



In The Supreme Court of Bermuda

REGISTRAR'S CHAMBERS

No. 311 of 2008

Between:

DENNIKA WARREN

Plaintiff/ Entitled Party

And

TINEE HARVEY

Defendant/ Paying 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 is a case which started by a claim for personal injury arising out of a motor vehicle accident on or about 19 August 2007.
2. By letter to the Registry dated 27 August 2014, Counsel requested a fixture for a hearing for damages to be assessed as liability was admitted on 11 February 2008.
3. The matter was listed and heard before the Hon. Chief Justice Ian Kawaley 24-26 November 2014.

Order and Judgment of 9 January 2015

4. An order for damages in respect of various heads of loss was awarded on 9 January 2015:
 - (a) \$138,123.09 in respect of the Plaintiff's loss of future earnings claim applying a discount rate of 3% (subject to leave to apply for a lower discount rate;
 - (b) \$86,297.90 in respect of past loss of earnings;
 - (c) \$40,462.90 in special damages;
 - (d) \$75,000.00 for general damages for pain and suffering and loss of amenity together with interest at 3.5% from 15 February 2008 until judgment;
 - (e) Interest at the rate of 7% on the agreed medical expenses claim in the amount of \$679,905.00 (together with 3.5% interest rate in respect of special damages)
5. Further, the Chief Justice ordered that the Plaintiff was to have her costs of the action to be taxed if not agreed.

Directions Order for Expert Evidence on 19 January 2015

6. On 19 January 2015 the Court directed the fixture of a hearing for expert accounting and economics evidence in relation to the appropriate discount rate in respect of the said future damages award.
7. Mr. Pachai for the Plaintiff urged the Court to adopt a 0% rate without hearing expert evidence. The Chief Justice, however, declined the invitation to depart from the discount rate without first hearing expert evidence. Specifically, the central expert evidence was ordered to address the following issues:
 - (1) What is the most appropriate measure in Bermuda for the rate of return on a lump sum conservatively invested? (eg. ILGS/ US TIP securities/local bank term deposit rates)

- (2) What provision, if any, should be made for a gap between price and earnings inflation;
- (3) Within the constraints of a modest retainer and providing a very basic guide, what range of discount percentage appears appropriate for the 2nd Defendant's case
8. Mr. Pachai then sought leave to file expert evidence which was unopposed by Mr. Rothwell.
9. This hearing was listed together with two other matters (*Thompson v Thomson No. 6 of 2012* and *Argus Insurance Company Ltd v Somers Isles Insurance Company Ltd v Henry Talbot No. 139 of 2014*) wherein similar issues arose for resolve.
10. The three Plaintiffs adduced evidence from the same actuary, Mr. Christopher Daykin. The Defendants called actuary, Mr. Peter Gorham. The Plaintiff in Thompson adduced evidence from an economist, Dr. John Llewellyn. However, each side essentially advanced conflicting expert assessments on the most appropriate discount rate calculation methodology.

Bill of Costs filed on 20 and 21 January 2015 for Costs of Action awarded 9 January 2015:

11. A Bill of Costs in the total sum of **\$223,972.11** filed on 20 January 2015 by Messrs Wakefield Quin Ltd (WQ) followed.
12. Equally, a Bill of Costs from Messrs Conyers Dill & Pearman in the total sum of **\$61,701.25¹** was filed on 21 January 2015 under the Wakefield Quin Ltd cover letter.
13. By letter dated 22 February 2015, the former Registrar, Charlene Scott, issued a notice to Counsel for the Defendant that WQ's Bill of Costs would be taxed on 15 April 2015.
14. By letter dated 19 March 2015, however, Mr. Rothwell wrote to the former Registrar in complaint of the Mr. Pachai's filing of a Bill of Costs. Mr. Rothwell advised that the action was ongoing in that the issue of the discount rate was yet to be finally determined.
15. By letter dated 25 March 2015, Mr. Pachai wrote to the Registrar stating his disagreement that the Bill of Costs was filed prematurely.
16. By letter to the parties dated 27 March 2015, the then learned Registrar delisted the fixture.

