relating to section 14 of the Legal aid and the reasonableness of the discharge of the Legal Aid Certificate (see further below), he complained that Mr. Pachai's below hourly rate was excessive:

$650	23 June 2015 – 8 January 2016
$675	14 January 2016 – 5 April 2016
$700	16 March 2016 – 17 March 2016 (Court appearances)

40. Mr. Rothwell submitted that my predecessor previously assigned an hourly rate of $600 to Mr. Pachai and that his own hourly rate was last approved by the former Registrar at $550. Mr. Rothwell invited me to have regard to the economic climate of recent years and in current times before deciding on the appropriate hourly rate.

41. I have had regard generally to the Rules of the Supreme Court *Part II Division I to Order 62* and particularly to:
    (i) Complexity of this matter;
    (ii) Skill and specialized knowledge required;
    (iii) Volume and importance of documentation prepared;
    (iv) The likely importance of this matter to Ms Warren;
    (v) The amount of money involved in damages; and
    (vi) Any other legal fees and allowances payable which resulted in the reduction of work which would otherwise have to have been done.

42. While the taxation of this Bill of Costs falls outside of the jurisdiction of the Supreme Court, I think it is helpful to take these factors into account when determining Mr. Pachai's hourly rate on a discretionary basis.

43. I am mindful that while Mr. Rothwell has the benefit of 17 years of post-qualified experience, Mr. Pachai has as many as 36 years of post-qualified experience. This presents a 19 year difference which is not distinguishable by $50 p/h in my view.

44. I do not think that Mr. Pachai's hourly charges are out of sync with current market rates for this kind of case. I am also of the view that these hourly charges are compatible with the Guideline Rates.

The Respondent's Submission on Breach of Section 14 of Legal Aid Act 1980

45. The Respondent was granted a Legal Aid certificate in March 2012 when she was represented by Counsel of Conyers Dill & Pearman Limited (CD&P). Ms Harvey, through her subsequent Counsel, Jai Pachai of Wakefield Quin Limited (WQ), requested the discharge of her certificate. Mr. Rothwell submitted that recovery of Mr. Pachai's fees were unenforceable by virtue of section 14 of the Legal Aid Act 1980 because Ms. Warren was the beneficiary of a Legal Aid certificate. In the alternative, he objected to the reasonableness of the Respondent's decision to discontinue her Legal Aid funding on 12 May 2016.

46. Mr. Rothwell's primary argument was that Section 14 of the Legal Aid Act 1980 precludes the Respondent from recovering her fees incurred for Mr. Pachai's services rendered during the active period of the Legal Aid certificate.

47. Section 14 reads:

> "*No counsel who acts for an assisted person under the authority of a certificate shall take or agree to take or seek from that assisted person or from any other person any fee, profit or reward, pecuniary or otherwise in respect of any work done for or on behalf of the assisted person after the issue of that certificate and included within the scope of that certificate*."

48. Mr. Pachai rebutted that at no time did he ever operate under the authority of a Legal Aid certificate. He went on to state that he never once submitted an invoice to Legal Aid for payment while representing Ms. Warren. In my view section 14 was intended to prevent attorneys from privately supplementing their fees payable out of the Legal Aid fund with the other sources of remuneration for such services. It is clear to me, on the position stated by Mr. Pachai, that he was not acting under the authority of a Legal Aid certificate. Accordingly, I am not persuaded that any portion of Mr. Pachai's fees for

payment is unenforceable on account of a breach of section 14 of the Legal Aid Act 1980.

The Appellant's Objection to 'Reasonableness' of Private Funding Arrangements

49. As an alternative submission, Mr. Rothwell submitted that it was not reasonable for the Respondent to have discontinued her legal aid certificate in exchange for a more expensive funding agreement.

50. Mr. Rothwell queried why Mr. Pachai had not produced a letter of advice to Ms Harvey explaining her liability for fees under the private funding arrangement with WQ. He went on to argue that even if there was dual liability for Argus and Ms. Warren to WQ, it was not reasonable for Ms Warren to agree to such funding arrangements since she would have had no liability for fees under the Legal Aid certificate.

51. Mr. Rothwell further argued that Ms. Warren unreasonably agreed to take on liability for any shortfall between the costs allowed on taxation out of Mr. Pachai's fees. Mr. Rothwell, in citing paragraph 68 of *Surrey v Barnet & Chase Farm Hospitals NHS Trust [2015] Lexis Citation 142*, submitted that the burden was on Ms. Warren to show that she made a reasonable decision, not necessarily the best one.

52. The case of a *Surrey v Barnet & Chase Farm Hospitals NHS Trust [2015] Lexis Citation 142* was decided by Master Rowley sitting in a UK Senior Court, Costs Office.

53. The central issue in *Surrey* at first instance was whether a change of funding from legal aid certificate to a conditional fee agreement (CFA) was reasonable. Liability was admitted from the outset. The real dispute was on the assessment of damages which were claimed at a high value.

54. The reasoning for the discharge of the Legal Aid certificate in *Surrey* was outlined in paragraph 9 of Master Rowley's decision as a recite of a statement made by the solicitor at Irwin Mitchell, Ms Stanford-Tuck. Amongst those reasons, it was submitted that the case was complex and of high value case with up to 15 experts. The solicitor also argued that there was never any guarantee that the Legal Aid Agency would provide the costs limitations to fund the life of any case. Based on this previous experience, Ms Stanford-Tuck's position was that she was unable to guarantee the Client that the Legal Aid Agency would provide sufficient funding should the matter proceed to an Assessment of Damages hearing.

