Basil Anthony Herman *v* Premier Security Co-Operative Ltd and others [2012] SGHC 48

Case Number : Bill of Cost No 89 of 2011(Summons No 3771 of 2011)

Decision Date : 06 March 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Singa Retnam, Kertar Singh and Anil Singh (Kertar & Co) for the Applicant/Defendant; Adrian Wong Soon Peng and Teo Siu Qiu (Rajah & Tann LLP) for the Respondents/Plaintiffs.

Parties : Basil Anthony Herman — Premier Security Co-Operative Ltd and others

Civil Procedure – Costs – Principles – Proportionality

Civil Procedure – Costs – Principles – Reasonableness

Civil Procedure – Costs – Taxation – Factors to be taken into consideration in taxation of party and party costs

Civil Procedure – Costs – Taxation – Principles governing taxation of party and party costs

Civil Procedure – Costs – Taxation – Review of taxation

6 March 2012 Judgment reserved.

Choo Han Teck J:

1 The applicant was sued for defamation. The High Court ruled that the remarks made by him which formed the subject of the suit were defamatory but granted the applicant leave to defend. The trial lasting nine days thus concerned only the defence. The trial judge gave judgment to the respondents and awarded damages totalling $150,000. The applicant appealed. The Court of Appeal allowed the appeal and ordered a retrial in the District Court on the ground that the trial judge ought to have allowed the evidence of certain witnesses that the applicant had subpoenaed. Despite succeeding on appeal for which he was granted full costs, the applicant was only awarded half costs for the trial below – supplemented by the remark that "weight had to be given to the fact that Mr Retnam did not assist the court as comprehensively and as promptly as one might expect from counsel of his standing and experience." Mr Retnam was counsel for the applicant at trial and also in this application before me for a review of the taxed costs awarded by the Assistant Registrar Leong Kwang Ian ("the assistant registrar") for the trial. The costs for section 1 were taxed and $91,500 was awarded, representing half of $183,000 which would otherwise have been awarded. The assistant registrar also allowed section 2 costs at $800, being costs for drawing up the bill of costs. He disallowed the sum of $13,790 being disbursements paid to a "Costs Draftsman" who drew up the bill of costs. The applicant's bill of costs claimed $357,500 under section 1 (being half of the full costs of $715,000), $4,500 under section 2, and, amongst other items, the disallowed sum of $13,790 under section 3. Mr Retnam's fees constituted the major portion of the applicant's bill and amounted to $650,000, calculated on the basis of 1200 hours of work done at the rate of $562.50 per hour. His assisting counsel's fees were $40,000 calculated on the basis of 100 hours of work done at the rate of $400 an hour.

2 Mr Retnam contended that the respondents' counsel contradicted his previous position at the summary judgment proceedings where the question arose as to whether the applicant's remarks were defamatory. Counsel for the respondents there submitted that the case was not complex. However, when the judge ruled in favour of the respondents at trial, counsel for the respondent then claimed that the case was a complicated one and asked for costs to be fixed at the High Court scale. Mr Retnam argued before me that this was not a "normal" defamation case. Here, three plaintiffs sued a single defendant. The counterclaim, it was alleged, "required a separate set of pleadings". Turning to the award, Mr Retnam submitted that the assistant registrar misapplied "the proportionality principle" cited in *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 ("*Lin Jian Wei*"). Before me, Mr Retnam said that he would not submit his claim on the basis of time costs "because the Court of Appeal [in *Lin Jian Wei*] held that time sheets were immaterial". Mr Retnam submitted that his bill was not disproportionate when compared to the taxed costs of $650,000 awarded at first instance in *Lin Jian Wei*. He argued that this was a much longer case and had more issues than that in *Lin Jian Wei*. I think that Mr Retnam is incorrect on both counts. The Court of Appeal cautioned against an uncritical acceptance of time costs and did not hold that time costs are immaterial. It is futile to compare the costs allowed in this case with that in *Lin Jian Wei* as Mr Retnam sought to do – that is not what proportionality means.

