Mero Asia Pacific Pte Ltd v Takenaka Corp
[2002] SGHC 228

Case Number : BOC 261/2002, SIC 3475/2002, 3660/2002

Decision Date : 30 September 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Tan Liam Beng (Drew & Napier LLC) for the claimants; Kenneth Koh (UniLegal LLC) for the respondents

Parties : Mero Asia Pacific Pte Ltd — Takenaka Corp

Civil Procedure – Costs – Costs thrown away – Getting up – Court ordering such costs without specifically ordering getting up costs – Whether taxing master can consider work done for getting up

Civil Procedure – Costs – Costs thrown away – Review of taxation of costs – Lawyer's hourly rate – Adjourning of arbitration hearing for 13 days – Whether appropriate to apply benchmark figures across the board – Whether claimant lawyer's costs excessive

Civil Procedure – Costs – Witnesses' costs – Witnesses not attending hearing due to adjournment – Whether original allowance excessively generous

Judgment

GROUNDS OF DECISION

1. These were two cross-applications for a review of the assistant registrar's taxation of costs. The costs in question were costs thrown away to the claimants, represented by Mr. Tan, in an arbitration. The costs were awarded by the arbitrator when the hearing had to be adjourned because of a late amendment by the respondents, represented by Mr. Koh, and consequential discovery occasioned by that amendment. The arbitration concerned a sub-contract for a project at the Changi International Airport. The sub-contract sum was about $18,000,000. The claim was for $3,805,000. The respondent's counter-claim was for $3,080,000. The arbitration was scheduled for 17 days' hearing between 8 July 2002 and 29 July 2002. 13 days were taken off by the arbitrator on 6 July 2002. It resumed for a day on 24 July 2002 and was again adjourned to November 2002.

2. The claimants asked for costs under s 1 amounting to $85,176, being 90% of Mr. Tan's charge-out rate of $600, as well as the costs of his assistant, Mr. Lek, for the 13 days. Mr. Tan submitted that as a director of Drew & Napier LLC, his charge-out rate of $600 an hour was not unreasonable. He said that although he was assisted by two assistants, he was only claiming for the costs of one. He blamed the respondents for the late notice of adjournment, a blame Mr. Koh readily acknowledged, but he demurred that notwithstanding that the cause of adjournment lay with the respondents, the costs allowed was excessive. I shall revert to Mr. Koh's demurrer shortly. Mr. Tan further submitted that he had to shorten his leave in order to prepare the claimant's case for the arbitration. Counsel made cross-allegations as to whether the adjournment was clearly anticipated in good time. Mr. Koh submitted that the claimants had at least two weeks of notice that the arbitration might not go on. Mr. Tan, on the other hand, alleged that the respondents delayed in confirming their inability to carry on as scheduled until the "eleventh hour". He also claimed a sum of $30,784 for two of his witnesses at the rate of $148 an hour. The assistant registrar allowed a total of $15,392 for the two witnesses. This was item 4 of s 3.

3. Mr. Koh submitted that Mr. Tan's charge-out rate should be weighed on the basis that he was

an advocate of eight years' standing, and that in *Engelin Teh & Partners v Shoba Gunasekaran*, Bill of Costs 1/2002, the assistant of a senior counsel was rated at $383 an hour. He submitted that Mr. Tan was of the same vintage as that assistant. I think that this may not be a fair measurement because in this case, Mr. Tan was the lead counsel, and his charge-out rate ought to be reviewed independently of another lawyer of the same vintage if the work, experience, status, or circumstances of the respective cases differ.

4. Mr. Koh further submitted that on the authority of *Choo Ah Kiat v Ang Kim Hock* [1983] 2 MLJ xciv, costs thrown away should not include getting up costs unless specifically ordered as was done in *Choo's* case. The Deputy Registrar in that case made this ruling in reliance on an order of Choor Singh J for 'costs thrown away, including getting-up fees' in the case of *New Zealand Insurance Co. Ltd v Ng Whye Keng* [1978] 2 MLJ xxiv. I do not think that the *New Zealand Insurance* case can stand for the proposition made in *Choo's* case. Where the court specifically ordered costs thrown away to include getting-up fees then it is axiomatic that getting-up must be allowed. It does not follow, however, that where the court does not order getting up costs, the taxing master ought not consider time spent on getting up. If the court merely orders costs thrown away, the taxing master is entitled to consider what, if any, getting up had been done and wasted. *Choo Ah Kiat* should not be regarded as a good precedent for this point. In the present case, however, the costs were for an adjournment of the hearing from 8 July to 24 July. The getting-up would not have been entirely wasted for this relatively short break; and if it were so, it must clearly be shown to be so. In the present case, what Mr. Tan would have lost was the time spent in refresher when the hearing resumed, within 14 days, on 24 July. In these circumstances, $32,000 seems to be excessive. I would allow Mr. Koh's application and reduce the costs to $15,000. This ought to cover some of the getting-up, although it may not be much, and the necessary refresher.

5. I now come to the review of item 4, of s 3. A witness is obliged to attend court or arbitration proceedings would clearly be entitled to reimbursement for reasonable expenses incurred in getting to t h e hearing. Witnesses from overseas would thus be paid reasonable costs of travel and accommodation. The two witnesses in question in this case were directors of the claimants, called to testify as to facts. Mr. Tan submitted that they have a reasonable charge-out rate of $148 an hour and by reason of the authorities cited by him, were justified in being awarded costs allowed at $15,392 for the time they had set aside to attend court. The authorities relied by Mr. Tan were *Halsbury's Laws of England* vol 11(2), 1543:

> "A witness other than a professional or expert witness, may be allowed … a loss of allowance not exceeding the relevant amount in respect of ... any loss of earnings."

6. Next, he relied on the text of *Cook on Costs*, 1995 page 162 as well as *Petrunic v Barnes* [1989] VR 927 in which a medical practitioner who attended court throughout the trial in which he was sued as a defendant, was allowed costs of attendance. The court there dispelled the misconception that a witness is only entitled to claim expenses for time spent in giving evidence. It was there acknowledged that a witness may have to be present even when witnesses for the opposite side are giving evidence because his advice and knowledge of facts may be relevant in instructing counsel. I agree entirely with that principle, but I am of the view that different considerations must apply in the case of 'costs thrown away'. It is true that the witnesses would have scheduled their time to accommodate the 14 days of attendance in the arbitration proceedings, and if they had indeed attended during the 14 days there would be little quarrel over the entitlement for attendance, save for the issue as to the reasonableness of the hourly or daily rate. But where, as in this case, the proceedings were adjourned, the witnesses were therefore, not in fact in attendance. Paying them as if they were, would be an act of excessive generosity. It is true that

they might have turned away opportunities by reason of the original schedule, but 14 days is plenty of time for new schedules to be made. Therefore, in the absence of more reliable evidence, and taking the rate of $148 an hour into consideration, I think that the costs thrown away for a witness such as those in the present situation and circumstance, would be $1,000 a day for two days. The allowance awarded by the assistant registrar is roughly $1,000 a day for about seven days. There was no evidence as to what would justify Mr. Tan's assertion before me that the witnesses would have done nothing for those seven days. The costs allowed is accordingly revised to the sum of $2,000 to each of them. I should conclude with the observation that in view of the discretionary nature of such awards, the assistant registrar taxing costs would be entitled to vary the rate and the number of days, it may be one day or three days, but not all 14 days. I would also stress that it is not a matter of calculating the percentage, but the actual number of days. Hence, a witness for a two day trial that had been adjourned may be entitled to his costs for two days even if that meant that he would effectively recover costs as if he had attended the trial in its entirety, that is, 100%.

Sgd:

Choo Han Teck

Judicial Commissioner