55. Ms Stanford-Tuck also went on to say at paragraph 11 of her statement, "*There was a risk to the client that there may not be sufficient funding to cover the cost of our work in the future and my Client could be exposed to make up the shortfall of any costs not recovered from the Defendant*."

56. At paragraph 12 of the statement, Ms Stanford-Tuck stated as follows: "*There were other general considerations to take into account. Over recent years, significant cuts had already been made to Legal Aid funding and it was evident that I could not guarantee that the Legal Aid Agency would continue to provide funding for the life of the claim. Further with successful Legal Aid cases, a Claimant can find that any element of the solicitor's costs and disbursements which have not been recovered from the Defendant, may be payable and owed by them under the "statutory charge.'*"

57. Notwithstanding Ms Stanford-Tuck's arguments, Master Rowley observed that the Claimant in Surrey had the benefit of legal aid for seven years at the time of the discharge of the certificate. The bureaucracy complained of was viewed by Master Rowley to be more of a matter for consideration by the Solicitor than the Client. In the absence of supporting evidence, Master Rowley also rejected the suggestion that Claimant would experience difficulty in obtaining the expert evidence he required while the Legal Aid certificate was in place. He said that no evidence was before him to show that Irwin Mitchell sought to increase the final level of the certificate before requesting the discharge. Further, Master Rowley acknowledged that there was no indication '*that the costs in this case had gotten away from the fee earner and the situation needed to be remedied*.'

58. Master Rowley in delivering his decision at paragraphs 68-69 of the Judgment held:

"*In every case cited to me it appeared that there was a very slight restatement of the test which I am required to apply. The test set out above from Sawar requires me to consider whether the claimant, assisted by his solicitor, has acted in a manner that is reasonable. The relevant action is of course the decision to change funding arrangements and so the question is whether the claimant made a reasonable choice in doing so. As Master Gordon-Saker said in LXM, the choice does not have to be the best one, but merely a reasonable one.*

Mr. Hutton sought to persuade me that the test is only "primarily" about whether the claimant has made a reasonable choice. Consequently, there must be secondary considerations regarding the reasonableness and proportionality of that choice. Mr. Hutton referred to a passage from Sawar which referred to "an inquiry into the availability of alternative funding arrangements which might be less expensive…" in order to establish that the costs have been incurred reasonably and proportionately."

59. At paragraphs 71 of Master Rowely's decision in *Surrey*:

"*Considering the reasonableness of the claimant's actions involves considering the merits and demerits of two different forms of funding. The playing field on which those two forms rest is a level one: it is not titled in favour of a non-additional liability option. If the claimant's actions were reasonable, there are no secondary considerations in my view to bring to bear*."

60. At paragraphs 85-89 of Master Rowely's decision in *Surrey*:

"*This does not mean that every single fact and matter has to be set out before compliance has been achieved. I agree entirely with Master Leonard's conclusion in AMH[6] that:*

'I am unable to accept that a choice must be unreasonable if it is not made on the best available information. I think one has to consider…whether the choice was reasonable in all the circumstances. It is …possible to make the right choice for, here, not so much the wrong reasons as an incomplete set of reasons.'

However, on the facts of this case, the failure to give advice regarding the post LASPO[7] landscape and in particular the Simmons damages, in my view rendered the advice[8] to be insufficient on which to found any proper or reasonable conclusion.'
Mr. Hutton referred to the recent Supreme Court case of Montgomery v Lanarkshire Health Board [2015] UKSC 11 on the question of informed consent being required of patients before an operation. In the leading judgment of Lord Kerr and Lord Reed the correct position is that:

"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

It seems to me that the test of materiality in this context is very similar. There is no evidence before me to indicate whether the claimant or his Litigation Friend would have considered the abandoning of up to £,20, 000, which was more or less guaranteed, in return for peace of mind regarding future funding. They may have decided that the system had apparently worked for 7 years was unlikely to break down in the final stages and they would rather have the money and risk the funding issues. They may have taken the view that QOCS protected them sufficiently not to incur an ATE premium. The possibilities for speculation are endless. What is certain, however, is that the Simmons damages were of significance and so should have been explained to the Claimant's Litigation Friend so that informed consent to a change in funding could be given. The absence from any evidence from the Litigation Friend on this point, to my mind, speaks volumes.

In the absence of being informed of these issues it seems to me impossible to say that the claimant can have made a reasonable choice to change funding arrangements. Consequently, I find that the additional liabilities flowing from the new arrangements are unreasonably incurred and as such are not recoverable from the defendant.

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[6] AMH v The Scout Association [2015]
[7] This refers to pending changes being brought into effect by the Legal Aid Sentencing and Punishment of Offenders Act 2012. Consequently the "case handlers" in law firm Irwin Mitchell were asked by the partners of the firm to review their legally aided cases out of concern that existing Clients would be potentially adversely affected.
[8] The advice referred to is that which was given to the Claimant by his Irwin Mitchell solicitor, Ms. Standford-Tuck, about the likely adequacy of the continued funding by the Legal Services Commission/Legal Aid Agency.

61. Notably, Mr. Pachai keenly placed before me a judgment in appeal of Master Rowely's decision in *Surrey*, which I outline further below.

62. Mr. Rothwell also referred to the case of *Sarwar v Alam [2001] EWCA Civ 1401* to which I had careful regard.

The Respondent's Reply to 'Reasonableness' Objection to Private Funding

63. Mr. Pachai at all material times represented Somers Isle Insurance Company Limited, a subsidiary of Argus Group Holdings Limited ('Argus'/ 'Somers Isle'), in its interests for a subrogated claim for medical expenses incurred for treatment of Ms. Warren's injuries.

