[2013] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 03783

BETWEEN	NORMAN W. M. BOWEN	CLAIMANT
AND	SHAHINE ROBINSON	1ST DEFENDANT
AND	RUPERT BROWN	2ND DEFENDANT
AND	DANVILLE WALKER	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

Mr. A. Dabdoub, Dr. R. Clough and Mr. F. Haliburton
Instructed by Knight Junor & Samuels for the Claimant

Mr. A. Braham QC and Ms. Nesta C. Smith Hunter
Instructed by Ernest Smith & Co., for the 1st Defendant

Second and 3rd Defendants did not appear and were unrepresented

Mr. Nigel Gayle
Instructed by the Director of State Proceedings for the 4th Defendant

Heard: November 4, 5, 2011, October 22 and 23, 2013

Costs granted on Indemnity Basis - Taxation of Bill of Costs by Registrar - Review or Appeal of Registrar's Decision - Section 27 Legal Profession Act and Civil Procedure Rules 65.26 considered - Registrar's Discretion - Retainer Agreement - must contain Language advising the Client of certain options – Onus on paying party to show costs are unreasonable – Right of paying party to cross-examine

Campbell QC, J

[1] The parties in this matter are the claimant and the first defendant. They were the only parties represented at the hearing before Jones J, and at taxation before the

learned Registrar. As a result of the General Elections held on the 3rd September 2007, the claimant filed a petition against the first defendant, alleging she was ineligible to be elected by reason of her being an American citizen and that she was in breach of Sections 39 and 40 (2) (a) of the Constitution of Jamaica. On the 15th September 2010, the first defendant indicated she no longer opposed the Petition. Jones J, subsequently granted judgment to the claimant, made the declarations sought, and ordered that the, "first defendant shall pay all the costs of the claimant (the successful party) in accordance with Civil Procedure Rules (CPR) 64.6 (1) to be taxed by the Registrar of the Supreme Court in accordance with CPR 65.13, if not agreed."

The First Defendant's Conduct

[2] Five days after the General Elections in which she had been elected to a seat in Parliament; the first defendant made public declaration of her status as an American citizen. On the 24th September 2007, the claimant filed a Fixed Date Claim Form (In an Election Petition), supported by his affidavit. The Fixed Date Claim Form, sought among other orders, (i) A declaration that by virtue of Sections 39 and 40 (2) of the Constitution of Jamaica that Mrs. Shahine Robinson was not qualified to be elected as a member of the House of Representatives. The claimant's affidavit in support of the petition alleged, *inter alia:*

> (a) That the first defendant was on August 7, 2007, a citizen of the United States of America and therefore not qualified to be nominated or elected to the House of Representatives.
>
> (d) That the United States of America is a foreign power or state.

[3] On the 16th November 2007, the first defendant filed a Notice for Court Orders, seeking an Order that the claimant's Fixed Date Claim Form be struck out. Further, that service on the first defendant, of the Fixed Date Claim Form, be set aside, for not having been served by registered post to the address given by her in the Nomination Papers pursuant to Section 6 of the Election Petition Act.

[4] On the 14th April 2010, neither the first defendant nor her attorney-at-law was present at the Pre-Trial Review, at which stage her defence was struck out. However,

she was later granted an order to set aside the striking out of the defence. On the 25th June 2010, she filed an Amended Defence contending that:

> *"I deny paragraph 20 of the Affidavit of the Claimant 21st September 2010 affidavit, I am a citizen of Jamaica by birth. I hold no other citizenship other than the land of my birth. I was not a citizen of any other country on the 7th August 2007*."

[5] On the 12th May 2010, the claimant filed a Notice of Application for Court Orders seeking that the Defence of the first defendant be struck out for non-compliance with Rule 10.5 of the Civil Procedure Rules 2002 and an Order that the first defendant provide the answers to the Request for Information filed April 9, 2010, and the Further Request for Information filed May 12, 2010.

[6] The claimant's Request for Information and Notice to produce, related to the first defendant's Alien Registration Number, the date she took the Oath of Allegiance to the United States of America and her Naturalization Certification Number. On the 15th September 2010, the first defendant's attorney-at-law indicated that they were not opposing the Petition. The court was told that the first defendant had become a naturalized citizen of the United States sometime in 2006.