¹ Corrected sum totaled \$62,941.25

Assessment of Damages (Hearing on 1-2 June 2015 and Ruling on 22 June 2015):

17. On 1-2 June 2015 the Chief Justice heard expert evidence on the contentious issue of the discount rate to be applied to the head of loss relating to future earnings.
18. The Chief Justice observed that the only issue for determination in this matter was the discount rate to be applied to the loss of earnings claim of Ms Warren. The Court accepted Mr. Daykin's evidence that the appropriate discount rate should be -1.5% for her future loss of earnings claim. She was accordingly awarded \$135,426.69 in addition to the provisional award for this head of loss of \$138,123.09.
19. As such, costs of this application came to be awarded to the Plaintiff.

Bill of Costs related to Order of Chief Justice dated 22 June 2015

20. On 29 April 2015 the Bill of Costs for Conyers Dill & Pearman in the sum of **\$61,701.25²** was refiled (having been originally been filed on 21 January 2015 under a cover letter by Messrs Wakefield Quin Ltd dated 29 April 2015).
21. By letter to the parties dated 27 March 2015, Registrar Scott relisted the taxation hearing to Wednesday 22 July 2015.
22. Mr. Pachai wrote to the Court on 10 July 2015 requesting for the 22 July 2015 taxation hearing to be delisted by agreement between to the parties to proposed dates leading up to 15 October 2015. Thus, the taxation hearing did not proceed for hearing on 22 July 2015 before Registrar Scott.
23. By letter of the Court dated 15 July 2015, the matter was accordingly relisted to 14 October 2015. However, by letter from Mr. Pachai dated 12 October 2015, the parties requested the delisting of the 14 October 2015 fixture in light of the pending appeal of the matter. The taxation hearing was then adjourned by Registrar Scott via email to the parties on 14 October 2015 on a *sine die* basis and relisted to a date up to 30 September 2016.
24. The matter was accordingly relisted to 27 September 2016 and proceeded on that date without completion. The hearing was therefore continued and completed on 6 October 2016.

² Corrected sum totaled \$62,941.25

REGISTRAR'S DECISION:

25. In respect of the particulars of objection made to specific item entries (see Tab 12 of the Defendant's hearing bundle and the Plaintiff's red-ink replies), I hold as follows:

