IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 58 and 59 OF 2019 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF GENERAL SHOPPING E OUTLETS DO BRASIL S.A.

AND IN THE MATTER OF GENERAL SHOPPING INVESTMENTS LIMITED

Appearances:

Appleby for the Petitioners

Walkers for the Respondents

Before:	**The Hon. Justice Kawaley**
Heard:	**On the Papers**
Close of submissions:	**3 March 2020**
Draft Ruling Circulated:	**20 August 2020**
Ruling Delivered:	**25 August 2020**

INDEX

Review of taxation by Taxing Officer - standard of review-indemnity costs taxation-recoverability of foreign lawyers' fees-Grand Court Rules Order 62 rules 13, 18 and 30-Practice Direction No. 1/2001

JUDGMENT

Background: the factual matrix

1. Petitions were presented against each of the Respondents (a Brazilian company and its Cayman Islands subsidiary) on April 8, 2019 seeking to wind them up on just and equitable grounds. Future insolvency flowing from a proposed "Asset Reallocation" and "Interim Dividend Payment" (together the "Transaction") was relied upon. It was also alleged that the Transaction entailed a breach of the "2012 Indenture", a New York law governed instrument.

2. The main factual evidence relied upon by the Respondents was the factual evidence of Francisco Ritondaro, sworn in Sâo Paulo, Brazil (33 pages), with exhibits running to more than 475 pages. Former Judge Robert S. Smith of Kaplan Seiler & Adelman LLP, instructed by the Respondents' New York attorneys Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), provided an expert Affidavit on New York law, which ran to 22 pages. The Respondents obtained advice on Brazilian law from Cescon, Barrieu, Flesch & Barreto Sociadades de Advogados ("Cescon") in relation to the Brazilian law implications of the impugned Transaction. The Respondents were served with Portuguese documents and needed to obtain translations.

3. The Respondents' case was, *inter alia*, that the Petitions were liable to be struck-out on abuse of process grounds on the grounds that they entailed re-litigating issues already determined in prior Brazilian proceedings or were unsustainable in any event. The Petitions were listed for hearing on May 24, 2019. On May 10, 2019, the Petitioners' attorneys Appleby indicated that their clients intended to apply for leave to withdraw the Petitions. The terms of the Consent Orders, including provision for the Respondents' costs to be taxed if not agreed on the indemnity basis, were ultimately agreed on the eve of the scheduled hearing.

4. On May 23, 2019, by Consent Orders in each case, the Petitions presented by the Petitioners were dismissed on terms that the Respondents' costs would be paid by the Petitioners and that these costs would be taxed if not agreed on the indemnity basis. Costs were not agreed.

The Taxation and the present Review

5. The Respondents filed their Bill of Costs on August 1, 2019. The Bill was disputed. The Taxing Officer issued a Re-Amended Costs Certificate dated January 6, 2020. The Respondents filed their Application for Review by a Judge and their Objections to the Taxing Officer's Taxation of the Bill of Costs on February 18, 2020. The Petitioners' Response was filed on March 3, 2020. Shortly thereafter, the Shelter-in-Place COVID-19 Regulations resulted in my conducting remote hearings only for more than three months without recourse to hard copy files. The present application, unfortunately, was overlooked during this period of time.

6. The broad complaint raised by the Respondents is that their claim was only allowed to the extent of 40.32% of the total amount claimed, which is said to be inconsistent with the notion of taxation on the full indemnity basis. US$307,439.13 was awarded, while the Bill claimed US$729,296.59. The Petitioners contend that the award made should be reduced to US$208,355.00 and that they should be awarded the costs of the Review. I summarily refuse that cross-application.

7. Looking at the Respondents' complaint with greater specificity, it is asserted that Walkers' fees were allowed at the level 65.25% as regards legal fees but big-ticket items which were not allowed included the following:

   (a) **Cescon**: 9.45% of legal fees allowed;

   (b) **Skadden**: 7.31% of legal fees allowed;

   (c) **Walkers' disbursements**: 4.62% allowed.