Jones J, Cost Order

[7] On the 8th October 2010 in dealing with the issue of costs, Mr. Dabdoub had submitted before Jones J that indemnity costs should be granted in the matter and that Section 28 of the **Elections Petitions Act**, allowed the judge to determine all costs, expenses and charges, incidental to the presentation of the petition. That such cost should be taxed "by the proper officer of the Supreme Court according to the same principles as costs between solicitor and client are taxed in an equity suit in the Supreme Court."

[8] Mr. Braham QC had submitted that Section 28 of the **Elections Petition Act** governed and controlled costs that are awarded in an election petition, that there is no mention in that Act of awarding costs on an indemnity basis and the Civil Procedure Rules 2002 although applicable is subject to the provisions of that Act. He said the

court should remain strictly within the express terms of the statute and refer the matter to the Registrar of the Supreme Court for Taxation. Jones J held that Mr. Braham's submission must fail, because CPR 2002, Rule 64.6, incorporates the traditional indemnity principle by making it clear that where the court decides to make an order as to costs of proceedings, "the general rule is that it must order the unsuccessful party to pay the costs of the successful party." Jones J concluded that "the indemnity principle that costs follow the event" is alive and well under the CPR 2002. Jones J ordered that, the first defendant shall pay all the costs of the claimant in accordance with the CPR 64.6 (1) to be taxed by the Registrar of the Supreme Court in accordance with the CPR 65.13, if not agreed."

[9] On the 8th October 2010, the claimant filed a Bill of Costs on an indemnity basis for the sum of $19,085,255.15; this bill was taxed and allowed by the Registrar of the Supreme Court on the 15th day of April 2011 in the sum of $15,373,547.49. The claimant and the first defendant have both appealed the Registrar's decision.

Claimant's Grounds

[10] The claimant's grounds concerned all the areas that the Registrar reduced. Their submissions hinged on the fact, that the Retainer Letter between the client and instructing attorneys-at-law dated 12th September 2007 was made pursuant to Section 21 of **Legal Profession Act** and the parties thereto had agreed the various appealed items. The grounds, on which the submissions rested, were:

(i) The said charges were agreed to in writing pursuant to Section 21 of the **Legal Profession Act**.

(ii) The claimant did not dispute the charges as being unreasonable and in fact gave evidence on affidavit to that effect confirming that the retainer letter contained the terms and conditions of the engagement of his instructing attorneys-at-law and the Counsel involved in the litigation.

(iii) The Honourable Mr. Roy Jones ordered that the Respondent Shahine Robinson pay all the claimant's costs on an indemnity basis.

(iv) The Registrar failed to appreciate that costs on an indemnity basis is intended to ensure that the claimant is not out of pocket, in paying his reasonable legal expenses.

(v) The claim is a novel and unique claim, of great weight and complexity, a first of its kind in Jamaica and required the services of an experienced Counsel with expertise in the area of law.

First Defendant's Grounds

[11] The first defendant complained that the hourly rates awarded Counsel, Professor Rowe's fees, and the time allowed for conferences are unreasonable. It was submitted that the retainer paid to Counsel, pursuant to the Retainer Agreement did not constitute an advance or down payment, therefore counsel was paid twice. Further, that the Registrar erred in refusing the application for cross-examination of the claimant on his affidavit dated 12th September 2007and that the matter was neither complex nor novel.

[12] Section 27 of the **Legal Profession Act**, provides:

(1) Upon every taxation, whether by order of the court or otherwise, the taxing officer shall certify what is found to be due to or from the attorney in respect of the bill, including the cost of reference.

