



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
SUMMARY COURT OF APPEAL**

SCA 32/2019

**IN THE MATTER OF AN APPEAL FROM THE MAGISTRATES' (SUMMARY) COURT IN CAUSE NUMBER SC
06383/2017**

IAIN NIGEL MACKELLAR

Appellant

And

THE UNITED STATES OF AMERICA

1st Respondent

And

H.E. THE GOVERNOR OF THE CAYMAN ISLANDS

2nd Respondent

ON THE PAPERS

BEFORE: Hon Mrs. Justice Marlene Carter (Actg.)

**Parties: Mr. James Austin-Smith of Campbells for the Appellant
Ms. Toyin Salako of Office of the DPP for the 1st Respondent**

Draft circulated: 17 October 2022

Further written Submissions: 11 November 2022 and 12 December 2022

Judgment Delivered: 10 January 2023

TAXATION OF BILLS OF COSTS

Background

1. On 9 March 2020, following an appeal from the Summary Court, the Grand Court discharged the extradition order made against the Appellant on the basis that it would be oppressive to extradite him to the United States of America on the grounds of his serious and life-threatening illness.
2. On the 28 August 2020 Dobbs J. (Ag) gave judgment on costs in this matter. The Judge dealt with issues relating to costs submitted by the Appellant and the Respondents. The Judge made the following findings:



- a. that there is a discretionary power to order the Appellant's costs out of public funds pursuant to section 134 of the Extradition Act 2003 (Overseas Territories) Order 2016;
 - b. that any order for costs against either of the Respondents would effectively be coming from the public purse; and
 - c. the Appellant was the successful party and therefore was in principle entitled to costs.
3. The learned Judge also found that because the matter was not treated as a single-issue case by the Appellant when it should have been, there should be a 35% reduction in the costs recoverable by the Appellant. She ordered that the first Respondent was to pay 65% of the Appellant's costs in the Summary Court and in the Grand Court.
4. Regarding the assessment of those costs, this court acting as taxing officer has paid particular attention to paragraphs 48-53 of the judgement on costs. Within those paragraphs the judge stated at paragraph 50, referring to the note prepared by counsel for the Appellant as a suggested approach to the assessment of costs:

"Having set out the procedure under the GCR, which is the system used in civil proceedings in the Cayman Islands, two possible routes were identified, to avoid the risk of double discounting in the event that the court made an order for a proportion of the Appellants costs. The court could order the taxing master to disallow costs which are obviously unrelated to the proceedings or which are manifestly unreasonable. The alternative is to order that costs be taxed on the indemnity basis which is the basis the Appellant has advocated in the submissions. Should the court make an order on the standard basis, it is submitted that it was appropriate to certify that the proceedings were unusually complex and important and that the maximum hourly rates allowable in the financial services division are to apply."

5. The learned judge ordered: *"The costs will be assessed on the standard basis. The taxing master should avoid double discounting and only disallow costs which are quite clearly unrelated to the proceedings or manifestly unreasonable. No further discounting should be engaged in."*
6. The court went on to certify that *"the case was unusually important. It concerned the life-threatening illness of the Appellant and the right to life and related issues. It was also complex, although not perhaps unusually complex, but certainly on a par with a financial services division case. Accordingly, those rates should apply and the lawyers' fees should be assessed by reference to the actual rates charged."*



7. The Respondents were given the opportunity to comment on the approach suggested by Appellant noted at paragraph 49 of the judgment. Neither of the Respondents, though given that opportunity, made submissions on this approach and I bear that in mind as I go forward with regard to the objections raised by the first Respondent on this taxation of costs.

Interim Costs Certificates

8. The Appellant has submitted two Bills of Costs for the hearing in the Summary Court and in the Grand Court. With regard to the Magistrates' Court proceedings the total claimed after deduction of 35% is \$753,392.34. The Bill of Costs submitted for the Grand Court proceedings after the 35% deduction is the sum of \$518,695.51.
9. The 1st Respondent in its Statement of Objections, while not agreeing with the total sum set out in the Bills of Costs, accepted that some of the costs in the Summary Court proceedings were payable. At paragraph 9 it was stated as follows:

"9. In summary, the Applicant accepts that the total costs in the Summary Court proceedings in this matter should amount to US\$624,713 with 65% payable by the Applicant amounting to US\$406,064."