64. Mr. Pachai stated that it was originally the intention of his Client (Argus) to join these proceedings to represent Argus' interest on the subrogation claim for medical expenses. Mr. Pachai's suggestion that Argus would be added as a Plaintiff was consistently resisted by Mr. Rothwell who asserted from the outset (as recorded in party correspondence dated 4 July 2013) that the Court would be unlikely to consider that the recovery of two sets of legal costs is justifiable. Having acceded to the reasonableness of Mr. Rothwell's resistance, Mr. Pachai explained that Argus made the decision for him (Mr. Pachai) to represent the Plaintiff, Ms. Harvey, on the same funding arrangement that Mr. Pachai had with Argus. This was underlined by the fact that Argus did not want CD&P to represent them in their million dollar claim.

65. In any event, Argus was never joined to this litigation as an additional Plaintiff in pursuit of its subrogated claim. Instead, Mr. Pachai came on the record to represent Ms. Harvey in place of her former CD&P attorneys. Mr. Pachai maintained in the hearing before me that he at all times continued to represent the subrogation insurer and, in doing so, Somers Isle made their claim through the Plaintiff, Ms. Warren. However, as a condition of his representation of Ms. Warren, Mr. Pachai stated in the hearing before me that he advised Ms. Warren that he would not be prepared to represent her on a Legal Aid certificate.

66. Mr. Pachai clarified that it was understood between him and Ms Warren that she was his Client. He was representing her for damages and Argus for the subrogation claim for medical expenses. Mr. Pachai said that his representation of Ms Warren was at the same rate at which he had been charging Argus thus far.

67. Mr. Pachai, in his oral submissions to me and in reply to my query on the basis for Ms. Warren's voluntary discharge of her Legal Aid Certificate, said:

"On the basis that I was representing her and through her there had to be a subrogation claim. I was representing her for damages and I was also representing the subrogated insurer, Argus… so it was on the basis that I was representing her and was going to do it on my regular basis as I had been doing thus far. She was going to become the Client, which she became. She was going to bear the primary responsibility to pay our bill if Argus didn't pay it because Argus had been paying it all along, right, as the insurer. So that was the basis on which I agreed to represent her…"

68. However, when I queried if Ms Warren had paid any portion of the fees in the Bill of Costs for taxation before me, Mr. Pachai replied that she had not. More so, he confirmed that Argus had in fact paid the fees charged in the Bill of Costs. Mr. Pachai emphasized here that Ms. Warren had the primary responsibility to pay for these fees. He hypothesized that if Argus ever became insolvent, Ms. Warren would have to cough up the payment of WQ's fees. He said, "*She always knew that she was the one who was my Client. If I didn't get the money through Argus because I was also representing their interests through her, she always had the main responsibility…".*

69. When I asked Mr. Pachai if he had a (written) retainer agreement with Ms. Warren he referred to paragraphs 25-31 and paragraph 42-43, 47, 51 of Lord Foskett's judgment as a basis for his entitlement to refrain from producing a retainer agreement for inspection. I will turn to the material parts of that Judgment hereunder.

70. Notwithstanding, Mr. Pachai further described the terms of his arrangement with Ms. Warren as follows:

"*You have to understand, I was already representing Argus who had a far bigger claim than Ms. Warren…you'll also see that CD&P did not, contrary to what Mr. Rothwell says, … include Argus' claim… you'll see that they say we have nothing to do with Argus' claim. And I showed you the last time the letter from Colonial…objecting to the Argus' claim and the basis for that. So CD&P never represented Argus… they did not…include the subrogation claim. So Argus being told, we are going to challenge your claim for some $700,000- obviously want representation- that was the basis on which they came to see me- I said to Mr. Rothwell, I've been consulted by Argus and I am minded to join the action on behalf of Argus. Mr. Rothwell said, 'No…if you do that, we will be objecting to two sets of costs...' which is a fair comment….although Argus has a separate legal right to make its claim, but in the normal course the claims for the reimbursement of medical expenses is made on a subrogation basis through the injured party. It is possible that if I had joined the action on behalf of Argus and CD&P continued to represent Warren, the Chief Justice may well have said at the end of it, Mr. Rothwell has a reasonable point, you should not get two sets of costs…in that scenario the question came up- 'who should represent Ms. Warren and who should represent Argus?' Argus were (sic) not prepared to go to CD&P. They wanted me to represent them and bearing in mind the objection that was taken by Mr. Rothwell, the question then arose, 'Should I represent Ms Warren?' and if I was prepared to represent Ms. Warren and she was prepared to have me represent her, then on what basis was I going to represent*

her… and when I met with Ms Warren and also her mother- I said to her- obviously, I explained it to them, I said, 'Look, if you agree for me to represent you, I am not prepared to do it on the legal aid funding. I will represent you but not on the legal aid and you will become the Client- Argus have been paying so far because they have a vested interest as they are the insurer and they will continue to pay but if they don't pay, you are the client…her advantage was to have one lawyer acting for her and for Argus… the medical treatment that she got which was front and center at trial occurred over a period of more than one year and all of that time she stayed in New York and she had medical records and documents all paid for by Argus- and Colonial will say she underwent that medical treatment against medical advice- the medical treatment was not successful- therefore we should not have to pay some or all of it. Now one of the advantages to her was also in me representing Argus- was that I had access to all the paperwork on this because her claim for damages was also related to that period of time- so it was beneficial to her…you couldn't draw the distinction between Argus claim and her claim because her claim was for pain and suffering and expenses incurred during that period and the medical records…they were huge binders of over a year of treatment…there was a clear benefit to her because Argus had the documentation…"

71. Mr. Pachai's bottom line position is that Ms Warren's decision to discharge her Legal Aid certificate in exchange for a private funding arrangement was a reasonable one and a decision which ought not, in any event, be the subject of review in a taxation of costs hearing.

