



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 121 OF 2016 (IKJ)

IN THE MATTER OF THE POULTON FAMILY TRUST

B E T W E E N:

- (1) MICHELE ALEXIA CANHAM**
- (2) JAMES ALEXANDER POULTON**
- (3) NICHOLAS JAMES POULTON**
- (4) JAMES MICHAEL POULTON**
- (5) DAISY ELIZABETH HOUGHTON-POULTON**

Plaintiffs

AND:

- (1) CUTTY SARK LAND COMPANY**
- (2) DEBORAH MCMULLAN POULTON**
- (3) WILSON MALCOLM MCMULLAN**
- (4) CHRISTINE JANE MCMULLAN**
- (5) CAYMAN NATIONAL TRUST CO. LTD.**
- (6) CNT (NOMINEES) LTD**

Defendants

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr. Neil McLarnon of Travers Thorp Alberga for the Plaintiffs
The 3rd and 4th Defendants (“D3-D4”) participated in person

Date of Hearing: On the papers

Draft Ruling circulated: 19 April 2024

Ruling delivered: 9 May 2024

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Bills of Costs-formal requirements-whether costs liability incurred-scope of costs award-need for parties to compromise to avoid uneconomic contested taxation -Grand Court Rules Orders 1 (12 (2), 62 rule 14(2)-Practice Direction 1 of 2001

RULING ON PLAINTIFFS' SUMMONS IN RELATION TO D3-D4's BILL OF COSTS**Introductory**

1. Litigation in the Financial Services Division is specifically designed for high value litigation in which the parties will be represented by lawyers. D3-D4 need to represent themselves has created not-insignificant headwinds for these proceedings to fly through, as they near the journey's end. The present application illustrates the position.
2. By a Summons dated 21 April 2023, D3-D4 sought an interim payment on account of their costs in the amount of \$2,359,630. The Summons was supported by the Fourth Affidavit of Christine McMullan sworn on 21 April 2023.
3. Before the application was listed for hearing, the Plaintiffs filed their own Summons on 29 September 2023 seeking, *inter alia*, Unless Orders in relation to an allegedly defective Bill of Costs filed by D3-D4 on 18 September 2023. It was sensibly agreed in January 2024 that that application should be dealt with first, in the first instance on the papers. The Sixth Affidavit of Christine McMullan (D4) was filed on or about 12 February 2024 (in response to the Sixth and Seventh Affidavits of Nicholas Poulton). The Plaintiffs' Submissions were filed on 26 February 2024.
4. A draft of the present Ruling was circulated on 19 April 2024. Both sides responded in writing (on or about 23 April 2024 and 5 May 2024, respectively), and neither side requested a further oral hearing.

The Plaintiffs' Summons

5. The Plaintiffs' Summons seeks the following relief:

“(1) A Declaration that the document entitled D3-D4 ‘Bill of Costs’ sent by email to the Plaintiffs’ attorneys on 18 September does not comply with the requirements of GCR Ord. 62 and be struck out.

(2) An Order that UNLESS D3 and D4 within x days of the date of the Order serve a Bill of Costs compliant with the requirements of GCR Ord. 62 that they be debarred from pursuing recovery of their costs, if any.

(3) An Order that any Bill of Costs served by D3 and D4 detail only costs (over and above any costs which were or would in any event have been incurred by Deborah in defending herself) which D3 and D4 can show were solely incurred in defending themselves against the Plaintiffs’ damages claims set out in paragraphs 79 to 82 of the Plaintiffs’ Statement of Claim.

(4) An Order that D3-D4 provide un-redacted copies of Letters of Engagement between D3-D4 and Kobre & Kim and HSM.

(5) A Direction that D3 and D4 have leave to file affidavits detailing the basis, if any, upon which they have to pay legal fees to Kobre & Kim and HSM.