10. Regarding the Grand Court proceedings, the 1st Respondent in its Statement of Objections noted:

"7. In summary, the Applicant accepts that the total costs in the Grand Court proceedings in this matter should amount to US\$645,354 with 65% payable to the Applicant amounting to US\$419,480.25."

The sums payable to the Appellant on the Bill of Costs are not less than what the 1st Respondent has identified as being at least payable. This court ordered that interim costs certificates should be made in those sums. The interim orders were in the amounts of US\$406,064.00 and UD\$419,480.25 respectively.

The objections to the Bill of Costs

11. The first Respondent submitted objections to each of the Bills of Costs. Most of the objections noted therein are the same with respect to each of the Bills. The responses of the Appellant to



the objections are also in almost identical terms. The objections relate to one or more of the following issues dealt with hereunder.

Issue 1 – Basis of taxation

12. In its statement of objections to the Bills of Costs the first Respondent stated that the judge ultimately ordered

- a. *“The costs will be assessed on the standard basis.*
- b. *“The court certifies that the case was unusually important... certainly on a par with a Financial Services Division case. Accordingly, those rates should apply and the lawyers’ fee should be assessed by reference to the actual rates charged.”*
- c. *“With regards to the costs of taxation hearings: whatever the usual rule is regarding such hearings should apply.”*

13. In its response to this paragraph of the objections the Appellant noted the provisions of section 134 of the Extradition Act and the broad discretion given to the judge thereunder. The Appellant submitted that the Grand Court Rules (“GCR”) do not apply to extradition proceedings, a fact accepted by the judge. At paragraph 35 of the judgment, it was stated as follows:

“There are guidelines in existence in relation to the taxation of costs in the Cayman Islands, but they do not relate to criminal cases¹. No authority or Practice Direction has been drawn to my attention to demonstrate that the court has the power to order that the costs be capped to Legal Aid rates. Whilst a taxing master might disallow certain costs, that is not the same as a blanket cap on the rates allowable. The knowledge that there was an additional financial risk in relation to costs when engaging lawyers privately – risk over and above the usual risks of litigation and what is contained in the guidelines – is something which, as a matter of fairness, would need to be explicit and clear in my judgment. A client needs to know what the risks are, in order to be able to make an informed choice. “

14. The Appellant submitted that the 1st Respondent’s statement of what the judge “ultimately ordered” was “missing context” and failed to mention the most important ruling that the court

¹ Practice Direction 1/2011



made and its clear directions to the taxing officer. The Appellant in this regard highlighted the qualifications noted by the judge. Regarding this context the Appellant submitted:

“This is not, therefore, simply a standard basis civil taxation but one subject to the Important qualification that:

- (i) The Taxing Officer should avoid double-discounting; and*
- (ii) Must only disallow costs which are either unrelated to the proceedings or manifestly unreasonable; and*
- (iii) Must not discount the costs further.”*

15. The Appellant submitted that the aim of awarding costs in extradition proceedings, to compensate for expenses properly incurred, were different from that of the GCR which was intended to allow the successful party to recover only reasonable costs incurred by him on the assumption that the proceedings were conducted in an economical expeditious and proper manner.
16. The upshot of this, submitted the Appellant, was that the court, cognisant of this difference, specifically directed that the taxing officer shall not discount the costs further and only disallow costs which are either unrelated to the proceedings or manifestly unreasonable. For this reason, upon the taxation of costs, *“there is no test of ordinary reasonableness to apply, the exercise to be carried out is to simply ensure that the expenses claimed (i) relate to the proceedings and (ii) are not manifestly unreasonable. Any other approach would lead to double discounting which the court has expressly directed the taxing officer shall not do.”*