72. Mr. Pachai, in sharing his analysis on the stance taken by the Legal Aid Committee, suggested that a reason for their subsistence in discharging the certificate could be explained by their interest in obtaining a reimbursement for the $14,000 worth of legal fees they paid to CD&P. Notwithstanding, Mr. Pachai emphasized that he was not privy to the arrangements or terms of the legal aid certificate which had been issued when Ms. Warren was represented by CD&P.

73. Somewhat academically, Mr. Pachai stated that the distinction between the Legal Aid system in England and that in Bermuda was that in England Legal Aid certificates allowed for Counsel to charge their actual office rates.

74. Mr. Pachai queried whether a person who, as a matter of certainty, was to receive a quantum award should be entitled to the benefits of a continued Legal Aid certificate in any event. In his words, "*she was going to get a lot of money*." He developed this submission to the point of arguing that Ms. Warren would not have qualified in 2012 as an eligible candidate for a legal aid certificate.

75. However, at my probing, Mr. Pachai confirmed that he was indeed aware of previous instances where the Legal Aid Committee granted certificates to applicants in cases where liability was admitted and the forthcoming quantum was likely to be sufficient for the Committee to claim reimbursement of the fees paid under the certificate.

76. Mr. Pachai qualified that concession in saying that it was a certainty that Legal Aid never granted a full certificate to fund this case. He explained that Legal Aid is not generally given in civil cases and for the most part where a certificate is granted, it is for limited hours. He said that legal aid certificates are limited to an approval of a specified time often in the neighborhood of 10 hours. Mr. Pachai emphasized that Legal Aid certificate was limited in 2012 for three hours for an opinion.

77. Mr. Pachai, in snookering Mr. Rothwell, readily placed before me the judgment of Mr. Justice Foskett on appeal of Master Rowley's decision in *Surrey v Barnet and Chase Farm Hospitals NHS trust [2016] EWHC 1598 (QB)*.

78. This was a hearing of three appeals from different Costs Judges, each concerning costs payable to a Claimant arising out of clinical negligence litigation on Legal Aid certificates. Suffice to say, each case was resolved on the issue of liability in favour of the Claimant resulting in costs awards against the defendants. The issue of reasonable funding arrangements was challenged successfully by each Defendant at taxation stage (as seen above in the outline of *Surrey*).

79. The central issue in these appeals was said to hinge on the rules of law applicable at the time the decisions were delivered. Lord Foskett at paragraph 95 of his judgment said,

"…the issue which, putting it shortly, is simply whether the additional liabilities were reasonably or unreasonably incurred. That question is to be determined by the application of the in Wraith…That test is, in my view, wholly objective, but applied in the context of the individual circumstances of the particular claimant. In LXM, Master Gordon-saker articulated the test…by saying that the question was as follows: "Was the CFA and the attendant ATE policy a reasonable choice for the claimant at that time, having regard to all the circumstances?" It goes without saying, of course, that "all the circumstances" are those that apply to the individual claimant. Expressed in that way, the focus is not, as Mr. Hutton suggested was the effect of Mr. Williams' argument, namely that if there was any reasonable person who might have agreed to the change, that was sufficient, but upon what a reasonable person standing in the shoes of the individual claimant would do.

The test, properly applied, would enable a costs judge to decide whether, in a particular case, the failure to mention the 10% uplift would be likely to have made any difference to the decision to transfer from legal aid to a CFA without any direct evidence from the claimant or the litigation friend. I will return to this below, I regard the reference to Montgomery as a distraction in this context. I agree that some kind of analogy could be constructed, but there is, in my view, a world of difference between someone being asked to decide on whether to embark on a course of treatment or to approach a particular medical condition in a particular way having been told there is a percentage chance of an adverse outcome and someone being asked if they are prepared to sacrifice a very small percentage of an overall substantial award of damages for the actual or perceived benefits of transferring to a CFA. Whilst Mr. Williams has, in my view rightly, accepted that the 10% issue has to be seen as something that ought to have been mentioned to each of the litigation friends, the failure to do so should, save in very exceptional cases, be a matter for discussion and consideration between the claimant and/or his litigation friend and the solicitors: it is not

a matter that should be of concern to the paying party. As I shall indicate below, where the issue does come into the arena in a costs assessment exercise if it ever does, in all but the most exceptional cases I consider that the court can decide if the failure to mention the 10% uplift would have made any difference by applying the Wraith test.

It seems to me, therefore, that the focus of the decision of each Costs judge was wrongly narrowed by reference to the analogy with Montgomery and, that being so, I am entitled to look afresh at the issue.

80. At paragraphs 99-104 of the appeal judgment, Justice Foskett held:

"*The principles and practice to be applied to this issue if it arises should, in my judgment, be informed by the need to ensure that detailed assessments of costs do not become an arena for a wide-ranging inquiry into the decision-making processes as between the claimant (usually, through his or her litigation friend) and his or her solicitors. Inevitably, any such inquiry would involve a number of logistical problems, one being the privilege accorded to communications between a litigant and a litigant's adviser. There was a distinctly unhappy period in the early stages of CFAs during which defendants sought to challenge (and indeed in some cases did so successfully) the validity of the CFAs entered into by reference to the adequacy of the advice received prior to the entry by the claimant into the relevant CFA. It is worth recalling it briefly.*

The Conditional Fee Agreement Regulation 2000 imposed obligations on solicitors to inform clients of certain matters before entering into a CFA. A material breach of the regulations rendered the agreement unenforceable: see Hollins v Russell [2003] EWCA Civ 718. On detailed assessment paying parties would seek to establish that the solicitors for the receiving party had failed to comply with the regulations, that the CFA was thereby unenforceable and that the receiving party, not being liable to pay his solicitor's costs, could not recover them from the paying party. This was part of the "costs war" described by Sir Rupert Jackson in section 5(iv) of Chapter 3 of his Preliminary Report.