(2) If either party is dissatisfied with the decision of the taxing officer as to the amount of the bill or the cost of reference, he may within twenty-one days after the date of the decision apply to the court *to* review the decision and the court may thereupon make such order varying or confirming the decision as the court considers fair and reasonable. (Emphasis mine)

[13] Section 27(2) mandates the court to review the decision where there is, as here, dissatisfaction with the taxing officer's decision. Counsel for the claimant referred to the authority of **Phillip Stephens v The Director of Public Prosecutions**, Claim No. 05020 of 2006, as to the principles applicable on appeal to a Judge in Chambers. In that case, Sykes J was considering Section 8 (1) of the **Bail Act**, which stipulates that a Resident Magistrate, in the consideration of the question of bail should give reasons for his decision, "so that the defendant may make an application before a Judge in

Chambers. The learned judge enquires of the application, “Is it a review or appeal, or is it a fresh application?” His Lordship notes that Section 9 obliges the Resident Magistrate to advise the unrepresented defendant of his right of appeal conferred by Section10, which entitles a person to whom Section 9 applies a right to appeal to a Judge in Chambers.

[14] Sykes J considered two judgments of Brooks J, (as he then was) in which the learned judge held in relation to an application under the Bail Act that the nature of the proceedings before a Judge in Chambers is a review. However, Sykes J, agreed with the reasoning of Sinclair-Haynes J (Ag), that Civil Procedure Rules 58 (1) cannot alter an **Act of Parliament**. I, myself agree with the reasoning of Sinclair Haynes J. An appeal is the product of statute. The **Bail Act** has so described it. The regulations should be read to conform with the statute. Similarly, in respect of the **Legal Profession Act**, the procedure to be applied is expressed in the Act as a “review of the decision.” Despite the reference, in the CPR 65.26 (a) the receiving party and (b) any paying party who has several points of dispute, may appeal against the decision of the Registrar in taxation proceedings; it is my respectful view that, the subordinate legislation cannot supersede the express terms of the **Legal Profession Act**. Where the language of the statute is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. The literal rule of construction is “that the legislature to have meant what they actually express.”

Review

[15] A Review undertaken by the Supreme Court is an exercise of its inherent supervisory jurisdiction over officials within its remit. The learned authors of **De Smiths**, **Judicial Review of Administrative Action, 4th Edition**, in defining the term, judicial review, says at page 28:

> *“Judicial Review is not a term of art. It is sometimes used to mean judicial scrutiny and determination of the legal validity of instruments, acts, decisions, and transactions” and at page 281:*

> *"The scope of review may be conditioned by a variety of factors, the wording of the discretionary power, the subject-matter to which it is related, the character of the authority to which it is entrusted, the purpose for which it is conferred, the particular circumstances in which it has been in fact exercised, whether is of the opinion that judicial intervention would be in the public interest. Occasionally the scope of review may also be influenced by the form of proceedings is sought."*

Appeal

[16] The learned authors, at pages 281-2, say of appeals:

> *"In many cases the right of appeal by a party aggrieved is to be construed as empowering the court to substitute its own opinion for the opinion of the authority if it is satisfied that the decision is wrong, through due regard to the competence of the local authority in arriving at its original decision." "……..the powers of those appellate courts must still be exercised judicially and not on the basis of legally irrelevant considerations. But power to entertain an appeal on the merits may endow a court with discretionary authority far wider than the inherent but residual supervisory jurisdiction over questions of legality, wider also than statutory power to hear appeals on matters of law."*

Registrar's Discretion

[17] The mandate of the taxing officer as provided by Section 27 (1) of the **Legal Profession Act** is to certify what is found to be due to the claimant. In the exercise of her functions pursuant to Section 27 of the **Legal Profession Act**, the Registrar exercises her discretion, in other words, she has a choice, and there is no beaten path that she must take. De Smith says of the exercise of judicial discretion:

> *"The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted the decision taken is not the exercise of discretion but the performance of a duty. To say that someone has discretion presupposes that there is no uniquely right answer to the problem."*

[18] However, in the exercise of her discretion, the Registrar is not at large. The Civil Procedure Rules imposes restraints for the exercise of the discretion. The restraints are those of reasonableness and fairness. Rule 65.17(1) provides -
Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount:

(a) that the court deems to *be reasonable*; and

(b) which appears to the court to be *fair both to the person paying and the person receiving such costs.*

[19] Rule 65.17 (2) provides –

Where the costs to be taxed are claimed by an attorney-at-law from his or her client, these costs are to be presumed:

(a) To have been reasonably incurred if they were incurred with the express or implied consent of the client.

