



IN THE SUPREME COURT OF BERMUDA  
CIVIL JURISDICTION  
2006: No. 31  
(Commercial List)

BETWEEN:

ALLISON THOMAS

Appellant

-v-

FORT KNOX BERMUDA LIMITED

Respondent

**REVIEW OF REGISTRAR'S TAXATION**

(in Chambers)

Date of hearing: September 10, 2014

Date of Judgment: September 11, 2014

Mr. Mark Diel, Marshall Diel & Myers Limited, for the Appellant/Plaintiff

Mr. Ben Adamson, Conyers Dill and Pearman Limited, for the Respondent/Defendant

**Introductory**

1. The Appellant appeals against the decision of the Registrar on or about June 19, 2014 that it was open to the Defendant to tax its costs awarded by me on October 1, 2010. The interpretation of that Order was disputed at an earlier hearing on May 28, 2014, and the Registrar administratively sought my guidance on the meaning of the Order. Based on my administrative indication, she resolved the dispute against the Appellant, the paying party without hearing full argument.

2. I was unable to deliver an ex tempore judgment due to the extremely loud drilling noise emanating from construction works on the third floor of the Government Administration Building, which impeded clear hearing, speaking and thinking. Mr Diel aptly characterised the noise as a legal nuisance. After reserving judgment, the nuisance thankfully abated in sufficient time to enable me to prepare the present short ruling.

### **The Costs Order**

3. The October 1, 2010 Costs Order, drafted by the Respondent's counsel, provided as follows:

*“2. The Plaintiff to pay the Defendant's costs, taxed if not agreed. Enforcement stayed pending further hearing to be listed on the first available date in October 2011 or following determination of the Plaintiff's section 111 petition, if earlier.”*

### **Submissions of Counsel**

4. Mr. Diel, ironically, as his client on October 1, 2010 was seeking to delay his obligation to pay these costs until after the section 111 petition had been determined, submitted in essence as follows:
  - (1) taxation of costs was not stayed at all by the words “enforcement stayed”, as a matter of construction of the Costs Order;
  - (2) the Court had no power, in light of Order 62 rule 29 (1) and in the case of a final costs order, to postpone the commencement of taxation beyond the standard six months from the date of the order awarding costs, in any event. This extension power was vested in the Registrar alone under rule 21 and no such application had been made;
  - (3) the six months' period for commencing taxation expired on April 1 2011, or a year later if taxation was stayed at all by the second sentence of the Costs Order. The Order mandated a further hearing on the duration of any stay in October 2011.
5. Mr. Adamson rightly pointed out that substantial justice favoured the receiving party, as the paying party had escaped paying costs since October 1, 2010, without any liability for interest. The Court's powers on a review were generous, and if the Registrar was entitled to extend time, so was a judge on review from her decision. As for the construction of the Order, he submitted that taxation of costs was stayed and that as no hearing took place in October 2011, there was no crystallizing event which lifted the stay until February 2014, when the petition was finally determined.

## Findings

6. The purpose of the stay, and the requirement of a hearing in October 2011, was to enable the Court to decide whether, in light of progress made by the Appellant in prosecuting his petition, the stay should be lifted or continued for a further time. Mr. Adamson is correct that as that hearing never took place, the stay remained in place until the determination of the petition. I had initially verbally articulated an order more favourable to Mr. Adamson's client according to which the stay would have automatically lapsed on October 1, 2011, but did not want to exclude the possibility of extending the stay if the section 111 proceedings were on the brink of being concluded at that juncture.
7. I was regretfully wrong to signify administratively to the Registrar: "*Time starts running from Feb 2014*". She should have been left to determine the meaning of the Order after hearing counsel. Having listened to the electronic record of the conclusion of the October 1, 2010 costs hearing, there is nothing to support the proposition that, in staying enforcement, I intended to stay taxation as opposed to merely enforcement of the obligation to pay pursuant to an order of taxation. Mr. Diel is quite right that the scheme of the Rules suggests that a trial judge does not have that power. That power is conferred on the Registrar by Order 62 rule 21:

*“(1)The Registrar may—*

*(a) extend the period within which a party is required by or under this Order or by the Court to begin proceedings for taxation or to do any thing in or in connection with those proceedings on such terms (if any) as he thinks just; or*

*(b) where no period is specified by or under this Order or by the Court for the doing of any thing in or in connection with such proceedings, specify the period within which the thing is to be done.*

*(2)The Registrar may extend any such period as is referred to in paragraph (1) of this rule although the application for extension is not made until after the expiration of that period.”*

8. Order 62 rule 29 provides as follows:

*“(1) Where a party is entitled to recover taxed costs or to require any costs to be taxed by the Registrar by virtue of—*

*(a) a judgment, direction or order given or made in proceedings in the Court; or*

*(b) rule 5(3), (4) or (5); or*

(c) *an award made on an arbitration under any Act or pursuant to an arbitration agreement; or*

(d) *an order, award or other determination of a tribunal or other body constituted by or under any Act,*

*he must begin proceedings for the taxation of those costs within six months of conclusion of the cause or matter in which the proceedings arise unless the Court when making an order for costs orders that costs ought to be taxed at an earlier stage under rule 8(2). In cases to which sub paragraph (b) applies he must begin proceedings for the taxation of those costs within six months after service of the notice given under order 21 rule 2 or order 22 rule 3. Where there is an appeal of any judgment, direction, order, award or of any other determination that concludes the cause or matter in which the proceedings arise, a party entitled to recover taxed Supreme Court costs must begin proceedings for the taxation of those costs within six months after the final determination of the appeal.* [emphasis added]

9. Order 62 rule 9 of our Rules is a *sui generis* provision and no great assistance as to its meaning can be gleaned from the commentary on Order 62 rule 29 of the *English Supreme Court Practice 1999*. For instance, under those rules “*taxation of costs is not stayed pending appeal*”: paragraph 62/30/9. On a straightforward reading of our own rule, however, Order 62 rule 29 contemplates that the Court will either order interlocutory costs to be taxed forthwith under rule 8(2) or that taxation will take place within six months of the conclusion of the proceedings. Where there is an appeal, there is an automatic stay until the appeal is determined. In the normal course, therefore, one would not expect a trial judge to be making an order interfering with timetable for commencing taxation. The power to extend time in this respect is expressly conferred upon the Registrar by rule 21(1).
10. I would not construe the Rules as excluding altogether the Court’s inherent jurisdiction to grant a stay of taxation proceedings, for instance, pending an application for leave to appeal or in other peculiar circumstances where such a stay may be just and convenient. But I do find that the scheme of the Rules is such that a costs order which merely stays enforcement cannot properly be construed as, by implication, overriding the scheme of Order 62 and staying the obligation to commence taxation proceedings within the time fixed by rule 29 as well. Clear words would be required to justify such a construction and/or such a result.
11. Accordingly, I find that the Registrar’s ruling that time for commencing taxation proceedings, based on my own informally expressed view of the terms and effect of the Costs Order, was wrong in law and liable to be set aside.

## **Discretion to extend time for commencing taxation**

12. It remains for me to consider what consequences should flow from my finding that the Costs Order, properly construed, did not postpone the Respondent's obligation to commence taxation proceedings by April 1 2011. This construction has only been reached on the basis of a technical argument advanced by the paying party for the first time three years after the deadline he contends for had expired. In addition, the contentious stay of enforcement provision was only included in the Order by way of response to the Appellant's request for enforcement to be stayed until after his section 111 petition had been determined. It does not lie in his mouth to complain that he has been substantially prejudiced by the delay.
13. Non-compliance with the Rules, in any event, does not make the any step taken in breach a nullity. Order 2 rule 1 provides as follows:

*“(1)Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”*

14. The Registrar, had counsel invited her to hear full argument, ought to have concluded that the Respondent was required to seek an extension of time for commencing the taxation, on the basis that time started running on April 1, 2011. The discretion to extend time is unfettered; and on an appeal from the exercise of this discretion, a judge can exercise his own discretion anew: Order 62 rule 35(4); *Supreme Court Practice 1999*, paragraph 62/21/1. In the unique circumstances of this case, it was entirely reasonable for the Respondent's counsel to assume that if he did not proceed with taxation until after the Appellant's petition had been disposed of, this would hardly give rise to any complaint on the Appellant's part.
15. The scheme of Order 62 rule 29, moreover, provides a paying party who is aggrieved by the receiving party's delay in proceeding with taxation with a specific remedy: commencing taxation themselves. Order 29 rule 3 provides as follows:

*“(3)Where a party entitled to costs fails to begin proceedings for taxation within the time limit specified in paragraph (1), any other party to the proceedings which gave rise to the taxation proceedings may, with the leave of the Registrar, begin taxation proceedings.”*

16. So where a paying party has sought a stay of enforcement of a costs order until a time which crystallizes in February 2014, and does not advise the receiving party that he will complain of delay if the receiving party does not proceed with taxation within a prescribed time period which expires in April 2011, justice clearly requires that an extension of time should be granted. The position might be otherwise if the

Respondent had not commenced taxation proceedings pursuant to the Costs Order within a matter of weeks after the determination of the Appellant's petition.

17. In the course of the hearing I considered remitting this issue to the Registrar to deal with, but on balance it appeared to me that would likely cause unnecessary delay and a waste of costs.

### **Conclusion**

18. The Appellant has succeeded on the main legal argument and the Respondent has succeeded in the ultimate result.
19. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, I would make no order as to the costs of the appeal.

Dated this 11<sup>th</sup> day of September 2014 \_\_\_\_\_  
IAN R.C. KAWALEY CJ