The issue of whether solicitors had complied with the regulations became the subject of witness statements produced for the detailed assessment hearing. Statements would be produced from the solicitor and also from the lay client. This could include the widows of deceased husbands and the parents of severely disabled children. Master Gordon-Saker has advised me that there were occasions he recalls when paying parties required such witnesses to attend to be cross-examined. An example from his own experience was Puksis v Brumby [2008] EWHC 90095 (Costs) in which the defendant required the mother and litigation friend of a claimant who had suffered severe head injuries in a road accident to attend court to be cross-examined about the inquiries that the claimant's solicitor had made as to the existence of other means of funding the claim. In an intervention during the hearing of these appeals, Master Gordon-Saker characterized the period prior to the Conditional Fee Agreements (Revocation) Regulations 2005, which stopped this type of challenge for CFAs concluded after 1 November 2005, as "the bad old days.

Without sacrificing entirely the possibility of a proper challenge to a changed funding arrangement that is demonstrably improper or seriously prejudicial to a defendant for no good reason, any return to such days must be resisted strangely. Master Rowley said in Surrey…that the absence of any evidence from the Litigation Friend in relation to the 10% uplift "speaks volumes". I do not, of course, possess anything

like his experience in these matters and, accordingly, I differ from his view with considerable diffidence. However, I would be inclined to be less robust in my attitude to this particular omission. The claimant's litigation friend was his mother (and thus the mother of a severely disabled child) who would doubtless have been relieved that the claim for her son had been resolved satisfactorily when the settlement was finally approved by the court. She will have walked away from that hearing thinking that she could forget the litigation and get on with the life that she and the rest of her family had to contemplate. The putting forward of any statement by her in relation to this issue may have led to a request that she should give evidence at the costs hearing. If that occurred it really would be a return to "the bad old days" and one wonders what truly useful evidence on the issue in question she could possibly have given.

Detailed assessment hearings should, in my judgment, be kept as simple and straightforward as possible so that the Costs Judge can focus upon and deal with (robustly if necessary) the real issues concerning the costs sought that traditionally arise. It must, in my view, be a wholly exceptional case where, for example, the litigation friend of the kind I have identified should ever be required to attend to relive one decision made in the litigation that probably did not seem a particularly difficult or important one at the time. Mr. Hutton has emphasized that the NHSLA would not seek to put anyone in this position unless it felt it was truly necessary to do so. I accept that unreservedly. The NHSLA has a difficult path to steer between defending robustly allegations that are unfounded, or at least properly defensible, and simply "giving in" to such allegations when made. Equally, when responding to the quantum element of a claim once liability and causation have been conceded or established, it plainly has a duty on behalf of the public purse to ensure that claimants do not receive more than the entitlement for which the law provides, but equally it needs to deal sensitively with claims made by families whose lives have been changed forever by (often) some relatively short-lived negligence. History shows that where concessions concerning liability and causation are necessary, the NHSLA does indeed make such concessions on behalf of those it represents (where appropriate, at an early stage) and suitable apologies are offered. This is plainly a responsible approach. In relation to damages, the availability of periodical payments orders has made it easier in many cases for appropriate settlements to be achieved satisfying both sides and the NHSLA has shown itself willing to engage constructively when discussing the disposition of a damages award. I am sure it is the case that the majority of claims are settled following roundtable meetings and this reflects a responsible and responsive attitude on both sides. As I say, I have no doubt that the NHSLA would not pursue the kind of hearing to which I have referred above if it was of the view that it was not properly necessary.

However, whether such a hearing is appropriate cannot be left to one party alone: the court must plainly retain control over the way in which detailed assessment hearings are conducted and whether such a hearing as that foreshadowed above is necessary must ultimately be a decision for the court. I will say a little below (see paragraph 110) about the practice I suggest is followed in these cases henceforth having received the advice of master Gordon-Saker."

81. At paragraph 110, Justice Foskett prescribed the approach for future practice as follows:

"The procedural framework for the way in which what I have termed the "Simmons v Castle 10% issue" should be dealt with in future is summarized as follows:

(i) In any case in which the claimant changed funding from Legal Aid to a CFA in the period from 26 July 2012 (the date of the first judgment in Simmons v Castle) to 1 April 2013, the claimant's solicitors should state in the narrative to the bill whether or not before the CFA was entered into the claimant or his /her Litigation Friend was advised of the 10% uplift. The solicitor's certificate that the bill is accurate will apply to that statement.

(ii) The court will go behind that certificate only if there is a genuine issue as to whether what is stated is accurate. In the event that there is a genuine issue, that should be raised in the points of dispute and the reasons for the issue explained clearly. If the court accepts that a genuine issue has been raised, the question of whether or not advice was given should be resolved at the detailed assessment hearing either by production of the claimant's solicitor's attendance note of the advice or by a short witness statement from the claimant's solicitor. It should never be necessary to adduce evidence from the claimant or the litigation friend. Furthermore, it is difficult to anticipate any circumstances in which it would be helpful for the claimant's solicitor to be required to attend for cross-examination.