Court’s conclusion

17. Taxation on the standard basis under GCR: GCR Order 62, r.13 states as follows:

- “(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably 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 paying party; and in these rules the term “the standard basis” in relation to the taxation of costs shall be construed accordingly.*
- (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. I have had the benefit not only of the judgment of the learned judge on costs but also the note which was put before the court by counsel for the Appellant and to which the learned judge referred at paragraph 49 of her judgement. Within that note was the suggestion of an approach to the assessment of costs given that the GCR do not apply. It was suggested that the court should utilise parts of that mechanism, under the GCR in order to assess the costs to be paid.
19. From the judgment this appears to be what the court did as it crafted the appropriate assessment in this case. Paragraph 35 of the judgment as quoted above makes it clear that the court accepted that GCR order 62 r.13 did not apply in this case to the extradition proceedings. The court must be taken to have also been aware that an award on the standard basis was to *allow the successful party a reasonable amount in respect of all costs reasonably incurred.*” It is clearly with this in mind that the learned judge, after stating that costs were to be assessed on the standard basis and that the taxing officer was to *“only disallow costs which are quite clearly unrelated to the proceedings or manifestly unreasonable”* went further to indicate that *“no further discounting should be engaged in.”*
20. This amplification by the learned judge cannot be ignored. This is not standard basis taxation in accordance with the GCR. It is the standard basis as opposed to the indemnity basis sought by the Appellant. The amplification is a clear indication that the learned judge made a determination of reasonableness in making her award to the Appellant of only 65% of his costs

Issue 2 - Actual rates charged.

21. The 1st Respondent submitted that the court’s judgment on this issue was that Financial Services Division (“FSD”) rates should apply, and Lawyers’ fees should be assessed by reference to the actual rates charged. Further that: *“The judges’ reference to “actual rates charged” came about following mention that the lawyers’ fees were in fact less than the FSD rates. Furthermore, to provide no cap on hourly rates is effectively allowing for indemnity costs, which is not what Dobbs J. ordered. Accordingly, the hourly rates charged by the various attorneys should be capped in accordance with FSD rates in Practice Direction number one of 2011.”*



22. The Appellant's response is that the practice direction does not apply to either criminal proceedings or to extradition proceedings and that the court has expressly accepted this. The Appellant referred to paragraph 35 of the judgment which is set out above. The further response of the Appellant is that the taxing officer is not bound by the maximum hourly rates which apply to proceedings in the Civil, Family, Financial Services and Admiralty divisions of the court.

Court's conclusion

23. The court's direction on the issue of lawyers' fees after noting that the case was unusually important and complex and on par with a financial services division case: *"those rates should apply and the lawyers' fees should be assessed by reference to the actual rates charged."* The only rates that the Learned Judge had noted at this point in this part of her judgment on the Assessment on Costs were *"the maximum hourly rates allowable in the FSD"*.
24. As referred to above this court was provided with the submissions of the Appellant to the Learned Judge on the process or approach to taxation which were to a large extent accepted and evidenced in the judgment. The submission before the court on this issue was as follows:

"The hourly rates can be capped on two bases: those applicable to the Civil and Family Division and those applicable in the Financial Services and Admiralty Division. The second are more generous. The Court may order that in Civil and Family cases the more generous caps may apply where the proceedings are "unusually important or unusually complex." In the instant case the hourly rates in the less generous basis would be less than the lawyers' actual hourly rates charged. (The applicable cap in the FSD/Admiralty Decision is however considerably higher than the actual rates charged in this case.) On either basis the successful party cannot recover more than the rates actually charged. Hourly rate caps do not apply to any order made for Indemnity Costs."

25. The Appellant had also suggested regarding hourly rates:

"It is submitted that in order to avoid the risk of "double discounting" by assessing reasonableness twice, the Court could proceed in two possible ways: either it could order that the taxing officer be directed only to disallow costs which are obviously unrelated to the proceedings or which are manifestly unreasonable. Alternatively, it may be easier simply to order that costs be taxed on the Indemnity basis (the court itself, by definition, having already made a determination of reasonableness). Whichever basis is allowed the taxing officer should be directed to allow the Appellant's lawyer's fees to be taxed at their actual hourly rates. It should also be ordered that the full costs of completing the taxation process be allowable (ie not subject to the CI\$2,000 cap.)"