8. Clearly, 'savage' cuts were made by the Taxing Officer, which can only be attributable to certain points of broad principle. The present Review will primarily turn on an assessment of these issues of mixed law and fact. The Respondents' counsel provided a helpful table which sets out a broad overview of the taxation which occurred:

Professional Fees and Disbursements	Amount Claimed (US$)	Amount Allowed (US$)	Amount Taxed Off (US$)
Walkers			
Legal Fees	$152,552.50	$108,404.50	$44,148.00
Disbursements	$4,544.86	$311.40	$4,233.46
Tom Smith QC			
Legal Fees	$13,511.88	$0.00	$13,511.88
Disbursements	$2,193.54	$0.00	$2,193.54
Cescon			
Legal Fees	$42,509.17	$4,016.67	$38,492.50
Disbursements	$7,381.35	$7,381.35	$0.00
Skadden			
Legal Fees	$378,872.50	$27,706.00	$351,166.50
Disbursements	$149,518.79	$141,226.14	$8,292.65

Findings: governing legal principles

The relevant Rules

9. GCR Order 62 provides as follows:

> "*30. (1) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision.*
>
> *(2) In the event that the taxation was conducted by a Judge in his capacity as an ex officio taxing officer, the review shall be conducted by a different Judge.*
>
> *(3) An application under this rule for review of the taxing officer's decision must be made within 14 days after the decision to be reviewed or within such other period as may be fixed by the taxing officer.*
>
> *(4) Every applicant for review under this rule must at the time of making his application –*

(a) deliver to the Judge his objections in writing specifying what is objected to and stating concisely the nature and grounds of the objection in each case;

(b) deliver a copy of the objections to all parties affected by the application;

(c) if the applicant is the paying party, pay the amount as taxed into Court; and

(d) serve notice of payment into Court on every party referred to in subparagraph (b) above.

(5) Any party to whom a copy of the objections is delivered under this rule may, within 14 days after delivery of the copy to him or such other period as may be fixed by the Judge, deliver to the Judge answers in writing to the objections stating concisely the grounds on which he will oppose the objections and must at the same time deliver a copy of the answers to the party applying for review and to any other party who was entitled to receive notice under paragraph (4).

(6) A review under this rule shall be inquisitional in nature and the Judge may receive further evidence and may exercise all the powers which he might have exercised on an original taxation, including the power to award costs of the proceedings before him.

(7) In the event that the Judge considers that he cannot properly review the taxing officer's decision without hearing oral submissions, he shall fix a hearing date and any party to whom a copy of the objections was delivered under paragraph (4) shall be entitled to be heard in respect of all or any of the objections notwithstanding that he did not deliver written answers to the objections under paragraph (5)."

10. The governing rules confer a broad discretion on the Judge hearing a review application under GCR Order to either:

(a) decide the matter on the basis of written submissions;

(b) request the parties to supplement their written submissions with supplementary evidence; and/or

(c) fix a hearing for oral submissions.

11. On the face of the rule, it is possible for the Judge to effectively rehear the entire taxation process. It is also possible for the Judge to deal with the Review on a summary basis based on the parties' written submissions. GCR Order 62, rule 3 not only characterizes the Review process as "*inquisitorial*" (paragraph (6)), but it empowers the Judge, rather than the parties, to decide whether or not an oral hearing is required to enable the application to be fairly adjudicated.

The standard of review

12. The Respondents emphasized the breadth of the Review jurisdiction. The Petitioners accepted that "*the Review is a de novo procedure and the Judge is not fettered by the Taxing Officer's decision (although, of course, the Judge may take the view of the Taxing Officer into account).*" This was common ground. Neither side directly addressed on what basis the Court decided whether to ignore or respect the findings of the Taxing Officer.

13. In my judgment it is clear from the terms of GCR Order 62, rule 30 that the extent to which the Taxing Officer's decision is reconsidered and the amount of deference (if any) which is given to the Taxing Officer's decision is a matter of judgment for the Judge depending on the specific items or issues in dispute.