(iii) If in a case where the advice was not given the defendant wishes to argue that the change from legal aid to a CFA was unreasonable, that argument must be raised in the points of dispute. In the event that the argument is pursued, the claimant's solicitor should indicate the actual or presumed value of the 10% uplift in the replies together with any reasons relied on as to why the change was unreasonable. To the extent that it may not be apparent from other material, the claimant's solicitor should also indicate the capitalized value of the agreed award or of the award of the court following the contested hearing.

(iv) *If the issue falls to be determined at a detailed assessment hearing, the costs judge should endeavor to reach a decision based on the arguments raised in the points of dispute and replies without any need for further evidence. Evidence as to what the claimant may or may not have done had the advice been given will not be helpful, given that the question for the court is whether the decision was reasonable in the way set out in this judgment. It would only be in the most exceptional case, where there is some suggestion of impropriety, that any oral evidence from any party should be considered. The Costs Judge should give careful directions concerning the reception of such evidence if it should be necessary.*

82. In summary, Mr. Pachai argued that the effect of Lord Foskett's decision was to overturn the 'reasonable' test outlined in *Surrey* and to shift the Costs Judge's focus in a taxation hearing away from the funding arrangement and onto the reasonableness of the actual costs incurred.

Decision on the Appellant's Objection to 'Reasonableness' of Funding Arrangements

83. Turning my mind to whether the additional liabilities (the shortfall created by taxation reductions) were reasonably or unreasonably incurred, I take into consideration the individual circumstances of Ms. Warren while applying the test objectively.

84. Ms. Warren, no doubt being aware that Argus was prepared to join the proceedings as a separate Plaintiff, had the opportunity to obtain representation by her insurers' first choice of attorney without having to pay the related legal fees out of pocket since Argus was writing the cheques. Ms. Warren would have also been happy not to be burdened by having to obtain control over the voluminous supporting medical evidence she needed which would have underlined her pain and suffering claim for damages.

85. The question as to whether Ms. Warren should have applied her mind to the plausible shortfall between the actual charges of her attorneys and the fees disallowed by me in a taxation is the gravamen of Mr. Rothwell's submission. As Argus was paying for all of WQ's legal fees, it seems to me that Ms. Warren would not have likely fixated her mind to such a finite point. In my view, that is not unreasonable.

86. I go further. Albeit that Counsel both opined that the Court would have been unlikely to allow two sets of legal costs had Argus joined these proceedings as a Plaintiff, I disagree. I think it entirely plausible that the Court would have recognized Argus' right to make a claim for recovery of the loss of the medical expenses, whether through the Plaintiff, Ms. Warren, as a subrogated claim, or in Argus' own right as a joined Plaintiff. In my view, it was inevitable that Argus' claim for the medical expenses would have entered into these proceedings one way or the other. Moreover, Argus had the right to select its attorneys of choice in so doing. It then follows that the losing party was going to encounter the duty to pay the costs of Argus Counsel, WQ, in any event. In fact, I think there is merit to the argument that WQ's dual representation of Ms. Warren was even a costs-saving opportunity as WQ were already familiar with the case and were already in possession of the voluminous associated documents.

87. Having regard to all these factors, I think it is clear that Ms. Warren reasonably perceived a laundry list of advantages in being represented by Argus' Counsel, in addition to the payment of the legal fees for her claim being overtaken by the said insurer. I accept that focus is not whether any reasonable person might have agreed to the change, but whether a reasonable person standing in the shoes of Ms. Warren would have changed her funding arrangement as she did. Accordingly, I find no criticism in Ms. Warren's decision to transfer her representation to WQ.

88. Following the principles stated by Lord Foskett, *'the assessments of costs is not an arena for a wide-ranging inquiry into the decision-making processes as between the claimant (usually, through his or her litigation friend) and his or her solicitors'*.

89. I agree with Mr. Pachai's submission that a detailed assessment of costs should, in any event, be focused more on the real issues concerning the costs sought as opposed to the funding arrangements entered between a litigant and attorney.

90. For all of these reasons I decline to disallow any portion of Ms. Warren's costs on the basis of the discharge of the Legal Aid certificate in exchange for a private funding arrangement.

Restriction on Recovery of Costs Required For Payment

91. While Mr. Rothwell did not dwell on whether or not Ms. Warren could recover through the taxation proceedings costs which were not paid by her, I find myself obliged to address the point with commensurate brevity. The question is thus whether Argus' payment of WQ's fees deprives Ms. Warren from an entitlement to recover the said fees on taxation.

92. I have considered the effect of RSC Order 62 R.29(5)(b)(iii) for Supreme Court matters which requires an entitled party to include in its Bill of Costs particulars a statement certifying that the costs claimed therein do not exceed the costs which the receiving party is required to pay to the attorney or law firm. The Bill of Costs is certified by Mr. Pachai in such terms.

93. However, I do not think it is a matter for me to inquire or investigate into whether or not a third party has assisted an entitled litigant with the payment of their legal fees which were properly chargeable by the attorney. It is not disputed that the fees in the Bill of Costs were incurred in providing representation to Ms. Warren. Whether those fees were going to be paid from the Legal Aid fund, an insurer, a friend or even a family member of Ms. Warren is not a matter for me. As such, I reject any invitation to disallow the recovery of fees on those grounds.