26. And further at paragraph 16:

"If, for any reason the Court determines that the matter should be taxed on the Standard Basis the Court is invited to rule that these proceedings were both unusually complex and unusually important such that the maximum hourly rates allowable in the FSD should apply and direct that the Appellant's lawyers' costs be assessed by reference to the actual rates charged..."

27. While the Practice Direction referred to by the 1st Respondent may not specifically apply, the ruling as to hourly rates has been made with reference to these. It is the approach suggested by the Appellant and adopted by the judge. This is an issue which the Learned Judge was specifically asked to consider. The taxing officer is bound by the maximum hourly rates which apply to proceedings in the FSD, the judge having been asked to note that *"the applicable cap in the FSD/Admiralty Division is however considerably higher than the actual rates charged in this case."*

Issue 3 - Foreign lawyers' fees

28. The 1st Respondent's objection was as follows: *"Work undertaken by foreign lawyers (that is, lawyers not admitted to practise in the Cayman Islands) can only be recovered on taxation where the foreign lawyer has been temporarily admitted in the Cayman Islands and the work was done after the lawyer was so admitted, Order 62 r 18(1). Work which relates to instruction and communication with a foreign lawyer by their local instructing attorney shall be disallowed."*

29. The response of the Appellant is that the expenses recoverable by the Appellant under the Extradition Order are not limited by the application of GCR Order 62 Rule 18. Further that there was no direction from the Judge that foreign lawyers' fees should be disallowed. The Appellant submitted that the remit of the taxing officer in this case is to only disallow costs which were either unrelated to the proceedings or manifestly unreasonable and that the costs for foreign lawyers' fees were neither of these.

Court's conclusion

30. There is no indication in the judgment of the court on this matter that this was an issue which was raised before the judge or that the judge had made a specific indication regarding foreign lawyers' fees. This court must follow what has been expressly accepted and stated in the judgment. GCR pertaining to costs in civil matters do not apply in this case. The only stricture placed upon the



Appellant, the court having determined by its 35% reduction in his costs in the Summary Court and the Grand Court that this was sufficient to reflect the court's determination of reasonableness per section 134 of the Extradition Act, was that the costs claimed must not be manifestly excessive or unrelated to the proceedings.

31. This court is therefore unable to accept that Order 62, r.18(1) applies in this case. The court must be taken to have been cognisant of the fact that the Appellant had the benefit of advice from foreign counsel given the nature of this case. The nature of the issues before the court concerned jurisdictional laws and procedures applicable in the United States.
32. Order 62, r.18 may be seen as an indication of the difficulty for this Court to assess the reasonableness or fees incurred by foreign lawyers whose rates and professional duties are different from that which obtains in the Cayman Islands. However, there are authorities in the Cayman Islands of instances where Order 62 r.18(1) and/or practice directions made consequent thereto applied but a court in its discretion in equity and common law sought to structure an award of costs which it deemed just in the circumstances out with the guidelines derived from that Order.²
33. The 1st Respondent did not raise this issue before the Learned judge when she invited submissions on the matter of the approach to taxation. It has been raised before me now as Taxing Master. Absent clear indication from the judgment that work undertaken by foreign lawyers should not be allowed, I consider that the fees for such work will only be disallowed if manifestly excessive or unrelated to the proceedings.

Issue 4 – The Costs of Preparation of the Bills of Costs

34. The 1st Respondent submitted to that the costs to complete bill of costs should be limited to CI\$2,000.00.
35. The Appellant argued before the judge that the full costs of completing the taxation process should be allowed and so not be subject to the usual cap at CI\$2,000.00. The Appellant argues submits again that given that the GCR do not apply to these proceeding reference should not be

² See *Sagicor General Insurance (Cayman) Limited and another v Crawford Adjustors (Cayman) Limited and others* [2008 CLR 482], per Henderson J. at paragraph 6.



made to same to limit these claimed costs. In any event the Appellant submits that the learned judge's statement that "*whatever the usual rule is regarding such hearings should apply*" at paragraph 51 of her judgment related only to the costs of taxation hearings and not the preparation of the bill of costs itself.