(b) To be reasonable in amount if their amount was expressly or impliedly approved by the client, and

(c) **To have been unreasonably incurred if –**

(i) If they are an unusual nature or amount; and

(ii) **The attorney-at-law did not inform his or her client that the client might not recover them all from the other party.** (Emphasis mine)

[20] In **Pan Caribbean Financial Services Limited v Sebol Limited & Selective Homes Limited** [2010] JMCA APP 19 - Application 56/2010, which was an appeal from the exercise of the Registrar's discretion in taxation proceedings. It is held that the scope of the examination by the Court of Appeal was conditioned by, the wording of the discretionary power, the subject-matter to which it is related, and the character of the authority to which it is entrusted. The Court of Appeal presumed the Registrar to be very conversant with the rules relating to the taxation of costs, and consequently would have applied her mind to Rule 65.17 (3) (See paragraphs 14 and 15).

Ground one – Hourly Rates

[21] Both sides questioned the hourly rates the Registrar allowed, of $30,000.00 for Mr. Dabdoub and $20,000.00 for Dr. Raymond Clough. The first defendant contending that the rates were too high, the claimant saying they were too low. Counsel for the claimant submitted that the Registrar did not have a discretion in respect to the hourly rates of the various attorneys-at-law, as these rates were set as a result of an agreement in writing between the claimant and the attorneys on the Record. Mr. Dabdoub contended that the rates are those agreed between the parties in a Retainer Agreement, and the claimant had not disputed the rates. Further, the claim is a novel and unique one, which is of great weight and complexity. Mr. Dabdoub submitted that, the only discretion the Registrar has pursuant to Rule 65.17 is deciding whether the time claimed for a particular work is reasonable.

[22] That submission, in so far as it restricts the Registrar's discretion, pursuant to Rule 65.17, to the duration of time claimed, is not sustainable. Mr. Dabdoub in his oral and written submission, (See item 1 in his Appeal Notice) argues that, the agreement being in writing, and not disputed by the claimant, and being taxed on an order that the first defendant pay all the claimant's costs on an indemnity basis, such fees are not susceptible to the discretion of the Registrar. Mrs. Smith-Hunter submitted here as she did before the learned Registrar, that Section 21 of the **Legal Profession Act** deals specifically with an attorney who wishes to recover fees. I accept that submission to bar the exercise of the discretion of the Registrar would prevent her being able to act, even where the agreement appears to have been made at less than arms length, and is the product of collusion. Which I should add, is not the case here. In any event, the comments of the learned authors of De Smiths**, Judicial Review of Administrative Action**, see paragraph 15 above is apposite. The Registrar would have before her alternatives to the claimant's Bill of Costs.

[23] Rule 65.17 (2) raises a presumption that the costs to be taxed, are reasonably incurred or reasonable in amount, if they are expressed or impliedly consented to by the client. The presumption is raised in this case because they were expressly consented to by the client (See affidavit of Norman Washington Manley Bowen dated 12th January

2011). The presumption raised is a rebuttable one. It can be displaced by evidence which shows the contrary. If the evidence is produced of the costs being of an unusual nature or amount, the pendulum, swings the other way, and a presumption is raised that the costs are unreasonably incurred (See 65.17(2) (c) (i)). There is no submission before me that the learned Registrar failed to consider something she ought to have considered, or took into her determination irrelevant considerations. The Registrar had contending views on the hourly rates before her; this court in reviewing the exercise of her discretion is at liberty to vary pursuant to S27 of **Legal Profession Act**, to make such order varying or confirming the learned Registrar's Order, I respectfully adopt the views of Harris JA, in **Pan Caribbean Financial Services Limited,** at paragraphs 13 and 15. I find that the Registrar has a discretion and exercised her discretion in a way that is consistent with Rule 65.17.