14. Yes, this is a *de novo* hearing, but if the Taxing Officer's findings are ignored altogether without good cause, litigants will always be encouraged to pursue what ought clearly to be a limited remedy of Review. If this Court is obliged to reconsider the minutiae of a taxation whenever invited to conduct a Review, the task of the Taxing Officer would become a thankless and meaningless one and Grand Court Judges would be duplicating the function of Taxing Officers.

Taxing costs on the indemnity basis

15. The basic rule is easy to ascertain and state. GCR Order 62, rule 13(3) provides as follows:

> "*(3) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the*

costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term 'the indemnity basis' in relation to the taxation of costs shall be construed accordingly."

16. The Respondents cited *Al Sadik-v-Investcorp Bank* [2012(2) CILR 33], where Jones J stated as follows:

> "*7 In principle, an order for costs to be taxed on the "standard basis" in accordance with these rules and guidelines will compensate the successful party in respect of the reasonable legal fees and expenses incurred in conducting his action in an 'economical, expeditious and proper manner.' The effect of an order for taxation on the 'indemnity basis' is that the paying party is deprived of the protections which apply in the ordinary case. The onus of proof is reversed. The proportionality rule does not apply. The legal fees scales do not apply with the result that the successful party may recover whatever hourly rates have been agreed with his attorneys unless the paying party can persuade the taxing officer that the contracted rates are unreasonably high (relative to those paid by the paying party). Most importantly in the context of proceedings pending in the Financial Services Division, the paying party will not have the protection of O.62, r.18, thereby exposing him to the risk of having to reimburse all the legal fees payable by the successful party to any foreign lawyers engaged by him, in addition to his local attorneys: see Sagicor Gen. Ins. (Cayman) Ltd. v. Crawford Adjusters (Cayman) Ltd. (4) and In re Wyser-Pratte EuroValue Fund Ltd.*"

17. GCR Order 62, rule 13(2) provides:

> " *(2)Where the amount of costs is to be taxed on the standard basis, the taxing officer will only allow costs which are not only reasonable but are also proportionate to the matters in issue having regard to –*
>
> *(a) the amount of money involved;*
>
> *(b) the importance of the case; and*
>
> *(c) the complexity of the issues.*"

18. To the extent that GCR Order 62 applies a proportionality rule to taxations on a standard basis, Order 62 clearly does dis-apply any such rule in the case of indemnity basis taxations. As far as indemnity costs are concerned all costs are recoverable, "*except insofar as they are of an unreasonable amount or have been unreasonably incurred*" (GCR Order 62, rule 13(3)). The proportionality rule is indeed not

applicable, but costs may be disallowed if they are shown to be unreasonable in amount or to have been incurred in an unreasonable manner.

The approach to foreign lawyers' fees and disbursements

19. It is common ground that the basic distinction between indemnity costs and standard costs is that in the latter case, foreign lawyers' fees are only recoverable if the foreign lawyer is admitted to the local Bar (GCR Order 62, rule 18(1), (2)). However, the Respondents submit that all such costs should be allowed, while the Petitioners submit that the following paragraphs in that rule still apply to an indemnity basis taxation:

> "*(3) Whenever a claim is made for work done by foreign lawyers, the taxing officer will investigate whether it has resulted in a duplication or increase in the cost of the proceedings and any such increase shall be disallowed.*
>
> *(4) Work done by local attorneys for the purpose of instructing foreign lawyers and vice versa shall be disallowed.*
>
> *(5) The taxing officer shall disallow any item which appears to have been incurred, or the costs of which appears to have been increased, because the successful party has engaged both local attorneys and foreign attorneys.*
>
> *(6) Time spent and disbursements incurred in respect of written and oral communication between foreign lawyers and local attorneys will be disallowed*
>
> *(7) The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys."*