Objection to Global Fees and Particulars Charged by Bermuda Counsel, WQ

94. Mr. Rothwell submitted that Mr. Pachai's fees were exceedingly excessive having compared the $95,243.55 figure to the sum of his own fees ($28,172.50) in the parallel appeal, *Colonial Insurance Company Ltd v Kate and James Thomson CA (Bda) No. 14 of 2015*.

95. WQ filed a Bill of Costs on 25 April 2016 in the sum of $95, 243.55 representing profit costs for Bermuda Counsel. The disbursements totaled $7,003.55.

96. Other particulars of objections to the Bill of Costs were shown in a table at Tab 13 of the Appellant's bundle.

97. For the most part, Mr. Rothwell complained that Mr. Pachai ought not to have billed (or sought reimbursement on behalf of his client) for fees relating to the reviewing of documents. Mr. Rothwell argued that Counsel should be confined to billing for tasks which advance the case as opposed to reviewing it. There are instances, however, where

Mr. Rothwell sought to lower the sum charged for reviewing an item as opposed to removing it altogether from the bill.

98. Mr. Pachai argued, however, that revision of case materials (as opposed to the law) is a necessary and unavoidable component of case preparation. He forcefully held on to the proposition that it is not possible to advance a case without reviewing materials.

Decision on Fees Charged by Bermuda Counsel, WQ.

99. I have carefully considered the Appellant's table of objections on a line by line basis. (See Tab 13 of the Appellant's hearing bundle of objections). I have also applied my mind to the Respondent's table of red-ink replies to those objections. Below is a table of my line by line decisions in relation to this head of the objections to the Bill of Costs:

BERMUDA COUNSEL'S FEES		
ITEM	**DECISION**	**CATEGORY OF TASK**
26	0.7hrs to 0.2hrs	Review of correspondence (0.2hrs)/ Notice of Appeal (0.0hrs)
27	0.6hrs to 0.0hrs	Review of law/procedure
42	1.6hrs to 1.0hrs	Reviewing note re grounds of appeal(0.8hrs) and correspondence (0.2hrs)
50	1.2hrs to 0.2hrs	Meeting prep/review judgments/order for costs and Bill of Costs
55	0.2hrs to 0.0hrs	Reviewing summons from Registrar
62	0.8hrs to 0.4hrs	Reviewing correspondence (0.1hrs) and schedule of docs for appeal record and draft order (0.3hrs)
63	1.2hrs to 0.5hrs	Reviewing pleadings and trials bundles for additional docs for appeal
82	0.3hrs to 0.0hrs	Review details re David Westcott QC
84	1.2hrs to 0.7hrs	Reviewing correspondence (including correspondence for taxation)
92	1.2hrs to 0.5hrs	Reviewing file material for court hearing
94	2.8hrs to 2.0hrs	Reviewing pleadings and docs for trial bundles re taxation of costs
95	0.6hrs to 0.3hrs	Reviewing authorities
112	0.2hrs to 0.0hrs	Reviewing file correspondence
124	0.3hrs to 0.1hrs	Reviewing correspondence (including correspondence from Registrar)
173	0.1hrs to 0.0hrs	Reviewing Notice of Hearing
176	1.6hrs to 0.5hrs	Reviewing appeal binders for record of appeal
184	2.8hrs to 0.5hrs	Continuation review of Court transcripts
187	1.6hrs to 1.0hrs	Reviewing Notice of Appeal (0.5hrs)…submissions (0.3hrs) and authorities (0.2hrs)
196	0.8hrs to 0.4hrs	Reviewing correspondence
199	5.3hrs to 3.0hrs	Continuation review of Court transcripts
206	1.2hrs to 0.0hrs	Conference call with LK
215	1.6hrs to 0.5hrs	Reviewing skeleton
223	0.5hrs to 0.0hrs	Travel accommodation arrangements
231	1.5hrs to 0.5hrs	Reviewing submissions in civ app no. 14 of 2015
242	1.6hrs to 0.0hrs	Reviewing correspondence / submissions …
243	1.2hrs to 0.0hrs	Reviewing correspondence / submissions …
264	1.0hrs to 0.5hrs	Reviewing correspondence (0.2hrs) / submissions (0.3hrs)…
267	3.6hrs to 1.0hrs	Discussions and meeting with QC
270	0.2hrs to 0.1hrs	Reviewing correspondence (including correspondence from Registrar)
272	3.5hrs to 2.0hrs	Preparation for Court

273	1.8hrs to 0.5hrs	Preparation for Court / meeting with QC
275	1.0hrs to 0.5hrs	Preparation for Court (lunch)
280	1.8hrs to 0.5hrs	Preparation for Court
286	0.2hrs to 0.1hrs	Reviewing correspondence
287	0.2hrs to 0.1hrs	Reviewing correspondence
298	0.2hrs to 0.1hrs	Reviewing correspondence
301	1.3hrs to 0.5hrs	Reviewing Court of Appeal Judgment

100. The above deductions were made so to allow only a reasonable amount of all costs reasonably incurred. Necessarily, I resolved all doubts on whether the costs were reasonably incurred in favour of the paying party.

101. In taxing down fees which were incurred through review and consideration of the law I followed the principle stated by Ground CJ in *Golar LNG Ltd v World Nordic SE No. 163 of 2009 (Commercial List) (para 13-14*) in his citation and approval of Cook on Costs Butterworths 2004, p. 230: "*Time spent considering the law and procedure is usually non-chargeable- and the higher the expense rate, the more law and procedure the fee earner is expected to know*…" In this case there were nuances of law which justified reductions in the fees charged as opposed to complete disallowances.