Court's conclusions

36. I agree that the costs of preparation of the Bills of Costs should be assessed with regard to whether it relates to the proceedings or is manifestly unreasonable.

Other objections.

37. Apart from the issues noted above, the other objections in the Bill of Costs are dealt with below:

THE SUMMARY COURT PROCEEDINGS

(i) Kobre & Kim's Bill of Costs

Item 38 – 1.8 hours Conference with Ben Tonner QC – **CLAIM ALLOWED.**

Item 40 – 2 hours Preparing for bail application on 20 December 2017 – **ALLOWED.**

Items 66 & 67 – 2 hours preparing for, and 3.5 hours attending, Grand Court bail appeal hearing – **ALLOWED.**

Item 125 – 1.5 hours Attention to documents to expedite review by legal team – **ALLOWED.**

Item 194 – 0.2 hours Attention to key dates for review by legal team – **ALLOWED**

Item 225 – 2 hours Attend Financial Crimes Unit to collect client's seized belongings and inspect physical documents to locate Merial Agreement – **ALLOWED.**

Item 230 – 0.5 hours Attention to draft correspondence to FCU Office regarding inspection of the client's files – **ALLOWED.**

Item 228 – 0.5 hours Attention to correspondence to expedite review by legal team – **ALLOWED.**

Items 246 & 247 – 0.2 hours and 0.3 hours indexing client information for expedited review by legal team and conferring with FCU regarding release of client's files – **ALLOWED.**



Item 321 – 1 hour Attention to correspondence – **ALLOWED.**

Item 322 – The ODPP concedes the US\$70,000 fee payable to Ed Fitzgerald QC **ALLOWED.**

Item 333 – 0.5 hours – **ALLOWED.**

Item 337 – 0.2 hours Address query received from David Gerger regarding prison visiting hours – **ALLOWED.**

Item 390 – 1.2 hours Travel to and from HMP Northward to meet with client – **ALLOWED.**

Item 392 – 0.5 hours Attention to correspondence to expedite review by legal team – **ALLOWED.**

Item 408 - 0.5 hours Attention to correspondence to expedite review by legal team – **ALLOWED.**

Item 409 – 1 hour Travel to and from HMP Northward to meet with client – **ALLOWED.**

Items 436 & 437 – 0.5 hours & 0.5 hours Attending Court to collect recording of case management hearing and to deliver electronic device to receive copy – **ALLOWED.**

Items 446, 450, 492, 506, 531, 541 & 549 - Attention to correspondence to expedite review by legal team – **ALLOWED.**

Item 451 – 1 hour - Attend court to file application for additional time for service of response to extradition request – **ALLOWED AT ½ TIME CLAIMED - 0.5 HRS.**

Item 516 – 1 hour Travel to and from HMP Northward to deliver packet of documents to client – **ALLOWED.**

Item 532 – 1.3 hours Attend HMP Northward for client meeting to deliver documents, including travel – **ALLOWED.**

Items 553, 561, 566 & 568 – Administrative Charges – **ALLOWED.**

Items 554-560 & 562-565 – Quinn Emanuel’s disbursements – **ALLOWED.**

Item 567 - \$84.15 – **Conceded.**

(ii) Campbells’ Bill of Costs

Item 573 – 1.5 hours travelling to HMP Northward for conference with Dr MacKellar. Taking instructions – **ALLOWED.**



Item 587 -0.25 hours Email to Doughty Street – **ALLOWED.**

Items 1089, 1092, 1094-1100, 1113, 1134, 1149, 1150 – These items relate to banking issues which arose as a consequence of the proceedings brought against the Appellant – **ALLOWED.**

Items 1223-1225, 1252-1259, 1262- 1264 – Disbursements charged by Gerger Khalil & Hennessy LLP – **ALLOWED.**

Items 1238 & 1242 – Provisions and sustenance for leading counsel during hearing – **ALLOWED.**