20. The Petitioners' submission is clearly right. In *Sagicor General Insurance (Cayman) Limited and another-v- Crawford Adjusters (Cayman) Limited and others* [2008 CILR 482], which the Respondents relied upon for other purposes, Henderson J stated:

> "*5 By the opening words of r.18 (1), it is made applicable only to a taxation of costs on the standard basis. This language is not accidental. Clearly, the intent was to exclude such considerations from any award of indemnity costs. Accordingly, that rule will have no application to any taxation of my costs award on the indemnity basis. Although some of the considerations mentioned*

in the rule (such as duplication of work) are still germane, O.62, r.18 (1) (b) is not applicable to the present case." [emphasis added]

21. However, Henderson J also found that the Court could expressly award travelling and hotel expenses in relation to foreign lawyers even though such costs were not ordinarily recoverable, even on an indemnity basis taxation:

> "*6 Finally, I refer to the practice direction entitled Guidelines Relating to the Taxation of Costs. It will be noted, at the outset, that the practice direction represents itself as 'guidelines.' It seems reasonable to expect that there will be exceptional circumstances which justify a case being dealt with in a manner which differs from the guidelines set out in the practice direction. Section 9.4 of those guidelines says 'Travelling and hotel expenses paid to foreign lawyers shall not be recoverable on taxation.' Section 1.5 makes it clear that the guidelines are intended to apply to taxations both on the standard basis and on the indemnity basis.*
>
> *7 Despite the mandatory nature of some of the wording in the guidelines, they do not, and cannot, alter the very broad jurisdiction I have, both in equity and at common law, to structure awards of costs: see the judgment of Taylor, J.A. in Bonotto v. Boccaletti (1). My award of indemnity costs to these defendants is intended to avoid the obvious injustice in their being out of pocket after being forced to defend ill-considered and unmeritorious allegations of fraud and conspiracy. It would be unjust to allow the guidelines to frustrate that intent...*"

22. I am guided by Henderson J's finding that the Practice Direction's Guidelines cannot oust the Court's jurisdiction to award such costs as it considers appropriate, having regard in particular to the scheme of the relevant rules within GCR Order 62. However, the context of those remarks was as follows. There was a contested hearing on costs, and as part of the decision as to what standard of taxation should apply, and on the application of the receiving party, Henderson J made a pre-taxation finding that foreign lawyers' fees should be recoverable by way of exception to the usual rule.

23. This case provides no support for the Respondents' submission to the effect that foreign lawyers' costs are subject to no restrictions under the indemnity costs taxation regime. As the Petitioners rightly submitted, there is simply no rule to this effect. Practice Direction No.1/2001 (the "Practice Direction") provides as follows:

> "*1.1 These Guidelines are made pursuant to GCR Order 62, rule 17 and are intended to be a comprehensive code relating to the procedure in respect of taxation; the form and content of bills of costs; and the nature and amount of fees, charges, disbursements, expenses, or remuneration which may be allowed on taxation…*

1.5 These Guidelines apply both to taxations on the standard basis and taxations on the indemnity basis. The only distinction between a taxation on this basis is (a) the difference in the burden of proof and (b) the application of maximum hourly rates for attorneys fees in the case of taxations on the standard basis…

4.1 A taxation shall be inquisitorial in nature.

4.2 The taxing officer shall control the procedure applicable to each taxation which will not necessarily involve any oral hearing.

4.3 The taxing officer will investigate each item in the bill of costs unless it is agreed and determine what amount, if any, shall be allowed in respect of it…

6.3 Notwithstanding paragraphs 6.1 and 6.2 above, the following sums may be claimed as disbursements:

(a) photocopying charges - up to 50¢ per page;

(b) printing charges - up to 50¢ per page;

(c) telephone and fax charges - the amount of the call charge plus a mark up not exceeding 20%;

(d) transcripts produced by court reporters - up to CI$3.50 per page.

6.4 Legal fees paid to foreign lawyers cannot be claimed as disbursements unless the foreign lawyer is engaged to give an opinion on a point of foreign law which is in issue in the proceedings.