102. In my view, Mr. Pachai's hourly rates are in the most upper range of rates allowable. Thus, reductions to the charges allowed in respect of his review of law and procedure is attributable to the expectation and presumption of his knowledge of the law. The presumption, however, did not reach so far as to disentitle him from recovery of his fees for research on the areas of particular complexity in this case.

103. I also disallowed fees where there appeared to be duplicity of the fees charged. Where I considered fees to be excessive charges for review of documents previously read and considered, I also taxed the costs down.

104. Notably, I did allow 2 hours for the preparation of the taxation proceedings. Item 12 under the Fourth Schedule reads:

"*Where no costs are specified by these Rules in respect of any matter or thing the Registrar may allow the costs applicable to such matter or thing as is laid down in the rules in force in the Supreme Court*"…"

105. Accordingly, I turned my mind to the RSC Part II Division II Item 5 which allows for costs in respect of taxation. This may include the preparation of the bill, preparing for and attending the taxation and travelling and waiting time.

106. For these reasons I did not disallow costs in preparation of the taxation proceedings under the overhead objection made by Mr. Rothwell.

Objection to Fee notes for Overseas Counsel

107. A total of £26,557.00 is claimed for the fees of overseas Counsel (£23, 182.00 billed in the name of Martin Porter QC and £3,375.00 billed in the name of Luka Krsljanin).

108. Mr. Rothwell argued that Martin Porter QC and Luka Krsljanin's fees were excessive. He suggested that Mr. Porter QC briefly addressed the Court for one hour after David Westcott QC (for Thomson) addressed the Court on all of the pertinent issues for determination. It was argued that had more of a collaborative effort been made between the Respondent QCs, costs would have been saved.

109. Mr. Pachai, on the other hand, submitted that it would have been negligent of him and his Queen's Counsel to have short-cut their preparation of the case on the unforeseeable notion that Mr. Westcott QC would have done all of the heavy lifting in Court. I agree with this submission in principle to the extent that it was reasonable for Mr. Porter QC to be prepared to fully argue the appeal, notwithstanding the appearance of Mr. Westcott QC. However, I also agree that a collaborative effort between Counsel who are joined in similar arguments is a reasonable costs saving measure.

110. Notwithstanding, I did not find Mr. Porter QC's fees to be excessive. For these reasons, I declined to interfere with sums charged subject to my decisions on the disbursement fees below.

111. Turning to the fees for the second overseas Counsel, Luka Krsljanin, I am reminded of Ground CJ's *ratio* in Re Extraordinary Mayoral Election (Taxation of Costs Review) [2008] Bda LR 28, "*while the third respondent may have had good reasons of her own for talking to two sets of lawyers, the losing party should not be obliged to pay for that, even on a taxation of an indemnity basis. One set of these costs should, therefore, be disallowed.*"

112. Accordingly, I hold that Mr. Krsljanin's fees are not reasonably allowable on a costs award made on a standard basis. Accordingly, I tax off his entire charge of £3,375.00 in fees.

113. Complaint was made separately on the sum of disbursements, specifically in relation to the fringe benefit of business travel class offered to Mr. Porter QC in additional to the excessive duration of his stay in Bermuda.

114. Mr. Pachai maintained that it was not unusual for Queen's Counsel to travel to Bermuda from London on business class. Notably, the cost of the airline travel neared $5000/£3000.

115. I am not persuaded that this is a charge which falls to be paid by the losing party under an award of costs on a standard basis. Accordingly, I summarily assess the costs of

air travel to $2000. Further, I reduce the costs allowed for his accommodation for the two day hearing from $2767.25 to $1500.00.

Conclusion

116. The effective commencement date for the Guideline Rates under the President of the Court of Appeal's Practice Direction No. 18 of 2016 is the date of its issuance, namely 15 July 2016. It, therefore, applies to all fees for taxation hearings listed 15 July 2016 and onwards.

117. The varying hourly rates up to $700p/h charged by Mr. Pachai in the Bill of Costs are allowed.

118. The Appellant's application to disallow charges beyond the Legal Aid rate during the period leading up to 12 May 2016 in the Bill of Costs on the grounds that it is a breach of section 14 of the Legal Aid Act 1980 is refused.

119. Equally, I reject the Appellant's submission that the Respondent's change of funding arrangements was unreasonable insofar as the Legal Aid certificate was voluntarily discharged.

120. I have reduced the allowance for the airfare of Overseas Counsel, Martin Porter QC, to the sum of $2000. Further, I reduce the costs allowed for his accommodation for the two day hearing from $2767.25 to $1500.00. Moreover, the fees for Luka Krsljanin have been disallowed altogether.

121. Costs taxed off the WQ fees of are reduced as tabled above. Where I have omitted reference to any particular item number in the Bill of Costs where there was an objection, I have purposefully refrained from reducing or disallowing such costs charged.

122. I will hear Counsel, if necessary, on the terms of the Certificate to be drawn up. Otherwise, an agreed amended Bill of Costs and Certificate giving effect to this Ruling may be filed for my signature.

123. Unless either party applies within 14 days by letter filed in the Registry to be heard on costs of the taxation hearings, interest on the costs award or the applicable conversion rate for the payment of overseas Counsel:

(i) Costs for the Respondent/Entitled Party for the preparation of the taxation proceedings as stated above by my decision on Item 94 of the Bill of Costs.

(ii) Costs for the Respondent/Entitled Party for attendance at the taxation hearings.

(iii) Interests at the statutory rate on the award for costs of the taxation.

(iv) The conversion on the Stirling-Pound for payment of Overseas Counsel is to be calculated at £1.00 to $1.6.

Monday 20 February 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR FOR THE COURT OF APPEAL