(6) An Order that the time for the Plaintiffs to provide any objections to D3 and D4s’ Bill of Costs be extended until after D3 and D4 have shown that they are liable to pay legal fees to Kobre & Kim and HSM and have filed a Bill of Costs which complies with the requirements of GCR Ord. 62, which relates solely to those costs, over and above any costs which were or would in any event have been incurred in defending Deborah, which were specifically incurred in the course of defending D3 and D4 against the Plaintiffs’ claims for damages.

(7) An Order that D3 and D4 pay the Plaintiffs’ costs of and occasioned by this Summons.”

6. The complaints raised may be summarised as follows:
- (a) the Bill of Costs is not compliant with the form prescribed by GCR order 62 as read with Practice direction 1 of 2001 (the “Practice Direction”) and should be struck-out;
 - (b) any new Bill of Costs filed should clearly relate only to the costs of defending the claims the Plaintiff brought solely against D3-D4, as these are the only costs which were awarded to them;
 - (c) D3-D4 should be required to demonstrate that they are actually legally liable to pay their attorneys on the basis that presently available evidence suggests that they may have been represented on terms that D2 (their mother/mother-in-law) would be solely liable for all fees.

The Bill of Costs

7. The Plaintiffs’ counsel referred to GCR Order 62, rule 16 (3) (formerly rule 17) which provides:

“The Rules Committee may issue guidelines relating to –

(a) the procedure in respect of taxation;

(b) the form and content of bills of costs; and

(c) the nature and amount of fees, charges, disbursements, expenses or remuneration which may be allowed on taxation, and, for the avoidance of doubt, including the maximum rates that may be allowed on a taxation.”

8. Order 1 rule 12 further provides:

“(2) The Rules Committee shall from time to time issue practice directions containing guidelines relating to the matters referred to in Order 62, rule 17.”

9. The Practice Direction provides, most pertinently, 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....

2.3 The bill should contain an introduction which describes the nature of the litigation sufficient to enable the taxing officer to gain a proper understanding of it without necessarily having to read the pleadings, evidence or judgments...

2.6 Each item of work done should be described. The number of hours worked on each item by each lawyer or paralegal should be stated, together with the applicable hourly rates.

2.7 The bill should be divided into five columns as follows:

(a) Column 1 should contain the item number.

(b) Column 2 should contain a description of each item of work arranged chronologically; the date(s) on which or period(s) during which it was done; the identity of the person(s) doing the work; the time spent; and the applicable hourly rates.

(c) Column 3 should contain the total amount claimed in respect of the item.

(d) Column 4 is for use by the paying party and should be left blank.

(e) Column 5 is for use by the taxing officer and should be left blank...”

10. Paragraph 2 sets out detailed requirements for the form of bills of costs, including the need to set out, *inter alia*, the work done by what lawyers and for a structure of five columns with specified headings. While D3-D4 appear to be aware of the Practice Direction, no effective compliance with its main terms has been achieved. There is a Summary, but it does not explain in any meaningful way that could be understood by the most discerning Taxing Officer the claims in relation to which costs were awarded and their significance (in costs terms) in the litigation as a whole. The column and headings requirements have all but ignored and the Bill of Costs does not contain a particularised statement of the work done, showing which lawyer performed what task. It does not look like a Bill of Costs at all. D4 suggests that they have followed the approach of the Plaintiffs, whose Bill of Costs is not in the Hearing Bundle for the present application. I doubt lawyers would file a bill of Costs that did not at least have one blank column for the paying party’s objections and another for the Taxing Officer to record their adjudication. In essence, it contains summary of

invoices, lawyers and their rates and copies of invoices covering the duration of the litigation have been submitted, discounted by 34%.

11. Relying on invoices in that manner might well be appropriate where the costs of a case have been awarded to the receiving party and it is reasonable to assume that all (or most) of the legal work done fell within the ambit of the costs award to which the Bill related. It is impossible to extract from the legal work described in the invoices which elements of it are attributable to the specific strands of the litigation in relation to which D3-D4 are entitled to recover costs. The fundamental flaw with the present Bill of Costs is that it appears to assert a right to recover the entirety of all three Defendant's costs of the entire action when in fact they have only been awarded the costs incurred in relation to a very small portion of the case as a whole.
12. The Bill of Costs is so defective that I find it the most efficient course is to strike it out and require D3-D4 to prepare a fresh document, rather than permitting them leave (as D4 requested in her Sixth Affidavit) to attempt to cure it by extensive amendments. I accept entirely that D3-D4 did their best to file a compliant document

D3-D4's entitlement to Costs

Have costs been incurred by D3-D4?