6.5 Admission fees and work permit fees paid in respect of foreign lawyers are not recoverable on taxation on the basis that such expenses are part of the overheads reflected in the foreign lawyer's hourly rates…

7.4 In the case of taxations on the indemnity basis, the hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable.

9.4 Travelling and hotel expenses paid to foreign lawyers shall not be recoverable on taxation."

24. Read in light of the restrictive terms of the Practice Direction, *Sagicor General Insurance (Cayman) Limited and another-v- Crawford Adjusters (Cayman) Limited and others* [2008 CILR 482] supports the following principle. If the receiving party wishes to displace the usual rule of practice that foreign lawyers' fees (and hotel and

travelling expenses) are only recoverable where the lawyer is giving an opinion as to foreign law, not to mention the restrictive policies in GRC Order 62, rule 18 (3)-(7) aimed at avoiding duplication of effort, an application for a dispensation from the usual approach should ordinarily be sought before the costs order is actually made. At very latest, a special approach case should be made before the Taxing Officer, not (for the first time) at the Review stage.

25. Where no such dispensation is sought, I accept that this Court has a residual jurisdiction on the hearing of a Review to give the sort of direction which Henderson J gave in *Sagicor*. But it can only be a jurisdiction which is sparingly exercised as it is by its very nature an exceptional jurisdiction rather than a general one.

Findings: award in respect of Walkers' fees and disbursements

26. The Respondents claimed in respect of Walkers costs US$166,062.38 in fees and US$6,738.40 in disbursements (total US$172,800.78) including the fees and disbursements of Tom Smith QC.

27. In the Respondents' Objections, complaint is made about the following items being disallowed by the Taxing Officer:

(a) deductions were made to lawyers' hourly rates with no objective basis for finding that the rates were unreasonable (and in some instances, applying different rates for the same lawyer). The reasonableness comparator was the Petitioners' lawyers' hourly rates, and those rates were never supplied to the Court;

(b) only 4.2% of Walkers' disbursements were allowed. Of the US$6,738.40 claimed, the Taxing Officer was said to have only allowed US$311.40, despite the fact that the Petitioners agreed to pay US$672.48.(US$652.44 of what the Petitioners agreed to pay were work permit fees for the Respondents' QC).

28. Having regards to the governing indemnity basis taxation principles, no qualifying ground for rejecting the hourly rates relied upon by the Respondents in respect of Walkers' time charges has been established. I reject the Petitioners' contention that the Taxing Officer was permitted to independently determine that the hourly rates were too high, as the Petitioners' taxation submissions encouraged him to believe. The Practice Direction states that "*the hourly rate or scale of rates will be that agreed*

between the attorney and his client provided that such rate or scale is not unreasonable" (paragraph 7.4). As the Respondents have correctly submitted for the purposes of this Review, the most obvious comparator (without engaging in a disproportionately extensive market analysis) is the rates charged by the Petitioners' attorneys.

29. It was not submitted to the Taxing Officer, and has not been submitted to me, that the Walkers rates are unreasonably high by reference to any potentially relevant local comparator at all. Instead, reference was made to the fact that it was incongruous for the two Walkers' partners to charge (marginally) higher hourly rates than Tom Smith QC (called to the Bar in 1999). The rates charged by the Appleby partners to the Petitioners would have been a more relevant comparison to make. The Respondents' claims for Walkers' fees which were discounted on the basis of hourly rates are accordingly allowed without deduction.

30. No complaint was sensibly made about some other deductions, such as those made for time billed in connection with instructing foreign counsel. I see no basis for adopting a different approach to the Taxing Officer in this regard. Such time is clearly properly billable to the client. However, GCR Order 62 rule 18 expressly provides:

> "*(4) Work done by local attorneys for the purpose of instructing foreign lawyers and vice versa shall be disallowed.*"

31. However, in paragraph 81 of the Respondents' Objections, complaint is made about Walkers' fee item 133 being disallowed when no objection was made to this item. I find that it was properly disallowed by the Taxing Officer having regard to Order 62 rule 18(4).