Item 1243 – Campbells photocopying and printing charges – **ALLOWED.**

Item 1264(a) – HUT incurred charges provided bail bond. These expenses incurred by the Appellant relate to the bail bond paid pursuant to an Order of the Court. The amount of the expenses incurred was prescribed by the amount of the bail bond - **ALLOWED**

Item 1265 -1270 – Legal Expenses incurred by Butterfield Bank and charged to the Appellant - **ALLOWED**

THE GRAND COURT PROCEEDINGS

Various Items - "*Relates to Second Respondent against whom no costs are ordered*" – This Objection is raised in respect of any item which relates (partially or in full) to the Second Respondent, represented by the Attorney General.

The First Respondent was ordered to pay 65 % pf the appellant's costs in the Grand Court and in the Summary court. These are the costs of *the proceedings*. Absent an indication from the Judgment on Costs that the costs payable by the First Respondent are limited to issues relevant only the First Respondent, the Second Respondent played an active role in the proceedings and the costs "*of the proceedings*" include any such costs. All items for which there is such an objection only are **ALLOWED.**

Items 358-359 – 0.25 hours phone call with CIMA and 0.25 hours phone call with Appellant – **ALLOWED.**

Items 656, 658, 661, 662 – **ALLOWED.**

Items 864-865 – 0.5 hours and 1 hour call with Appellant and professional adviser re: banking options and note - **ALLOWED**

Items 878-880 and 887 – 1.5 hours (in total) Liaising with Cayman Compass – **NOT ALLOWED.**

Items 905-906 – 0.75 hours (in total) – Advising on banking issues – **ALLOWED.**



Item 911 – Considering and responding to Objections filed – **ALLOWED.**

Item 918 – \$122.56 - **Conceded.**

Items 923, 928-930, 953 and 957– Disbursements charged by Gerger Khalil & Hennessy LLP – **ALLOWED.**

Item 952 - Campbells photocopying and printing charges – **ALLOWED.**

Supplemental Bills of Costs

Additional fees charged to the Appellant by Butterfield Bank previously undisclosed and not available at the time of the submission of the Appellant’s Bill of Costs to include costs incurred in connection with the return of the bail bond – **ALLOWED.**

Costs of the Taxation Process now updated

The amount claimed by the Appellant is not sought merely for preparation of the Bill of Costs. Costs of the appellant to include work done by Campbells from 25 May 2021 to 11 December 2022, a large proportion of which included communication, correspondence and interface with the ODPP’s office are costs which related to the proceedings and are not manifestly unreasonable – **ALLOWED.**

Conclusion

38. I have received mathematical calculations that reflect the determinations on the various issues raised on this taxation from the Appellant. Those final figures inform the final orders upon this taxation. They are:

(i) Costs taxed in the Magistrates/Summary Court

- i. Total sum calculated at **US \$1,159,178.85.**
- ii. Percentage of which payable by the First Respondent at 65% is **US \$753,466.25.**
- iii. Sum paid out on Interim Costs Certificate in the sum of **US \$406,064.09.**
- iv. Balance of costs due to be paid in the sum of **US \$347,402.16.**

(ii) Costs taxed in the Grand Court

- i. Total sum calculated is **US \$796,237.33.**



ii. Percentage of which payable by the First Respondent at 65% is **US \$517,554.26.**

Additional Costs

iii. Costs of the taxation process **US \$48,139.38.**

iv. Additional costs of and occasioned by the return of the bail bond and Butterfield Bank further fees, payable by the First Respondent at 65% in the sum of **US \$65,752.95.**

v. Total Grand Court Taxed Costs = **US \$631,446.59** (\$65,752.95 + \$517,554.26 + \$48,139.38).

vi. Interim Costs Certificate already paid in the sum of **US \$419,480.25.**

vii. Balance to be paid in the sum of **US \$211,966.34.**

A handwritten signature in blue ink, appearing to read "Marlene I. Carter".

Hon Mrs. Justice Marlene I. Carter
Judge of the Grand Court (Actg.)