The Retainer Agreement

[24] Counsel for the first defendant submitted that the Registrar wrongly exercised her discretion in allowing the sums of $5,750,000.00 to Knight Junor & Samuels, in that the Registrar had found of the Retainer Agreement that "they were partly in writing," and that she was bound by the overriding objective. It was further submitted that Counsel for the claimant had contended that the retainers were an "incentive." Counsel submitted that the sum of $5,750,000.00 is unreasonable in amount and unreasonably incurred and not in keeping with the way in which Retainers are dealt with in our courts. Counsel distinguished **Richard Edward Azan v Michael A. Stern et al** Claim No. 2007HCV03948 on which the claimant relied. According to Counsel for the first defendant, in **Richard Azan**, the Retainer Agreement sets out the actual work done by the attorney- at-law. In contrast in this case, there existed no proof that work was actually done, pursuant to the Retainer Agreement. Mr. Dabdoub in response said, that: *"where indemnity costs have been ordered the onus is on the paying party to show that the costs claimed are unreasonable."* There is no requirement that the receiving party be put to proof of his claim. (See paragraph 78, Appellant's Skeleton Submissions, filed 26th September 2011).

[25] Mr. Dabdoub has argued throughout that Jones J order, for costs on an indemnity basis, is a reflection of the court's displeasure with the paying parties' conduct of the case. There are clearly aspects before me, on which both Jones J. and later the Registrar could find that the conduct of the first defendant was called into question. The first defendant having stated on national radio on the 8th September 2007 that she was an American citizen, subsequently denied in several documents filed in this court that she was in breach of the Constitution of Jamaica. She subsequently filed a Notice to strike out the Petition. Her affidavit of 3rd June 2010, records her denying the infringement of the Constitution of Jamaica, and deponing that at the time of her nomination and election she was not an American citizen. The manner, in which the claimant defended her case, was un-praiseworthy and warranted disapproval of the court. Her conduct had serious implications for the nation as a whole, in **Noorani v Culver** 2009 EWHC 592, Coulson J said:

> *"Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity cost can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving moral condemnation (citing **Reid Minty v Taylor** [2002] 1 WLR 2088). However, such conduct must be unreasonable "to a high degree, unreasonable" in this context, does not mean merely wrong or misguided hindsight."*

[26] An award of cost on an indemnity basis is not intended to be penal and that regard must be had to what in the circumstances is fair and reasonable. However, there is dicta, **in BSKyB Ltd. & Anor. v HP Enterprise Services UK Ltd., and Ors.** (No.2) 2010 EWHC862 that on an indemnity assessment there is no requirement for the cost to be proportionate to the matters in issue and that any doubt as to whether costs were reasonably incurred or reasonable in amount is to be resolved in favour of the receiving party. There is raised a presumption that the costs were reasonably incurred and reasonable in amount. Mark Friston, **Civil Costs; Law and Practice**, explains how the presumption is to be applied in practice, at paragraph 11.28, page 463:

> *"The presumption will not be rebutted merely by putting the receiving party to proof of the secondary fact (i.e. that there has been no breach of the indemnity principle) instead a "genuine issue" (otherwise known as a "genuine concern") must be made out."*

The first defendant submits there is a genuine concern of double-counting in regards to the Retainer Agreement. There is the further complaint that there is, no evidence adduced in the claimant's detailed Bill of Costs, which represents work done pursuant to the Retainer Agreement.

[27] It is not usual, that in a suit for recovery of costs, there may be an issue in identifying whether a particular agreement represents a Retainer Agreement. There is no contention to the contrary that the Knight Junor Samuels' letter of 12th September 2007, constitutes the true bargain struck between the client and his attorney. Before the Registrar, Counsel defined the purpose of the Retainer Agreement as, "*in the event that the petition is being contested, we are retained to contest and appear at the trial on behalf of the plaintiff as Counsel and cannot appear for anybody else."* The document when construed does not favour Mr. Dabdoub's submission that, the 'retainer sums,' are advances on the cost to be incurred in the execution of the client's instructions. A literal construction of the letter, supports, the contrary view that the only services that are covered in the retainer letter, are in paragraph 1, the opinion contained in the letter, and at paragraph 9, where it is stated that in the event no claim is filed there will be a fee of $375,000.00 plus General Consumption Tax (GCT), if there is a filing of the claim that will be incorporated in the retainer.