13. The award of costs in civil litigation is governed primarily by GCR Order 62. Order 62 sets out the governing principles of the costs regime in the following terms:

“(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by [the] successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.” [Emphasis added]

14. It is clearly fundamental that a party seeking to recover costs should demonstrate that they have incurred a legal liability to pay the costs they are claiming. That is ordinarily not in issue. But here it would not be surprising if D2 had agreed to accept sole liability for the legal costs of defending the proceedings she had embroiled her son and daughter-in-law (D3-D4) in. The Kobre & Kim (Cayman) LLP invoices addressed solely to D2 suggest that this is precisely what may have

occurred. HSM invoices covering the period 2017-2018 are at least addressed to D3, however part the text in the fees section of the 2 June 2017 retainer letter have been redacted.

15. It is not possible to fairly conclude from the retainer letters and invoices thus far supplied that D3-D4 did incur any fee liability at all (as regards the costs of both HSM and Kobre & Kim). The context is a young couple (D3-D4) being embroiled in litigation by their mother/mother-in-law (D2). Having regard to natural love and affection, it seems inherently likely that D2 would have wanted to shield her son and daughter-in-law from the burden of potentially substantial legal fees. After this Court's provisional findings were circulated, it has of course been suggested by way of submission that is to some extent what occurred. It was seemingly agreed that, in effect, the lawyers would only look to D3-D4 for fees if D2 failed to pay, although strictly D3-D4 were legally liable for all fees.
16. My own researches indicate that there are precedents for a court examining retainer letters to verify that the receiving party has actually incurred a liability for the legal costs they are seeking to recover: e.g. *Times Newspapers –v–Burstein* [2002] EWCA Civ 1739.
17. Accordingly, it is appropriate to grant the Plaintiffs' application for an Order requiring them to produce un-redacted copies of the HSM and Kobre & Kim retainer letters, but only to the extent that:
 - (a) the redacted portions of those letters are relevant to their liability to pay the fees of the lawyers who undoubtedly acted for them in relation to these proceedings. For example, the redaction in the "Fees" section of HSM's 2 June 2017 letter and Kobre & Kim's letters dated 2 June 2017 10 October 2019 seem likely to be relevant; and
 - (b) D3-D4 do not abandon their costs claim altogether.
18. D3-D4 have liberty to file further evidence confirming their liability to pay the invoices they rely upon in relation to both firms. Their unsworn 'Response to Draft Ruling of 19 April 2024' appears to quote portions of previously undisclosed portions of the Kobre & Kim retainer letters which suggest that they were in fact legally liable to pay the relevant fees although their lawyers would look, in the first instance, to D2 for full payment. Those submissions did not address the HSM retainer issue, because I did not advert to this in the provisional version of the present Ruling.

Scope of D3-D4's award under Costs Order

19. In the Costs Ruling dated 30 August 2022, I ruled:

“47. It is indeed clear that D3-D4 succeeded overall as regards all claims asserted against them and no credible basis has been asserted for displacing the dominant costs principle that costs should follow the event. Their costs should be paid by the Plaintiffs, and (without binding the Taxation Judge by formally deciding this point), a logical starting assumption would appear to be that 2/3rds of D2-D4's combined costs of defending those 'makeweight' claims should be recovered by them...”

20. In the Judgment dated 18 February 2022, I described the claims upon which D3-D4 succeeded as follows:

“4....Other, makeweight claims against D2-D4 were sensibly only addressed in a cursory way: (a) improper exercise of a fiduciary power/fraud on the power, (b) estoppel, and (c) unlawful means conspiracy...”

21. Clearly, assuming that they are in fact liable for the legal costs at all, D3-D4 were only awarded the costs incurred in relation to those peripheral claims. Any fresh Bill of Costs should obviously deal only with costs attributable to the claims to which the costs award relates. The Plaintiffs are entitled to the Order they seek in this regard.

22. In their supplementary submissions, D3-D4 took issue with the notion that the only claims asserted against them were these peripheral claims and that they did not succeed in relation to all of the Plaintiffs' claims. The Costs Ruling was delivered on 30 August 2022 following a hearing on 4 August 2022 at which D3-D4 were represented by Leading Counsel. The decision was not appealed. Nonetheless, it is easy to understand why as litigants in person the position seems less than clear.

23. The Costs Ruling proceeded on the explicit basis that D3-D4 were only successful in relation to the 'makeweight claims and that the Plaintiffs should only be entitled to recover any costs at all in relation to the main claim they succeeded on from D2. This is why the Court awarded the Plaintiffs' 65 % of their trial costs against D2 alone. The amount D2 had to pay was reduced by 35% to take into account the fact that, *inter alia*, the Plaintiffs did not succeed on the entirety of their main claims.

24. This approach was adopted not based on a technical legal analysis but on a more pragmatic costs assessment of what claims D3-D4, as opposed to D2, positively had to defend. It is true that in strictly legal terms, the Defendants were treated by the Amended Statement of Claim as being Defendants for all purposes. But for the conspiracy claim, which made positive averments against them (and in relation to which damages were sought), they might well not have been sued or needed to defend the proceedings at all. As I noted in the Costs Ruling (at paragraph 47), “*Wilson and Christine ought in hindsight not to have been sued at all*”. The main rationale for the approach taken to their costs position was to protect them from being unjustly responsible for the far greater liability to pay the Plaintiffs’ costs.
25. The Costs Ruling on any sensible view did not treat D3-D4 as being successful in relation to the main claims in relation to which the Plaintiffs were found to have achieved substantial success. It also explicitly made an award in their favour alone, distinguishing both (a) their position from that of D2, and (b) the costs of the makeweight claims from the costs of the main claims. It was stated in the Costs Ruling:

“47. It is indeed clear that D3-D4 succeeded overall as regards all claims asserted against them and no credible basis has been asserted for displacing the dominant costs principle that costs should follow the event. Their costs should be paid by the Plaintiffs, and (without binding the Taxation Judge by formally deciding this point), a logical starting assumption would appear to be that 2/3rds of D2-D4’s combined costs of defending those ‘makeweight’ claims should be recovered by them.” [Emphasis added]

Likely range of recoverable costs and difficulties of contesting a taxation application in an economically proportionate manner

26. The claims to which the relevant costs award relate were dealt with in the Judgment in 7 pages of a judgment which ran to nearly 250 pages. These claims were addressed in the Amended Statement of Claim in 5 of the over 50 page long pleading. More pertinently still, they occupied 4 of the nearly 50 pages of the Amended Defence and Counterclaim. This suggests that, in rough and ready terms, the relevant costs are unlikely to validly exceed:

- (a) **Pre-trial costs:** 10% of their reasonable costs incurred in preparing for the trial as a whole (discounted by a third as two of three defendants were awarded their costs);

(b) **Trial costs:** 5% of their reasonable costs incurred in preparing for the trial as a whole (discounted by a third as two of three defendants were awarded their costs).

27. What is recoverable on a taxation on a standard basis is always less than the actual cost liability the receiving party incurred to their lawyer. The assumption made in the context of interim payment on account of costs cases is that 65% of the costs a successful party has actually incurred will be recoverable on taxation: see e.g. *Credit Suisse London Nominees Limited-v- Principal Investing Fund I Investing Limited et al*, FSD 268-270/2001 (IKJ), Judgment dated (at paragraph 8). The Bill of Costs which is liable to be struck-out not unreasonably used 66% as the discount figure.
28. It also important to remember that foreign Leading Counsel's fees cannot ordinarily be recovered as a disbursement when costs are taxable, as they are here, on the standard basis: see e.g. *Scully Royalty Limited-v-Raiffeisen Bank AG Limited* [2022 (1) CILR 572] (Birt JA at paragraphs 36-39).
29. With these principles in mind, sensible litigants in cases such the present would see that rough and ready assessments of what D3-D4 are likely to recover can fairly easily be made. The time entailed in a contested taxation hearing is likely to be disproportionate to the amounts which can reasonably be disputed. In the present case, the one issue which the parties do not presently have sufficient information to form the basis of a compromise is the question of whether or not D3-D4 actually incurred liability to Kobre & Kim (who acted for most of the litigation) at all.
30. In some cases, it may be appropriate to claim a proportion of work done on generic trial preparation tasks, in others it will not. Lawyers preparing the Bill of Costs would be able to readily and distinguish generic work streams from work done solely on certain issues because they were involved in carrying out the relevant work. Their clients will not. D3-D4 are unlikely to be able prepare a proper Bill without obtaining significant and time-consuming assistance from their former attorneys. This seems likely to be difficult, if not impossible, for them to achieve.
31. If this judgment is correct, the taxation would only be able to proceed on the basis that the Taxing Officer would have to adopt a bespoke procedure which would be legally uncertain and therefore likely be wasteful of this Court's resources. Any appeal from the Taxing Officer's decision, for which reasons are not normally given, would be a rehearing: see e.g. *Patraulea-v-Institute of the Cayman Islands Institute of Professional Accountants*, G 70/2018, Judgment dated 7 February 2022 (unreported), per Carter J (Acting, as she then was), at paragraph 17. For instance, whether the rough and ready approach to calculating the recoverable costs I have suggested above would be consistent with the prescribed taxation requirements or not is, for my part at least, far from clear.

32. It may be, however, that this Court's jurisdiction to deal with D2-D3's Interim Payment application might be a sufficiently flexible jurisdiction to ameliorate these challenges to some extent. But the general rule is that no more than 50% of the costs which seem likely to be recovered are awarded on an interim basis.
33. It is because it is obvious that preparing a proper Bill will be onerous that I strongly encourage the parties to dispose of the taxation of costs matter on a pragmatic and consensual basis, rather than a formal and legalistic one. In this regard it is important to remind them that:
- (a) they have a duty under the Overriding Objective to assist the Court to achieve it (GCR, Preamble paragraph 3);
 - (b) the most pertinent elements of the Overriding Objective in the costs context are (1) saving expense and (2) dealing with the matter in a way which is proportionate to the amount of money in issue; and
 - (c) the overriding objective of the costs regime in GCR Order 62 rule 4 (2) is that D3-D4 should recover their reasonable costs pursuant to the Costs Order made in their favour.

Conclusion

34. The Plaintiffs are entitled to an Order substantially granting the relief sought under paragraphs 1, 3, 4 (subject to the modification indicated in paragraph 17 above) and 5 of their Summons. I would adjourn all other heads of relief (including costs) and grant general liberty to apply.
35. The parties are encouraged to seek to resolve all outstanding issues on a pragmatic basis consistent with their undoubtedly common interest (as relatively young people with hopefully long lives ahead of them) in stemming the legal costs tide that this litigation has unleashed. It is to be hoped that the Plaintiffs, who alone are now legally represented, will take the lead in this regard.
36. The Plaintiffs sought to displace my provisional view that costs should be reserved by relying upon the observations of Lord Sumption that the usual costs rules should generally apply even where litigants in person are concerned: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 (at paragraph 18). Reserving costs does not signify that the Court is making a particular costs decision, on the contrary it is postponing making any decision. In the present case the Court is encouraging the parties, and in particular the Plaintiffs, to reach a compromise to avoid the need for any further

applications in relation to the taxation of costs process. Although the Plaintiffs are in principle entitled to their costs incurred thus far in relation to the Summons, it would be premature to make such an award at the present stage while the wider issues are yet to be resolved.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT