

Smart Trike Mnf Pte Ltd v Fung Kwok Hoi

22 March 2019

Court of First Instance

CFI

High Court Action No 1989 of 2014

HCA 1989/2014

Citations: [2019] HKCFI 671  
[2019] HKEC 885

Presiding Judges: Master J Wong in Chambers

Phrases: Civil procedure - costs - taxation - review

Counsel in the Case: Mr William Leung of Messrs. William K W Leung & Co, for the 1st plaintiff (the receiving party)  
Mr A Wong (LCD), instructed by, Messrs. Joseph Leung & Associates, for the defendants (the paying party)

REVIEW OF TAXATION:

Master Wong in Chambers

Introduction

1. This is a review of taxation.

Background

2. Briefly, for the present purpose, it suffices to understand that, in the course of suing other defendants in HCA 847/2013 (called as "the related action") for, inter alia, breach of contract and infringement of intellectual property rights, the 1st plaintiff commenced the present proceedings in 2014 against both defendants herein for, among others, offering to sell some infringing products. It further obtained a summary judgment against both defendants on liability with costs.

3. The 1st plaintiff filed its bill claiming for about 1.5 million. The defendants prepared their list of objections and the bill was set down for taxation with 1 day reserved.

4. About 2 months before the taxation date, the 1st plaintiff sought leave to amend the said bill. There were quite some amendments made by the 1st plaintiff and the total sum claimed became more than 2.3 million. A master allowed the application and awarded costs to the defendants. Leave was also granted to the defendants to amend their list of objections.

5. The taxation came before me on 15 January 2018. However, almost the whole of the morning was taken up by some (unnecessary) preliminary matters, including whether the 1st plaintiff should be allowed:

to put in a supplemental bill 1 ,

to rely on a written skeleton 2 only handed up at the taxation hearing, and

to report to the court for about half an hour of items to be withdrawn from the amended bill.

Taxation was left part-heard. The receiving party said that one more day was needed when the paying party estimated three. I decided to reserve for 2 more days. Before parties left, the court reminded them of their obligation to narrow down items in disputes as per Practice Directions ("PD") 14.3.

6. The taxation was later resumed on 9 and 10 August 2018. Parties reported that global settlement had been attempted but was not successful. There was however no narrowing down of a single item in dispute on the remaining bill. It turned out that the matter had to be adjourned part-heard again.

7. Thereafter, the matter was further dealt with on both 19 and 30 October 2018.

8. At the end of the 5th day of the taxation, regarding the costs thereof, after hearing submissions, I was not persuaded that the attendance of a solicitor (Ms Yam for the 1st day and Mr Leung for the remaining 4 days) was needed and adopted a hypothetical approach that, with the supervision of the solicitor-in-charge, Mr. Leung, the matter should and could have been handled by a law costs draftsman ("LCD"). For work done before and after 1 January 2018, I allowed Mr Leung at the hourly rates of \$4,000 and \$5,800 respectively. As to the hypothetical LCD, it was \$1,600 and \$1,800. I further ordered the receiving party should only be entitled to half of the costs of taxation because of a number of unsatisfactory problems which unnecessarily lengthening the hearing of it.

9. After taxation, under o. 62 r. 33 (2) of the Rules of High Court ("RHC"), parties have 14 days to apply for a review of any items thereof. One day before the deadline, on 13 November 2018, the receiving party wrote to this court informing that they wanted to apply for review of item 11 of costs of taxation.

10. This court replied on the following day:

"Please take out appropriate inter-parties summons for review (see Reasons for Judgment of CACV 113/2006 dated 28 October 2016)"

11. It was only about 1 week later, on 21 November 2018, the receiving party issued the present summons for review. I dealt with the call-over on 12 December 2018. Upon hearing parties' argument, I allowed the application in principle, notwithstanding that the application came late. I also directed them to deliver and file the objections and answers (if any) respectively according to o.62 r. 33 (3) and (4) RHC. The review would be restored before me with 1 hour reserved.

12. A few days before the scheduled hearing for review, the receiving party attempted to fix two summonses returnable before the scheduled day, one for interrogatories and the other, leave to include more items for review. The summonses were referred to me. In light of the development of the above matter, including that only one hour was estimated/fix and the substantive hearing of the review was a milestone date after our civil justice reform, I declined to allow these 2 summonses to be fixed to be heard at the same time of the review.

13. Parties appeared before on 26 February 2019 for the substantive argument on the review of taxation.

#### Preliminary matter

14. Mr Leung, for the receiving party, started by an oral application to include five more items of review (Item I of Section B2 and Item 10B to 10E of Section C). Mr Wong, LCD for the paying parties, strongly opposed it. By the present decision, I dismiss such application.

The application is very late. From the deadline of 14 November 2018, it has been over 3 months.

For the 1st item (Item I of Section B2), it was a claim of \$19,980, being fees paid to an agent for an investigation report. At the taxation, I taxed it down by about half (\$9,980) because the report was done for investigation of a number of infringing products. I took the view that half of it should go to the related action. Mr Leung said that it was indeed solely prepared for the present proceedings. Ms Yam was not aware of it and did not inform me at the taxation. Hence, the deduction should be re-visited. He also brought the original of the report and the invoice to support his proposition.

Upon reading the report, I do not think that it supported the case of Mr Leung. Further, the invoice (with certain parts covered up for unknown reasons) does not help him either. Last but not least, as pointed out by Mr Wong, at the time when I made the deduction at the taxation, the court was provided with all correspondence between parties. However, they

were not available at the review.

Regarding the remaining four items (Item 10B to 10E of Section C), they are costs of the fee earner(s) regarding preparation time for the taxation and its resumed hearings. Mr Leung explained that they should have been included together with item 11 in his summons for review. It was an oversight not to do so. He said that the crux of his review lied in "Should the taxation warrant the presence of a solicitor?" and items 10B to 10E all touched on the same issue and should form part of the review.

I respectfully disagree.

Mr Leung's letter of 13 November 2018 referred to one single item, namely, item 11.

The summons prayed for a review of item 11.

The supporting affirmation talked about item 11 only.

The skeleton submission of Mr Leung prepared for the call-over hearing on 12 December 2018 also referred to item 11 only.

If it was something having escaped the attention of Mr Leung for four times, he probably had himself to blame.

After all, as I will demonstrate later, I do not agree that the presence of a solicitor was helpful to me at the present taxation. Hence, even though I would allow the inclusion of these late items as a matter of procedure, it does not affect the final result of the review.

#### The review

15. I now return to Item 11 of Section C of the amended bill. I will spend some time to explain how this court dealt with the costs of taxation.

16. I started to dismiss the summons issued by the receiving party to seek leave to add a supplemental bill to cover further costs of taxation. This was not the usual way how this court decided on the matter. As a matter of usual practice, at the time of drafting the bill, the drafter would include certain usual costs to be incurred and provided for 4 . Depending on the development of the matter, appropriate additions and deductions were to be made. Mr Leung did not and could not submit any valid ground to support that the supplemental bill (7 pages with an addition of costs of about \$350,000) was necessary.

17. I then made the following rulings.

|  | Claimed                  | Allowed  |
|--|--------------------------|--|
| 1. Drafting the Bill of Costs                      | Costs Clerk - 24 hours   | LCD - 24 hours   |
| 2. Approving the Bill of Costs                     | Mr Leung - 2 hours       | Mr Leung - 1.5 hours   |
| 3. Considering List of Objections                  | Mr Leung - 1 hour        | Mr Leung - 1 hour  |
| 4. Communications for settlement                   | Mr Leung - 2 hours       | Mr Leung - 2 hours   |
| 6. Taking instructions on settlement 5             | Mr Leung - 3 hours       | Mr Leung - 1.5 hours   |
| 7. Drafting application to set down for taxation   | Costs clerk - 15 minutes | LCD - 15 minutes   |
| 8. Perusing directions from taxing Master          | Costs clerk - 15 minutes | LCD - 15 minutes   |
| 9. Writing letter to fix date                      | Costs clerk - 5 minutes  | LCD - 5 minutes  |
| 10. Reviewing files and preparing taxation bundles | Costs clerk - 3 hours    | 10A: LCD - 11 hours<br>10B: LCD - 2 hours<br>10C: LCD - 2 hours<br>10D: LCD - 1 hour<br>10E: LCD - <u>1 hour</u><br>17 hours |
| 11. Attending court for taxation                   | Costs clerk - 3 hours    | LCD - 25 hours for the 5 days of   |

|                           | Claimed                  | Allowed<br>taxation      |
|---------------------------|--------------------------|--------------------------|
| 12. Checking calculations | Costs clerk - 30 minutes | LCD - 4 hours            |
| 13. Drafting allocatur    | Costs clerk - 10 minutes | LCD - 10 minutes + \$294 |
| 14. Attendances           | No claim                 | \$(110 + 50 + 110 + 440) |

18. I made the above decision on the hypothetical basis that the bill should have been dealt with by a LCD, and supervised by Mr Leung.

19. I further taxed off the whole of the taxation costs by 50% as because of the following features.

On the first day of taxation, certain time was wasted to argue the skeleton submissions handed up to the court without prior notice to both the receiving party and the court. Ms Yam eventually conceded to withdraw the same.

Notwithstanding leave had been granted by the court to amend the bill, the amended bill further contained mistakes of which Ms Yam took about half an hour only to orally report those withdrawn items.

The taxation bill was not prepared in accordance with the format as laid down in Appendix B of Practice Direction ("PD") 14.3. Notwithstanding the said amendment of the bill and oral reported withdrawal of items, during the taxation, it was discovered from time to time that there was duplication of items. Some items were related to the main action only. Some items had been taxed by summary assessment. Some items were indeed costs awarded to the paying party.

There was no narrowing down of a single item in the amended bill as stated by paragraph 4 of PD 14.3, even after express reminder by the court on 15 January 2018.

20. Mr Leung said that the present taxation was complicated and difficult. The paying party argued that the receiving party could only recover half of the costs common to both plaintiffs. All communications among his firm, counsel and clients were objected ferociously and as such Ms Yam and he had to attend to make very detailed submissions.

21. I was not so persuaded at the taxation and remain of the same view at the present review.

22. I dealt with costs of taxation upon a hypothetical basis. It is wrong and/or not appropriate to single out item 11 from the whole.

23. Indeed, it was my assessment that the bill/amended bill, if properly drafted and some of the issues properly (like correspondence among parties) narrowed down, should have been concluded within half of the time actually spent herein.

24. Mr Leung referred me to the case of Acting Registrar Au-Yeung (as she then was) dated 9 August 2008 in FACV No 3 of 2006. I have no quarrel with Mr Leung on the ratio of the case, namely, the taxing master may in appropriate case allow the attendance of a solicitor (rather than a LCD) in taxation. I indeed often do so and allow some time (say a few hours) for the solicitor-in-charge to attend the taxation to explain to me some special features of the case and/or argue on some legal or factual issues affecting the taxation generally.

25. However, in my view, the present taxation did not justify the presence of Ms Yam and/or Mr Leung. Alternatively, their presence did not provide useful assistance to me.

Ms Yam was not the solicitor-in-charge of handling the conduct of the case.

Although Mr Leung did play a significant role in the case, the complexity of the case could be understood from the written decision of the Judge when he granted summary judgment to the plaintiffs on 22 June 2016.

It is true that the paying party argued that common costs should be apportioned 50:50 between the 1st and 2nd plaintiffs. However, with another written decision dated 18 January 2017 by the Judge to deal with the position of the 2nd plaintiff, including in particular the comment that "... To me, the extra costs of having the 2nd Plaintiff in the proceedings are quite minimal... 6 ", I had no difficulty to reject such suggestion by the paying party and ruled that only 2% be taxed off from Sections A and B of the amended bill because of the involvement of the 2nd plaintiff. With or without Mr Leung, I would make the

same decision.

Last but not least, given the presence of so many hiccups having identified earlier, with all respect, if the matter were handled by a LCD, it would have been conducted in a more efficient and effective way.

#### Costs of the review

26. Parties agreed that costs should follow the event. They also agreed that gross sum assessment would be appropriate. Here is it.

|                         |               |
|-------------------------|---------------|
| Solicitor (\$5,800 x 2) | 11,600        |
| LCD (\$1,800 x 10)      | <u>18,000</u> |
|                         | 29,600        |

#### Conclusion

27. To conclude, I make the following order.

The review is dismissed.

The receiving party do pay the paying party costs of the review, including costs reserved, in the assessed sum of \$29,600. Such costs order nisi will be made absolute after 14 days from the date hereof.

1The relevant summons was later dismissed by me at the end of the taxation.

2After discussion/argument, Ms. Yam (solicitor for the receiving party) decided not to rely on her written skeleton.

3See paragraph 19 (a) to (d) of the present decision.

4Like costs in considering the list of objection, taking instructions for settlement/narrowing down of items in dispute, reviewing files and preparation of taxation bundles, attending court for taxation, etc.

5Item 5 of the amended bill did not contain any particulars or claim at all. No ruling was therefore made.

6Paragraph 8 thereof