[28] Mrs. Nesta Clare Smith challenged the decision of the learned Registrar on two grounds:

> (a) That the sum in the Retainer Agreement does not constitute an advance on payment. That the retainer fees did not represent services, for which the Claimant should be indemnified.
>
> (b) The Registrar did not properly exercise her discretion pursuant to Rule 65.17 (1), as she did not consider, whether it was fair as between parties, and reasonable, but limited herself to a finding that the document

> was in writing. In so ruling, the Registrar accepted the submission of Mr. Dabdoub that the document being in writing made impermissible any further examination in accordance with Section 21 (2). The evidence before the Registrar did not support the contention that the retainer fees represented a cost, for which the claimant ought to be indemnified.

[29] In **Brian Dowling v Chicago Options Associates, Inc. (DLA Piper Rudnick Gray Cary (US), LLP, Appellant**), on which Mr. Dabdoub relied. The Supreme Court of the State of Illinois had to determine whether monies paid by a client to his lawyers, belonged to the client or his counsel.

[30] **Dowling** sued **Davis** for breach of contract, and obtained judgment. Thereafter, **Davis** set out to shield his assets from the reach of **Dowling's** judgments. **Davis** hired **Piper** a firm**,** to represent him in the purchase of a home and deposited monies with **Davis** for that purpose. Based on an "Agreement Letter," **Davis** and his wife authorised **Piper** to allocate $100,000.00 of that money as a retainer.

[31] The agreement said in part:

> *"These funds will be applied towards payment of the ..... monthly invoices containing entries with respect to the above referred matter and will be subject to repayment by us if the amount of our fees for the work done and costs incurred that remain unpaid do not equal the amount of the retainer then held by us. Under such circumstances, the balance of the retainer would then be returned to you when our representation of you on this matter ceases. We reserve the right to use any part of the said funds to satisfy a delinquent payment and to discontinue our representation until you forward funds to restore the ..... retainer."*

[32] **Dowling** filed a motion to require **Piper** to turn over all money belonging to **Davis**. **Piper** represented that it was not holding any funds for **Davis** in its trust account. Before the Circuit Court, **Dowling** was granted an order for **Piper** to pay **Dowling** a sum. **Piper** filed a Notice of Appeal. **Piper** argued that the retainer belonged, not to **Davis**, but to the firm.

[33] The Appeal Court was required to determine whether monies paid to **Piper** by **Davis** and his wife in connection to **Piper's** legal representation belonged to the law firm or to its client. The court was of the view that the determination hinged on the terms of the written agreement. The firm argued that the money was an advance payment retainer that became the firm's property when it was paid. **Dowling** said there was a failure by the firm to discharge the burden of demonstrating that the payment was in fact an advance payment retainer.

[34] The Court of Appeal opined of the types of agreements that are generally recognised. The first is the Classic Retainer: "*Such a retainer is paid by a client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer actually performs any services for the client."*

[35] The second type is a "Security Retainer." The funds are not present payments for future services, rather the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned funds are refunded to the client.

[36] The third type of retainer, called the "Advance Payment Retainer." This consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment. If it is an immediate payment for the lawyer's commitment to perform future services – the funds are the property of the lawyer unless expressly designated to constitute security fees.

[37] The court identified certain requirements that were necessary for the Retainer Agreement to provide for an advance payment:

> *"A written agreement providing for an advance payment retainer must contain language advising the client of the option to place his or her money into a security retainer. The agreement must clearly advise the client that the choice of the type of retainer to be*

> *used is the clients alone; provided, however,* ***that if the attorney is unwilling to represent the client*** **without receiving an advance payment retainer, the** ***agreement must so state, including the attorneys' reason there for****. In addition, an advance payment Retainer Agreement must set forth the special purpose behind the retainer and explain why an advance payment retainer is advantageous to the client." (Emphasis mine)*

[38] Advance payment retainer agreements must be in writing and they must clearly disclose to the client, the nature of the retainer, where it will be deposited, and how the lawyer or law firm will handle withdrawals from the retainer in payment for services rendered. Must advise the client of his option to place his money into a security retainer and that the choice of retainer is his alone. However, if the attorney is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state, including the attorney's reasons therefore. In addition, an advance payment retainer agreement must set forth the special purpose behind the retainer. These are required to ensure that the sum is "fair both to the person paying and the person receiving such costs."