32. In paragraphs 83-85, complaint was made that the time (0.2) billed by the second of two lawyers for an inter-office meeting time was wrongly disallowed (Walkers, items 11-12) for duplication. Despite the small size of the item, I find the Taxing Officer adopted the wrong approach and allow the claim for both lawyers.

33. The reason given by the Taxing Officer rejecting the second item was "*Internal Discussion. Duplicative and unreasonable*". This US$160 item, as *de minimis* as it appears to be, should in my judgment be allowed because the burden was on the Petitioners to show that it was unreasonable, and they have failed to do so.

34. The disbursements position can be dealt with more shortly. The Respondents' sense of grievance about having items the Petitioners agreed to pay disallowed is understandable, but the correct legal position is as follows:

(a) paragraph 9.4 of the Practice Direction makes it clear that hotel (and travel) expenses are not recoverable. I decline to exercise any residual discretion which I probably have to override that rule at this late stage;

(b) paragraph 6.5 of the Practice Direction makes it clear that hotel work permit fees are not recoverable. I decline to exercise any residual discretion which I probably have to override that rule at this late stage;

(c) however only the US$20.04 telephone charges the Respondents claimed and the Petitioners agreed to pay were *prima facie* recoverable under paragraph 6.3(c) of the Practice Direction. These were wrongly rejected as being "*overhead expenses*", as the general prohibition on recovering overhead in paragraph 6.1 is explicitly modified by paragraph 6.3. This *de minimis* amount is allowed.

Findings: foreign lawyers' fees and disbursements

Tom Smith QC

35. In my judgment the Respondents are entitled in principle to recover the costs of instructing Mr Tom Smith QC. Tom Smith QC's fees of US$13,511.88 were disallowed altogether on the grounds that it was unreasonable to instruct Leading Counsel to review Walkers' work. The Taxing Officer accepted the Petitioners' Response Objections (at paragraph 5.2) to the effect that the Respondents had failed to justify retaining a QC. The Respondents did not, since this was a taxation taking place on the indemnity basis, have to justify anything. It was for the Petitioners to demonstrate that what was claimed was unreasonable.

36. GCR Order 62 rule 18 neither expressly nor impliedly imposes a threshold requirement on the receiving party in an indemnity costs taxation to establish the reasonableness of the decision to retain Leading Counsel. The requirement that foreign counsel must be admitted before doing eligible work (rule 18(1)) does not apply to an indemnity basis taxation. The present matters were typical of the sorts of matters in relation to which Leading Counsel are routinely instructed by parties litigating in the Cayman Islands. No plausible case for disallowing these fees in the context of an indemnity costs taxation was advanced by the Petitioners.

Skadden

37. The guiding principle under the Rules is that the Taxing Officer should be astute to avoid duplication and to unfairly burden the paying party with foreign lawyers' fees (claimed as a disbursement) which were not strictly required. It is obvious that New York law was one of several issues and that it was primarily addressed by Judge Robert Smith. The Petitioners' main line of attack against the Skadden fees (US$ 378,872.50 compared with Walkers total of US$166,062.38) was to describe it as "eye-watering" involving 375 hours over two months with a team of 9 lawyers and 2 clerks (Petitioners' Response to Respondents' Objections, paragraph 14). It was then submitted that the reasonable and recoverable costs primarily entailed:

    (a) the Affidavit of Francisco Ritondaro, substantially prepared by Walkers; and

    (b) the Expert Affidavit of Judge Robert S. Smith, which the expert primarily prepared.

38. In my judgment the overriding principle applicable to foreign lawyers' fees ("*that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys*") is fortified by another consideration of legal policy. This Court is generally well equipped to assess the reasonableness of fees incurred in relation to litigation before this Court. It is not generally well-equipped to assess the reasonableness of fees incurred by foreign lawyers whose rates and professional duties will be different to our own.

39. The Rules, quite logically, assume that most legal work in relation to Cayman Islands litigation will be conducted by qualified local lawyers whose professional duties are owed, ultimately, to this Court. Lawyers who practise within a legal system in which costs generally follow the event and all billing takes place with an awareness that there are limits to what level of costs an opponent will be ordered to pay. It is a notorious fact that the United States legal system has a different approach to costs.

40. On its face, no matter how commercially reasonable the Skadden costs may be in lawyer/client terms, the proposition that the Petitioners should be required to primarily pay their opponents' New York lawyers for litigating in the Cayman Islands must be rejected out of hand. The Taxing Officer clearly took a principled and nuanced approach by acknowledging that was reasonable for <u>some</u> Skadden costs be allowed (7.31%), with a view to avoiding duplication. This took into account the fact that the lion's share of the New York law Expert's charges were being allowed, and that he

was the main character in the 'Broadway show'. I see no grounds for adopting a different approach to that of the Taxing Officer.

41. In this case the indemnity costs Order was embodied in Consent Orders and so the Respondents had no convenient opportunity to invite the Court to make a pre-emptive Order that "all" foreign lawyers' cost should be paid. In my judgment the Respondents may arguably be viewed as having agreed to be bound by usual costs rules in electing not to insist upon a special dispensation when the Consent Orders were made. If that is wrong, an application could have been made to the Taxing Officer to displace the usual foreign lawyers' taxation rules on special grounds. I decline to exercise the residual discretion which I probably have to entertain such argument for the first time at this late stage.

42. As far as disbursements are concerned, the Respondents concede that 94.45% of disbursements were allowed (Objections to Taxation, paragraph 34(b)).

Cescon

43. A marginally more generous approach was adopted in relation to Cescon, 9.45% of whose fees were allowed. A specific complaint the Respondents make is that the claim for fees was US$42,509.17, the Petitioners offered to pay US$5,000, but the Taxing Officer allowed only US$4,016.67. Bearing in mind the basis of taxation, it is difficult to see why less than the Petitioners offered to pay should be allowed. The Respondents are allowed the US$5,000 the Petitioners initially agreed to pay.

44. Having rejected the Respondents' primary submission that "all" foreign lawyers' costs should in principle be allowed, it is difficult to see why I should adopt a different approach to the Taxing Officer. The Respondents have not attempted to explain why they contend no duplication is involved and it would in my judgment be inconsistent with the overriding objective of GCR Order 62 for me to invite them to advance points that they have declined to advance before the Taxing Officer or in their Objections to his adjudication. Clearly some input was required from Brazilian lawyers as one of the Respondents is a Brazilian company.

45. But the Rules articulate a clear policy of restraint as regards foreign lawyers' fees being recoverable on taxation.

46. For the same reasons as stated in relation to the Skadden fees, I decline to invite the Respondents to advance for the first time grounds for a dispensation from the usual taxation rule on foreign lawyers' fees at this late stage.

47. As far as Cescon's disbursements are concerned, the Respondents accept that 100% of disbursements were allowed (Objections to Taxation, paragraph 34(a)).

Conclusion

48. The Respondents' Review is granted to the extent set out above. The Walkers fees and, to a lesser extent, disbursements have been uplifted. The foreign lawyers' fees have not. I leave it to counsel to work out the mathematical impact of this decision in dollar terms. For the avoidance of doubt I agree that the minor mathematical errors properly identified by the Respondents in the Re-Amended Costs Certificate should, of course, be corrected in the Petitioners' favour. I will also consider any matters which counsel may advise I should have dealt with but have overlooked. Unless either party applies by letter to the Court within 21 days of delivery of this Judgment to be heard as to costs, I would make no Order as to the costs of the present Review. My sense is that, absent settlement offers of which I am presently unaware, neither side has achieved substantial success overall.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY

JUDGE OF THE GRAND COURT