3 The court's power in the assessment of costs is an important way in which the cost of litigation can be controlled. People want to have access to justice, but they have their own views of what justice means. Their views may clash. So they need lawyers to present their cases, and their lawyers need to be paid. It is important to bear in mind that the assessment of party and party costs are distinct from the assessment of solicitor and client costs without losing sight of the important connection that party and party costs contribute towards the overall costs of litigation of the successful party. Costs allowed by the court go towards paying the lawyers. Party and Party costs contribute to a party's legal costs whereas solicitor and client costs are the professional fees a client pays to his own lawyer. Those fees are contractual and are largely governed by market forces, subject only to the court's review if necessary. The value of a lawyer's work is not easy to assess because facts and circumstances vary from one case to another. One might ask, for example, whether a successful and wealthy litigant should be allowed lower costs against a poorer party who lost? A person who succeeds in a $250,000 claim might have to pay his lawyers $500,000 in fees. If he recovers costs of $150,000, he will be $100,000 poorer. He is owed $250,000 before he sued to enforce his rights and claim justice. When the litigation is over and he is proclaimed the victor, he then finds that he owes $100,000. Successful litigation has turned creditor into debtor. Should costs be higher or lower where a senior counsel appeared, even though success in that case could have easily been achieved by a competent but junior counsel? How costs are to be assessed is a study in the meaning of justice. Is the question of whether a sum is fair the same question as whether the receiving party deserved the sum? An impecunious employee who takes his employer to court for wrongful termination - because neither knows for sure whether the law is on his side - and loses, has to pay costs to the wealthy employer. Since costs awarded to a successful litigant do not absolutely compensate every cent he had incurred, is there justice for he who is vindicated but left poorer? The unsuccessful party may rightly protest that it would be unfair if he were to pay for the imperfections of the law. The list is long because justice is dressed sometimes as desert and sometimes as fairness. Desert and fairness are often incompatible in the same pot – much like freedom to the wolves is death to the lambs. It is in the context described above that the "proportionality principle" operates.

4 The "proportionality principle" endorsed by the Court of Appeal in *Lin Jian Wei* (now in O 59 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) was examined in *Review of Civil Litigation Costs: Final Report* (The Stationery Office, 2010), where Lord Justice Jackson studied the problems of the prevailing principles upon which recoverable costs were assessed in England. The historical accounts in Lord Justice Jackson's report as well as *Lin Jian Wei* regarding the assessment of costs show that

the courts in England and here have struggled to establish the ideal formula with regard to the proper assessment of costs. Some may say that "proportionality" is just new wine in an old bottle. History teaches the valuable lesson that names and descriptions in themselves are mere semantic articles. They thus attract constant judicial exegesis. And over time, as succeeding generations of jurists believe they have found a better description of the previous formula, judicial pronouncements accumulate in a murky mass. Mindful that this judgment may add to that mass, I shall be brief, and I hope, clear in setting out my grounds in respect of Mr Retnam's application.

5 I start with the undisputed matters. First, costs are the award of money to be paid to a litigant who is usually, but not necessarily, the successful party. It is not an award of payment for the fees of the litigant's lawyer although it is usually so applied. Second, costs are awarded so that the receiving party is compensated as much as it is reasonable to do so – it is not a punitive measure even though its consequences may be harsh on an impecunious party. The law as it stands requires the court to consider each item constituting the costs expended and determine whether the amount claimed was reasonable. The court is also required in the light of paragraph 1 of Appendix 1 to O 59 of the Rules of Court to have regard to the principle of proportionality and all the relevant circumstances and, in particular, to the following matters:

(a) the complexity of the item or the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the urgency and importance of the cause or matter to the client; and

(f) where money or property is involved, its amount or value.

(a) The list above is a useful but obvious reminder of matters that are relevant to the trial or proceedings which the court assessing costs should consider. There is little left that is not covered in the list above, but unusual cases may warrant the court's consideration of their unusual features. At this point, we are only concerned with the general. The important purpose of the exercise of assessing costs is to ensure that the receiving party is given a fair amount of money towards compensating the costs he expended in pursuit of his cause. It is not to compensate him for every cent he expended even if they were reasonably expended. It is in the public interest to keep costs within reasonable limits.

6 Costs payable are calculated to include work from the incipient stage of instructions by client to counsel, to the preparation for trial, and the trial itself. The receiving party must satisfy the court

that the items enumerated in the bill of costs are reasonably incurred. Examples of such items include meetings with witnesses and drafting the writ and statement of claim. When irrelevant items have been noted and occluded from consideration by the court, the court will then consider the amount claimed, and in this exercise, take into account the matters from (a) to (f) listed above. This process of evaluation is very much a matter of discretion. There is no scientific or logical method of stating that the complexity of any given case, for example, can be accurately fixed at a certain amount of dollars. The requirement that the court shall have regard to "the principle of proportionality" together with "all the relevant circumstances" may not add very much more to the assessment if the matters from (a) to (f) had been reasonably considered. The idea behind "proportionality" in the taxation of costs is to avoid awards which have a vast difference between the amount claimed or awarded and the costs billed.

7 Who deserves more costs – the party who claimed much and was awarded much (in damages, for example) in the action, or the party who claimed much and was given little? The answer seems obvious, but when all factors are taken into account, it is not unreasonable to find that in some cases, higher costs might appropriately be allowed even though the damages awarded were low. So long as the registrar taxing the bill of costs has taken all these factors as well as any other unusual or special circumstances into account, his decision will not be easily disturbed. The discretion of a court cannot be displaced by any specific finding in the way one might say a principle of law was misapplied or a fact was found against the weight of the evidence. It can only be displaced by another discretionary decision. It is thus natural to expect diversity and variety in discretionary orders. In reviewing a discretionary order, the reviewing court must be satisfied that the discretion was wrongly exercised. The lower court's discretion should not be held to be wrong just because the reviewing court would have exercised its discretion differently. Although discretionary orders can be diverse and unpredictable, the courts do try to maintain consistency and order in the assessment of costs to avoid idiosyncratic decisions. Thus, by a combination of policy and practice, the range of costs between $10,000 and $20,000 for each day of trial is a useful guide. In general cases, an award within this range is unlikely to be disturbed. Claims or awards outside this range may be regarded as exceptional. A predictable range of costs is necessary to reduce the instances of bills of costs having to be taxed and reviewed.

8 Reverting to the case at hand, how has Mr Retnam shown that the assistant registrar exercised his discretion wrongly? Mr Retnam said that just because the Court of Appeal ordered a retrial in the District Court, the assistant registrar assumed that the applicant's section 1 costs claimed at $357,000 (being 50% of the original amount of $715,000 claimed) were not proportional to the maximum District Court jurisdiction of $250,000; that is to say, the costs exceeded the claim amount (assuming the maximum was ordered). He argued that this misled him from considering the amount and value of work that had been done. It appears that the reason the retrial was ordered to take place in the District Court was that the respondents had re-estimated the damages to be no more than $190,000. Against this, the trial judge had awarded $150,000 as aggravated damages. Hence, by any count, the amount to be awarded should the respondents succeed in the retrial can reasonably be estimated to be between these two sums. In that case, the registrar's assumption cannot be faulted. What remains to be examined is the amount and value of work done. If Mr Retnam as lead counsel spent 1200 hours on the case as stated in his bill of costs, then he would have worked on this case for six months, assuming that he worked 10 hours a day on a five-day week. The assisting counsel claimed $40,000 which according to Mr Retnam was only for the nine days in court, "perusing documents and just attending court". If that were so, I am of the view that the assisting counsel's fees would be excessive. In any event, the costs for the assisting counsel cannot be given without a certificate for two counsels. As to Mr Retnam's fees, after examining the records and the judgments of the trial judge as well as that of the Court of Appeal, I am of the view that 1200 hours would have been an inordinately long time to spend on this case. Either the time keeping was faulty

or counsel was inefficient, and in either case, I would not give the time record much weight. I am mindful that Mr Retnam abandoned his claim based on time costs on review before me. Without time costs, his claim for $357,000 as half costs is even more difficult to justify. Looking at the records and the judgments of the High Court and the Court of Appeal, I am of the view that there is nothing to indicate that the assistant registrar did not take the matters in (a) to (f) above into consideration, or that he exercised his discretion wrongly in any way.

9 The assistant registrar also allowed costs for work done for taxation at $800. This is also a discretionary decision based on his estimate as to how much should be allowed for the drawing up of the bill of costs. I shall deal with this together with the claim for $13,790 being expenses paid to an external agent for drawing up the bill. Mr Retnam referred to this external agent as "the draughtsman". He would be more accurately described as a freelance billing clerk. Mr Retnam explained that this clerk draws up bills of costs for a number of law firms. I do not know how lawyers who engage the services of such clerks protect their clients' privacy, but the issue I have to deal with presently is this: should the clerk's fee of $13,790 be charged as expenses? The drawing up of a bill of costs is the responsibility of the solicitor concerned. He can leave the task to a clerk in his firm, but in such a case he cannot charge the salary of the clerk or part thereof as expenses for drawing up the bill. Hence, even if it were proper to have engaged the freelance clerk, and he rightly charged the solicitor $13,790, I do not think that that fee should count as expenses. It should be borne by the law firm concerned. The Rules of Court already allows the solicitor to claim some costs for drawing up the bill of costs and in this case, that amount was adjudged by the assistant registrar to be $800. I think that it is not unreasonable and I see no reason to disturb that order.

10 For the reasons above, this application is dismissed. I will hear the question of costs on another date if parties are unable to agree costs.