[39] Our rules do not address the question of proportionality. I accept that proportionality is not applicable to taxation on an indemnity basis. The Retainer Agreement had the purpose of causing the attorneys to appear at trial for the claimant and not for anybody else. There was no language advising the claimant, of the option to place his or her money into a security retainer or (a) that the client agrees to pay in advance for some or all of the services expected to be performed. (b) that the agreement was not shown to include those features elucidated in **Dowling** for the protection of the client. That the decision refusing the first defendant, the right of cross-examination has a fetter on her ability to discharge the onus placed on her, to prove that the costs are not reasonable. See **Excelsior Commercial & Industrial Holdings v Salisbury Hamer & Johnson (Costs)** [2002] EWCA Civ 879 at [15]. There was a failure to take into the Registrar's contemplation, those relevant considerations pursuant to section 65.17(1) of the Civil Procedure Rules that the sum was reasonable and was

fair both to the person paying and the person receiving such costs. That the fees in the Retainer Agreement were not shown before the Registrar, to represent, any service provided by the attorneys in the conduct of this case. I find it would be unfair and unreasonable to allow the Registrar's Order to stand. I would accordingly vary the learned Registrar's Order by disallowing the recovery of the retainer fee of $5,750,000.00.

Grounds Four and Five

[40] The first defendant is contending that the fees for Professor Rowe, in the sum $1,902,990 and $3,620,700.00 respectively are unreasonable. The first respondent submits that filing of the action was unnecessary, and there was no nexus between the information presented and the claim filed. The first defendant, in dealing with the presumption of reasonableness that clothe the bill of cost, refers to the Final Cost Certificate in **Azan v Stern et al**. In which there were certain similarities, Counsel Dabdoub had appeared in the matter; the issue of dual citizenship was common to both, an attorney-at-law services were retained to research substantiality the same area of law as in the case before the court. In 2009, the cost to prepare the research in **Azan** case was $450,000.00, the research cost in 2010, has been billed in excess of $5,000,000.00. The disparity between the two fees raises a genuine concern. At taxation, one cheque in the sum of $1,800,000.00 issued by Dabdoub & Co., to David Rowe dated 10th November 2010 was in evidence. There is no evidence of anything being achieved by the filing of the law-suit.

[41] Mr. Dabdoub in his written submission at paragraph 83 says *inter alia*: *"Again the Claimant has failed to produce any evidence as to why the fees are unreasonably incurred. Mr. Dabdoub submitted that it was the deceitful behaviour of the first defendant to file a claim denying that she was on the 7th day of August 2007, a citizen of the United States of America which forced the Claimant to have to file a claim in the name of one of his attorneys-at-law in the United States in order to obtain the information from the United States Authorities."*

[42] I find myself unable to agree with Mr. Dabdoub, that the first defendant has failed to produce any evidence that the fees were unreasonably incurred. To my mind, if you were to ask seven ordinary Jamaicans waiting on a bus in Cross Roads, St. Andrew, if they thought it was reasonable to pay ten times the sum that was paid to acquire substantially the same information, that had been garnered one year previously, the answer would be, "No its most unreasonable unless there is some special reason in the second case." The test of unreasonableness is objective. See Lord Hudson, in re **W (an infant)** [1971] AC 682, at 718B and see Lord Hudson at 699H - 700A. The Registrar had no evidence before her on which she could find that such a disparity was justified.

[43] The concern of the first defendant is a genuine one. It begs the question, what has changed? Was the cost reasonably incurred? An assessment on an indemnity basis cannot mean that the receiving party is to be reimbursed, for all costs including those that were unreasonably incurred. Rule 65.17(1) obliges the Registrar to allow a sum that is reasonable and to be fair to both the paying party and the receiving party. Would reasonableness and fairness require an explanation to the paying party for the tenfold increase for a substantially similar service, over the period of a year? The paying party has said that there was no evidence that any information was forthcoming from the launch of the suit. The matter according to the first defendant was neither novel nor complex.

[44] The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly. This entails, saving expenses, ensuring that cases are dealt with expeditiously and fairly. I find that the Registrar failed to consider the relevant factor of the tenfold increase in the research and the necessity of launching a claim in the United States. I would therefore disallow the fees of $3,641,400.00 payable to Professor Rowe for filing a claim in the Federal Court Southern Division.

Registrar Disallowing Cross-examination

[45] An application to cross-examine the claimant was made before me, it was denied. Mr. Dabdoub submitted that the Retainer Agreement cannot be examined pursuant to Section 21(2) of the Legal Profession Act. Mrs. Nesta Clare Smith Hunter

had applied at taxation to cross-examine the claimant. The learned Registrar refused the application. I also, refused to grant the Order for the cross-examination of the claimant at this hearing, on the basis that the mandate of this court pursuant to Section 27 (2) is to review the decision of the Registrar varying or confirming the decision. Jones J's Order was made for the first defendant to pay all costs of the claimant on an indemnity basis; this had implications for the hearing at taxation as there is a divergence between an assessment on a standard basis and on an indemnity basis. The main areas of differences are explained by Woolf CJ, in **Excelsior Commercial & Industrial Holdings v Salisbury Hamer & Johnson (Costs)** [2002] EWCA Civ 879 at [15] in this way:

> *"The differences are two-fold. First the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of standard order, the onus is on the party in whose favour the order has been made.* ***In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made****. The other important distinction between a standard order and an indemnity order is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matter in issue, this requirement for proportionality does not exist in relation to an order which is made on the indemnity basis. This is a matter of real significance. On the other hand, it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of the costs which are payable in consequence of litigation. On the other hand, an indemnity order means that a party who has such an order in their favour is more likely to recover a sum which reflects the actual costs in the proceedings." (Emphasis mine)*

[46] The first defendant carries the onus of proving that the orders are unreasonable. Counsel for the first defendant, has said that the Bill of Costs was prepared based on the instructions in the retainer letter. It was further submitted that the paying party should be given all the opportunity to challenge this bill, without which, the first defendant is limited in discharging the onus of proving that the cost claimed is either

unreasonable or unreasonably incurred. The Registrar in the absence of cross-examination could have lost an opportunity, to determine what was "just and reasonable," in keeping with the overriding objective of the Civil Procedure Rules.

[47] Apart from a right to establish that the costs were not reasonably incurred or unreasonable in amount, there is an unqualified right to cross-examine an applicant pursuant to CPR 30 (3) which states" 'Whenever an affidavit is to be used in evidence, any party may apply to the court for an Order requiring the deponent to attend to be cross-examined. The learned authors, Stuart Sime, **"Civil Procedure," Ninth Edition**, speaking of the practice in interim matters, where the evidence relies soley on affidavit, which is similar to the practice in taxation matters:

> *"In not allowing the usual position is that evidence in interim applications is placed before the court in written form, and no 'live' evidence is called. However, there are occasions where the facts adduced in a witness statement (or affidavit) are seriously challenged, and the court may be persuaded to make an order granting permission to cross-examine the person who signed the witness statement or swore the affidavit. (CPR R32.7 (1)) These matters are only made if there are good reasons to justify the additional delay and expense. If such an order is made, the challenged evidence may be used only if the witness attends in compliance with the order, unless the court gives permission."*

The facts adduced in the claimant's affidavit have been seriously challenged as to their reasonableness in amount and in the manner in which they were incurred. This is a final determination of a matter, and there is a burden on the applicant for cross examination to establish a vital ingredient to prove his case, which could not be done in the absence of cross-examination. The governing principles applicable in these matters to cross-examination should be allowed if the circumstances of the particular case so requires, as it does in this case.

[48] I find that the learned Registrar erred in not allowing the claimant to be cross-examined, the inability to cross-examine the claimant, would have hampered and restricted the first defendant's ability to properly present and prove her case.

I alter the Registrar's Order by disallowing the award of the Retainer Fee of $5,750,000.00. I will disallow the fees of $3,641,400.00 paid to Professor Rowe for filing a claim in the Federal Court Southern Division.

I find that the Registrar's refusal to allow the claimant to be cross-examined, was wrong, and restricted the first defendant's ability to prove her case.

Costs to the first defendant against the claimant to be agreed or taxed.