TAXATION REDUCTIONS TO BILL OF COSTS UNDER ORDER OF 9 JANUARY 2015		
ITEM	REGISTRAR'S DECISION	CATEGORY OF TASK
2	1.3hrs to 0.5hrs	Review of Somers Isles claims; pleadings...
3	1.4hrs to 0.5hrs	Review of medical reports / records
11	1.2hrs to 0.0hrs	Reviewing RSC and joinder authorities
19	1.2hrs to 0.5hrs	Review of medical reports / records
24	3.8hrs to 1.5hrs	Review of client files/docs...medical reports / records
27	1.3hrs to 0.5hrs	Reviewing correspondence and order
37	1.3hrs to 0.5hrs	Review of CD&P correspondence / quantum...law joinder
38	0.8hrs to 0.2hrs	Review of CD&P correspondence
43	0.2hrs to 0.0hrs	Internal discussions with Counsel of same firm
47	1.2hrs to 0.5hrs	Reviewing correspondence, medical reports... in prep for meeting Clients
51	0.3hrs to 0.1hrs	Reviewing correspondence and summons
63	1.4hrs to 1.0hrs	Reviewing correspondence
64	0.7hrs to 0.0hrs	Internal discussions with Counsel of same firm
68	1.8hrs to 1.0hrs	Reviewing correspondence
76	0.6hrs to 0.3hrs	Reviewing correspondence from Client (including medical reports...)
77	0.8hrs to 0.4hrs	Reviewing Client narrative
80	2.8hrs to 0.0hrs	Reviewing file ...
92	1.8hrs to 1.3hrs	Reviewing file ...
96	4.5hrs to 3.0hrs	Review of claim docs (hundreds of pages)
104	0.3hrs to 0.0hrs	Disallowed by Agreement
105	0.8hrs to 0.5hrs	Correspondence...
108	1.3hrs to 0.8hrs	Review of docs and correspondence
111	0.2hrs to 0.0hrs	Disallowed by Agreement
112	1.8hrs to 0.8hrs	Reviewing CD&P correspondence file
115	0.2hrs to 0.0hrs	Disallowed by Agreement
116	4.3hrs to 2.0hrs	Reviewing CD&P correspondence and file docs
117	1.6hrs to 1.0hrs	Reviewing correspondence from Argus with MEF policy...
135	3.6hrs to 1.0hrs	Reviewing court file ...
149	0.8hrs to 0.0hrs	Reviewing pleadings
150	0.7hrs to 0.5hrs	Correspondence...reviewing pleadings
156	0.3hrs to 0.0hrs	Reviewing correspondence and file docs
157	2.5hrs to 1.5hrs	Reviewing docs from NYU hospitals
166	\$884.21 to \$0.00	Reviewing Dennika Warren medical records
176	7.8hrs to 2.0hrs	Reviewing med records from NYU hospitals
180	\$500.00 to \$0.00	Travel Expense of Plaintiff having to travel to NY for recovery of med records
181	0.6hrs to 0.3hrs	Reviewing correspondence and docs from NYU hospitals
197	1.3hrs to 0.8hrs	Reviewing correspondence and docs from client and Doctors...
207	3.3hrs to 0.5hrs	Reviewing pleadings...
214	0.8hrs to 0.4hrs	Reviewing correspondence...
215	0.7hrs to 0.0hrs	Reviewing accounts
216	1.3hrs to 0.5hrs	Reviewing med records
217	0.2hrs to 0.0hrs	Reviewing correspondence from GCS...
219	0.4hrs to 0.3hrs	Reviewing correspondence and accounts from Argus ...

221	1.3hrs to 0.5hrs	Reviewing docs from Argus' files
224	0.4hrs to 0.0hrs	Reviewing correspondence from GCS...
227	0.3hrs to 0.0hrs	Reviewing correspondence from GCS...
228	1.5hrs to 0.5hrs	Reviewing Client Narrative
230	0.6hrs to 0.3hrs	Reviewing med records
231	\$150 to \$0.00	Cell phone charges
232	0.6hrs to 0.0hrs	Reviewing correspondence from GCS...
238	0.2hrs to 0.0hrs	Reviewing correspondence from GCS...
239	2.3hrs to 0.5hrs	Reviewing med records
241	2.6hrs to 0.5hrs	Reviewing med records
248	1.8hrs to 1.3hrs	Finalizing Affidavit
251	1.8hrs to 0.3hrs	Reviewing docs from Client
253	0.6hrs to 0.0hrs	Reviewing law
259	1.3hrs to 0.5hrs	Reviewing correspondence
264	0.4hrs to 0.3hrs	Preparing Order
266	0.4hrs to 0.3hrs	Correspondence to CHW and Registrar
269	0.8hrs to 0.4hrs	Reviewing docs re Schedule of Losses
280	0.6hrs to 0.2hrs	Reviewing correspondence from CD&P...
285	1.2hrs to 0.5hrs	Review of witness narrative
319	8.6hrs to 1.0hrs	Review of file documents
331	0.2hrs to 0.0hrs	Disallowed by Agreement
334	1.3hrs to 0.8hrs	Reviewing bank statements
339	1.4hrs to 0.5hrs	Reviewing file docs
342	0.8hrs to 0.0hrs	Reviewing law
346	0.2hrs to 0.0hrs	Disallowed by Agreement
349	0.6hrs to 0.2hrs	Reviewing correspondence and med records
353	0.8hrs to 0.0hrs	Internal discussions with Counsel of same firm
356	0.6hrs to 0.2hrs	Reviewing correspondence and med records
358	0.6hrs to 0.0hrs	Reviewing Client docs
364	0.5hrs to 0.0hrs	Reviewing docs and correspondence
366	0.8hrs to 0.0hrs	Reviewing law
368	0.3hrs to 0.0hrs	Reviewing law
371	2.9hrs to 0.0hrs	Skeleton
374	7.5hrs to 0.0hrs	Reviewing law
376	5.3hrs to 0.0hrs	Assistance with trial bundles (administration)
378	0.8hrs to 0.2hrs	Reviewing correspondence CHW
382	0.8hrs to 0.0hrs	Reviewing law
384	4.8hrs to 2.0hrs	Settling trial bundle
387	1.3hrs to 0.0hrs	Reviewing law
388	0.5hrs to 0.0hrs	Reviewing correspondence CHW
393	3.5hrs to 1.5hrs	Reviewing Client and file docs
397	0.3hrs to 0.0hrs	Disallowed by Agreement
404	1.8hrs to 0.2hrs	Reviewing correspondence CD&P
411	1.3hrs to 0.5hrs	Review further docs for trial
424	0.8hrs to 0.0hrs	Disallowed by Agreement
439	7.0hrs to 0.0hrs	Disallowed by Agreement
440	4.2hrs to 0.0hrs	Disallowed by Agreement
449	3.0hrs to 0.0hrs	Disallowed by Agreement
450	0.2hrs to 0.0hrs	Disallowed by Agreement
459	0.8hrs to 0.0hrs	Disallowed by Agreement
460	0.2hrs to 0.0hrs	Disallowed by Agreement
461	0.1hrs to 0.0hrs	Disallowed by Agreement
465	1.0hrs to 0.0hrs	Disallowed by Agreement
466	0.2hrs to 0.0hrs	Disallowed by Agreement
469	0.3hrs to 0.0hrs	Disallowed by Agreement

470	0.8hrs to 0.0hrs	Disallowed by Agreement
472	0.8hrs to 0.0hrs	Disallowed by Agreement
475	1.3hrs to 0.0hrs	Disallowed by Agreement
476	0.2hrs to 0.0hrs	Disallowed by Agreement
477	0.8hrs to 0.0hrs	Disallowed by Agreement
478	0.2hrs to 0.0hrs	Disallowed by Agreement
479	0.2hrs to 0.0hrs	Disallowed by Agreement
480	0.2hrs to 0.0hrs	Disallowed by Agreement
482	0.8hrs to 0.0hrs	Reviewing law
483	3.2hrs to 0.0hrs	Reviewing law
484	1.8hrs to 0.0hrs	Reviewing law
491	0.2hrs to 0.0hrs	Disallowed by Agreement
493	0.2hrs to 0.0hrs	Disallowed by Agreement
505	0.2hrs to 0.0hrs	Disallowed by Agreement
508	1.0hrs to 0.0hrs	Disallowed by Agreement
510	0.2hrs to 0.0hrs	Disallowed by Agreement
512	0.2hrs to 0.0hrs	Disallowed by Agreement
513	0.2hrs to 0.0hrs	Disallowed by Agreement
516	Task	Disallowed by Agreement
517	0.3hrs to 0.0hrs	Disallowed by Agreement

TAXATION REDUCTIONS TO BILL OF COSTS UNDER ORDER OF 22 JUNE 2015		
ITEM	DECISION	CATEGORY OF TASK
11	0.1hrs to 0.0hrs	Reviewing RSC and joinder authorities
25	\$3115.90 + \$7725.19 = \$10,841.09 to <u>\$5,420.545</u> disbursement	Services rendered by C Daykin
53	3.6hrs to 3.0hrs	Reviewing appendices to report of C Daykin
55	2.3hrs to 1.5hrs	Reviewing appendices reports of Llewellyn and Daykin
67	0.4hrs to 0.2hrs	Review of CHW correspondence
68	1.6hrs to 1.0hrs	Reviewing expert report of Peter Gorham
69	0.6hrs to 0.2hrs	Reviewing correspondence, medical reports... in prep for meeting Clients
71	1.3hrs to 0.8hrs	Reviewing correspondence/Judgment/Order/ report of Peter Gorham
83	0.8hrs to 0.5hrs	Reviewing report from C Daykin (supplementary report)
85	0.5hrs to 0.3hrs	Reviewing further correspondence from C Daykin with final report
95	1.8hrs to 0.8hrs	Reviewing docs from PH/summons/affidavits...
99	0.6hrs to 0.0hrs	Reviewing pleadings ...
110	1.6hrs to 0.5hrs	Correspondence and reviewing expert evidence
114	1.3hrs to 0.5hrs	Reviewing authorities
130	0.3hrs to 0.0hrs	Reviewing docs
136	2.8hrs to 1.0hrs	Reviewing Defendant's bundle of docs (400+ pages)
137	4.6hrs to 1.0hrs	Reviewing Defendant's authorities
140	1.6hrs to 0.4hrs	Reviewing submissions from Canterbury
144	1.2hrs to 0.0hrs	Attending meeting ...
145	0.8hrs to 0.4hrs	Reviewing further authority from PH with docs
163	1.2hrs to 0.5hrs	Reviewing accounting and ledger for costs claim
167	1.3hrs to 0.5hrs	Reviewing BILL OF COSTS
174	2.4hrs to 1.0hrs	Reviewing draft Judgment of CJ ...

26. 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.
27. 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.
28. 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. Again, the reductions were in any event modest having considered the complexities of this case.
29. 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.
30. Items 166, 180 and 231 in the Bill of Costs relating to the 9 January 2015 Order are in my view costs which should have formed part of the Special Damages claim. They are not costs for inclusion in a Bill of Costs.
31. Item 25 of the Bill of Costs filed under the 22 June 2015 Order was reduced because I accept Mr. Rothwell’s submission that the Plaintiff should only be entitled to recover for half of Mr. Daykin’s fees which should have been charged in equal shares under a maximum total not exceeding \$10,841.09.

Conclusion

32. The Bill of Costs filed by CD&P is allowed by consent between the Parties and the Court fees related to this Bill of Costs will be \$25.00 on the basis that it was non-contentious.
33. The varying hourly rates up to \$700p/h charged by Mr. Pachai in the Bill of Costs relating to the 9 January 2015 Order and the 22 June 2015 Order are allowed.
34. 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.

35. 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.
36. My reasons for rejecting Mr. Rothwell's arguments in relation to these points are outlined in my taxation ruling for this case as Registrar for the Court of Appeal in *Tinee Harvey v Dennika Warren (Court of Appeal) Bda No. 13 of 2015*.
37. 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.
38. I will hear Counsel, if necessary, on the terms of the Certificate to be drawn up. Otherwise, an agreed amended Bill of Costs giving effect to this Ruling may be filed for my signature.
39. Unless either party applies within 14 days by letter filed in the Registry to be heard on costs of the taxation hearings or interest on the costs award:
- (i) Costs awarded to the Plaintiff/Entitled Party for the preparation of the taxation proceedings relating to both the 9 January 2015 and 22 June 2015 Orders of the Court. Costs are summarily assessed as follows:
 - a. Total of \$650.00 allowed for items 163 and 167 of the Bill of Costs for 22 June 2015 Order; and
 - b. Total of \$325.00 allowed for preparation of the taxation proceedings for the 9 January 2015 Order.
 - (ii) Costs for the Plaintiff/Entitled Party summarily assessed at \$650.00 for attendance at the taxation hearings.
 - (iii) Interests at the statutory rate on the award for costs of the taxation.
 - (iv) Costs award includes the Court fee of \$100 payable to Registry for a contentious taxation pursuant to Schedule to Order 62 R.32 Part I (Item 53).

Monday 20 February 2017

**SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT**