[2018] JMCC COMM 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. I0006 of 2017

BETWEEN	**RAJU KHEMLANI**	**CLAIMANT**
AND	**SURESH KHEMLANI**	**DEFENDANT**

IN CHAMBERS

Seyon Hanson and Jerome Spencer instructed by Seyon T Hanson & Co for the claimant

Kevin Williams and David Ellis instructed by Grant Stewart Phillips & Co for the defendant

December 20, 29, 2017 and January 4, 2018

CIVIL PROCEDURE – COSTS APPEAL - RULE 65.28 – WHETHER APPEAL WITHIN TIME

SYKES J

The assessment

[1] This case the latest round between Mr Raju Khemlani ('Mr Raju') and Mr Suresh Khemlani ('Mr Suresh'). It seems that there is no end in sight to this bitter dispute. The quarrel between both gentlemen has assumed various forms and guises and is now in its eleventh year.

[2] In March 2017 Mr Raju filed a fixed date claim form seeking the appointment of a receiver so that he could obtain payment of a near JA$8,000,000.00 debt against Mr Suresh. The debt resulted from two claims filed against Mr Suresh. Those claims ended in favour of Mr Raju.

[3] Mr Raju sought to enforce his judgments but the bailiff returned empty handed and declared that he could not find any property of Mr Suresh on which to levy, seize or take. This led Mr Raju to file a fixed date claim form in which he alleged that Mr Suresh had committed an act of bankruptcy and therefore a receiver should be appointed.

[4] This trip to the land of insolvency was ill fated. It came to a disastrous end on July 20, 2017 when Edwards J dismissed the claim with costs of the claim to Mr Suresh 'exclusive of the costs of a three (3) hour application for the claimant to be agreed or taxed.' There was no agreement. There was taxation.

[5] On October 5, 2017 the matter was taxed by one of the Registrars. The final costs certificate was issued on October 24, 2017. It is from this assessment that the appeal is filed.

[6] Mr Kevin Williams for Mr Suresh took the point that the appeal was out of time and since there was no application for an extension of time then the court could not hear the appeal. It is this preliminary issue that needs to be resolved. In making good his submission Mr Williams also took the point that the appeal had no merit therefore no extension of time should be granted.

The rule

[7] Without citing authority it can be said that taxation of costs is the process by which a bill of costs is reviewed in order to determine the amount payable by the paying party to the receiving party. The primary advantage of taxation is that the receiving party has the right of execution to secure payment of the assessed costs once the relevant procedural steps are followed.

[8] In Jamaica taxation is done by the Registrars of the Supreme Court. The process commences by the filing of a bill of costs at the registry by the receiving party and a copy is served on the paying party (rule 65.18 (1)). The rest of rule 65.18 speaks to the time when it must be filed, the content and other matters. The paying party has the right to dispute 'any item in the bill of costs by filing points of dispute and serving a copy on' the receiving party and every other party to the proceedings (rule 65.20 (1)). The points of dispute must identify each item on the bill of costs which is disputed, give the reasons for the objection and state the amount if any which is considered appropriate (rule 65.20 (1)).

[9] All this is the foundation for rule 65.28 (1) which states:

> *The appellant must file an appeal notice in form 29 within 14 days after the date of the decision the appellant wishes to appeal against.*

[10] Both sides are agreed that the Registrar did not announce any final figure at the end of the taxation. Both are agreed that she conducted the taxation by varying the time spent on some aspects of the matter. She did her calculations.

[11] Mr Williams said that although the Registrar did not announce her final figure to the parties her decision was known because it could be derived from the arithmetic articulated by her during the process. Mr Seyon Hanson took the view that there was no decision on October 5, 2017 and so time for appealing did not run from that date.

[12] The Registrar asked the receiving party to file a revised bill of costs to reflect her decisions. Mr Suresh filed his revised bill of costs was filed on October 9, 2017. This revised bill had some inaccuracies and Mr Suresh was required to amend and file a bill with the corrections. This was done on October 24, 2017. This further revised bill of costs met the satisfaction of the Registrar and she issued the final costs certificate.

[13] During the hearing the court was of the view that the expression 'date of the decision' in rule 65.28 (1), in the context of a detailed assessment, meant the date the Registrar announced her final figure. Research subsequent to the hearing has shown that there is authority that has decided otherwise. In the case of **Kasir v Darlington** [2001] 2 Costs LR 228 Popplewell J had to consider when was the date of the decision for the purpose of an appeal from a costs assessment. In that case the taxation continued over several hearing. The costs judge made a number of decisions as he went about the taxation of the bill of costs. The decisions that the claimant wanted to appeal had occurred in May 2000. On October 13 the claimant's solicitors applied for permission to appeal which was refused on the grounds that the application should have been made at the end of the hearing in August and further that the application should have been made to the judge.

[14] The defendants contended that time began in May while the claimant said it was from October 4. At the time of Popplewell J's judgment it was the case that rule 52.4 (b) of the English CPR governed appeals from all courts and there was no specific rule for appeals from taxation of costs.

[15] Counsel for the claimant in **Kasir** submitted – as this court believed – that the 'date of the decision' for the purpose of the rule was the date the final decision on costs was announced. This is how counsel put the argument before his Lordship:

> *If time starts running from every decision that the taxing judge makes, going through a very elaborate bill over three weeks will cause tremendous practical difficulties. It cannot be, he says, that the 14 days can apply in those situations, partly because pragmatically it is impossible to put a notice of appeal in within time, and secondly, until the final determination has been made, the party may not know whether it wants to appeal. It may be that the global result is satisfactory although individual items are not, and until the whole figure has been assessed, a party will not want to waste time by seeking to appeal a decision which subsequent events may show it is to no purpose.*

[16] Counsel for the defendant put his submissions even more succinctly. He said:

> *…firstly that the rules provide that the 14 days start after the date of the decision that the appellant wishes to appeal. What is the decision which the appellant wishes to appeal? It is the three matters to which I have referred. They were dealt with in May. They were not the subject of matters subsequently and therefore the 14 days starts to run from May.*

[17] Popplewell J concluded at paragraph 19:

> *I have come to the clearest possible conclusion that the argument of the defendant in this case is right and that the 14 days starts from the date of the decision in May. The taxing judge thought that August was the right date. I do not agree with that. It seems to me that May is the correct time. Fourteen days have elapsed, and accordingly the claimant is out of time.*

[18] What was the reasoning? His Lordship took the view that each item in the bill of costs required a separate decision and the date of the decision on the specific item was the date from which time began for the purpose of the appeal. Popplewell J also accepted the submission of the defendant's counsel that the duty to give reasons stated in **Flannery and Another v Halifax Estate Agencies** [2000] All ER 373 applied. Even though his Lordship recognised that very often the taxation process is done very quickly with a broad brush approach being taken in the event of appeal it is unlikely that the costs judge will remember precisely what caused him to decide one way or the other.

[19] This decision stood for twelve years until April 2013 when the English rule was changed to read at rule 47.14 (7):

> *If an assessment is carried out at more than one hearing, then for the purposes of rule 52.12 time for appealing shall not start to run until the conclusion of the final hearing, unless the court orders otherwise.*

[20] This new rule and the fact that the decision stood for over a decade suggests that not many thought that Popplewell J got it wrong.

[21] It is noteworthy that the new rule only applies to the circumstance where the assessment is carried out over more than one hearing. **Kasir** applies with full rigour where the assessment is done at one hearing even if no final figure is stated at the end of the taxation.

[22] In the present case the taxation took one day, namely October 5, 2017. This means that based on **Kasir** the decision that the paying party wants to appeal was made on October 5, 2017.

[23] The next obvious implication of **Kasir** is that it is not necessary that the final figure be announced by the taxing officer before the appeal is filed. The finalisation of the certificate is not a condition precedent to an appeal. If that reasoning is applied here, Mr Hanson is very late indeed.

[24] This court had not thought of it that way before but on reading this decision and reading rule 65.28 (2) several times the reasoning makes sense though admittedly in the context of long and complex taxation its application may be cumbersome and lead to multiple appeals from the same taxation if it takes place over several days. The court now sets out rule 65.28 (2):

> *The appeal notice must –*
>
> *(a) specify each item in the taxation which is appealed; and*
>
> *(b) state the grounds of the appeal in respect of each item.*

[25] This court revised its position and agrees with Popplewell J. The conclusion is that Mr Williams is correct when he submits that time began to run from October 5, 2017 and not on October 24, 2017 when the final figure was captured in the final costs certificate. The court will not make a short observation about giving reasons.

Giving of reasons

[26] On the question of reasons it is this court's view that duty to give reasons extends to Registrars but this court is not about to impose any duty on the

Registrars to give long and elaborate reasons. That is not necessary. All that is necessary is some indication such as 'item is/is not reasonably incurred.' If reasonably incurred sum 'is/is not reasonable in amount.' If not reasonable in amount, then indicate what the reasonable amount would be. The Registrar is to have regard to rule 65.17. Those wishing to appeal should adopt a similar wording. That is to say the appellant should identify the item being challenged and state quite briefly what the challenge is. What has been suggested came from **Cook on Costs**. [1]

The appeal

[27] Rule 65.29 states the following:

> *On an appeal from a registrar the judge will*
>
> *(a) re-hear the proceedings which gave rise to the decision appealed against so far as is necessary to deal with the items specified in the appeal notice;*
>
> *(b) make any order or give any directions as he or she considers appropriate.*

[28] A reading of the criteria to be used by the Registrar in quantifying cost shows that she has significant discretion. Rule 65.17 which contains the criteria the Registrar is to use has words and phrases such as 'reasonably incurred', 'reasonable in amount', 'unreasonably incurred', 'time reasonably spent', 'novelty, weight and complexity.' From these words it is clear then that the Registrar is involved in weighing and assessing a number of factors. This imports significant exercise of discretion. A large part of this kind of assessment comes from experience. This

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[1] Cook on Costs 2018. Last updated November 2017.

http://www.lexisnexis.com/uk/legal/api/version1/toc?shr=t&csi=333802&secondRedirectIndicator=true. Accessed on December 24, 2017 @ 2052hrs.

necessarily means that there will always be room for disagreement among reasonable Registrars, lawyers and judges.

[29] What then should the approach of the court be on a taxation appeal? This court agrees with what was said in **SCT Finance v Bolton** [2013] 3 All ER 434 by Wilson J at paragraph 2:

> *This is an appeal brought with leave of the single Lord Justice from the county court in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under CPR 44.3(1). For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely.*

[30] This position was reiterated in **Dixon v Blindley Heath Investments Ltd** [2016] 4 All ER 490, 517. Hildyard J held:

> ***[127]*** *Appeals in relation to costs are discouraged. An appeal court will be particularly loath to interfere with a decision on costs. As Wilson J (as he then was) said (sitting in the Court of Appeal) in* SCT Finance Ltd v Bolton *[2002] EWCA Civ 56, [2003] 3 All ER 434 (at [2]).*
>
> ***…***
>
> ***[128]*** *In other words, the generous ambit within which a reasonable disagreement is possible is at its most generous in such a context.*
>
> ***[129]*** *Nevertheless, the court must be astute to correct plain injustice;*

[31] It is not immediately obvious what is meant by ‘plain injustice.’ Whatever it may mean it is not a cloak for the appellate court substituting its own views on the matter on the basis of ‘plain injustice’ unless it can be shown that the Registrar erred in principle, took irrelevant matters into account and left out of account relevant matters or reached a conclusion that is so unreasonable that no

reasonable Registrar properly applying her mind to the circumstances and the law could have come to the conclusion that was arrived at.

What does 're-hear' mean in rule 65.29 (a)?

[32] In this court's opinion re-hearing means an examination of the Registrar's decision to see whether she identified the relevant principles and considerations, took only relevant matters into account, excluded irrelevant matters and her decision is not so unreasonable that no reasonable Registrar could have come to the conclusion that she did. It is this court's considered view that 're-hear' in rule 65.29 does not mean a hearing in full as if the matter were being heard for the first time and that parties are able to adduce evidence on appeal not placed before the Registrar. The court explains why it has taken such a restrictive view of 're-hear.'

[33] Under this rule the judge can only re-hear that part of the proceedings that gave rise to the decision appealed against. This ties in with rule 65.28 (2) which requires the appellant to specify the item in taxation that is being appealed. The grounds must also be stated. Why? If the grounds are not sufficient to raise any serious issue regarding the Registrar's decision then the appeal either should not be heard or if heard dismissed. The re-hearing is not a second hearing of the taxation but rather a determination of whether the Registrar acted properly and correctly having regard to all the information available to her. What this means is that it is not for the judge to disturb the Registrar's findings unless some error of law or principle, misunderstanding of facts or excluding relevant matters or taking into account irrelevant matters can be shown. If it were otherwise, then the Registrar's taxation would be reduced in status and become pointless because it would only be serving as a dress rehearsal for the second round before the judge dressed up as an appeal. That is not the purpose of Part 65. The intention is that the Registrar's assessment and decision making is to be accorded high respect not because she is infallible but because she is (a) an attorney at law; (b) has

more practical experience that the judges in the assessment of costs; (c) given full responsibility to exercise her discretion.

[34] Why does this court take this restricted view of re-hearing? An examination of Part 65 shows that it provides a comprehensive code for taxation. It sets up the matter perfectly by stating what the bill of costs should contain. It has the points of dispute provision. It has the factors which the Registrar must weigh and assess. The Registrar is given discretion in the weight to be attached to various matters. As noted earlier an appeal against the Registrar's decision should not be lightly entertained. It is also not a matter of using the right formulation of words but there must be substance to the complaint.

[35] Mr Hanson cited the case of **El Du Pont De Nemours &Co v ST Dupont** [2004] IP & T 559. In particular paragraphs 85 – 90. The case reveals that 're-hear' does not necessarily mean that the matter is heard from beginning to end as it was before the Registrar. The meaning depends on the context in which the word appears. A reading May LJ's decision suggests that whether the word 're-hear' carries the meaning of full scale hearing as if the matter was being heard for the first time depends on (a) the respect appropriate to the court or tribunal; (b) the subject matter and (c) those parts of the process that are challenged.

[36] In applying these criteria to rule 65.29 're-hear' the court finds that a restricted meaning is intended. When the May LJ speaks of respect for the tribunal his Lordship means that where the decision maker is one who has unique competence acquired by experience or training or both in an area then a decision made by such a person ought to be accorded high respect. The Registrar is, in the Supreme Court of Jamaica, the specialist taxation officer. Judges don't do assessments. Regarding the subject matter of costs, it is one of the core functions the Registrar. The part of the process being challenged fell exclusively within her discretionary power. When the Registrar makes an assessment, therefore, her decision is not lightly overturned or varied.

Merit?

[37] Mr Kevin Williams took this other point. He submitted that even if the appeal were filed within the time it has no merit and therefore it should not be heard. The evidence on this point is this. At the October 5, 2017 taxation proceedings, Mr Hanson told the Registrar that he had not received pages 2 to 7 of the receiving party's bill of costs. The Registrar took the view that it was inaccurate to say that the missing pages were not received by Mr Hanson. The court will refer to the email chain below. Her reason was that the points of dispute referred to items on page 2 of one of the allegedly missing pages. In other words, the Registrar had no reasonable basis, on a balance of probabilities, for concluding that all the pages alleged to have been missing were indeed missing. Having resolved the factual issue of the missing pages in the way that she did the Registrar proceeded with the taxation.

[38] It should be observed that before the Registrar the submission put to her was that Mr Hanson had not received the pages at all. He did not tell her that he had received them but that his chambers had mishandled them. The mishandling arose after the taxation. Thus what the Registrar had to resolve factually **at the time of the taxation before her** was whether there was any reliable evidence to support the proposition, on a balance of probabilities, that the paying party had not received pages 2 to 7. The Registrar came to the conclusion that since the points of dispute referred to a matter on one of the allegedly missing pages the balance of probabilities favoured the conclusion that all the pages were received. That conclusion was not unreasonable having regard to the material that she had and what was said to her. Having resolved the matter in the way she did the Registrar was obliged to continue the taxation. As shall be seen the Registrar was factually correct on this point.

[39] Mr Hanson, during the course of the taxation, sought to challenge items that were not in his points of dispute. At the hearing, Mr Williams submitted to the Registrar that any items not disputed were taken to be admitted. The Registrar

did not permit Mr Hanson to raise matters not on his points of dispute and the matter proceeded in the normal way. The real point Mr Williams was making was that since Mr Hanson had received the entire bill of costs and had not filed points of dispute there was no rational or reasonable basis for the Registrar to exercise her discretion to permit Mr Hanson to raise points not stated in the points of dispute. Rule 65.23 (6) is important here.

[40] Rule 65.23 (6) would have told the Registrar the following:

> *Only items specified in the points of dispute may be raised at the taxation hearing unless the registrar gives permission.*

[41] This rule expects that the points of dispute is the place where the paying party raises disputes. The rule permits a dispute to be raised even if it is not in the points of disputes. But before this happens the Registrar has to give permission.

[42] The court pauses here to observe that under rule 65.23 (6) the Registrar's discretionary power is not exercised by a coin toss by the rule of reason. She must have some reasonable and rational basis for the exercise of such a power. It cannot be simply because she feels that it would just. That is a conclusion. She would need to be able to articulate rational and reasonable reasons for her decision to permit Mr Hanson to raise points not in the points of dispute.

[43] After the taxation hearing ended there was email traffic between Mr Hanson, Mr Williams and the Registrar. This was between October 6 and October 20, 2017. The court has examined the exhibited emails and has culled the following:

(a) Mr Hanson emailed Mr Williams on October 6, 2017 @ 1216hrs raising the issue of the missing pages 2 to 7 and sought to have the agreement of Mr Williams to reopen the hearing before the Registrar;

(b) Mr Williams' reply of October 6, 2017 @ 1250hrs pointed that Mr Hanson was served with the full bill of costs and the matter having ended on October 5, 2017 there was nothing further to discuss;

(c) Mr Hanson emailed the Registrar on October 6, 2017 @ 1403hrs telling her about the missing pages and how unfair it would be for his client to be treated as not challenging the bill when '[u]pon my return to my office I made various checks as detailed in the forwarded messages below, and my checks revealed that the missing pages could not be accounted for insofar as the scan copy of the documents which was done by my secretary shortly after receipt of some does not have the missing pages, which only came to my attention while I was in Chambers and in the circumstances it would be grossly unfair to my client to treat the contents of the said pages as unchallenged.';

(d) The Registrar responds on October 13, 2017 @ 1539hrs. She apologised for the delay in responding and explained that she was out of office. She promised to respond by October 17;

(e) by email of October 18, 2017 at 1719hrs the Registrar told Mr Hanson that when she examined the points of dispute 'it is clear that you must have been in receipt of page 2 of the bill given that the points of dispute addressed the items under **April 2017** in reference to the fixed date claim form and the acknowledgement of service [and] you addressed items under **May 5, 2017**' and so the question 'therefore is whether you were served with pages 3 – 7.' (emphasis in original). In other words she stuck to the position she took on October 5, 2017;

(f) Mr Hanson responded by email on October 19, 2017 @ 1306hrs. He said to her that 'based on the fact that page 2 was responded to, and is still not accounted for I would not pursue the matter any further in relation to pages 3 – 7 as it would seem that the reason why those pages were not responded to is that they were received and misplaced in the process of reproducing the document resulting in no objection being raised to the contents';

(g) By email dated October 20, 2017 1340hrs the Registrar replied to Mr Hanson by saying that the 'content of your email is duly noted.'

[44] What all this means is that Mr Williams' assertion that Mr Hanson was served with the full bill of costs has not been displaced. The Registrar's assertion that at the very least page 2 was received has not been successfully controverted. Finally, Mr Hanson's response suggests he was not explicitly admitting that the entire bill of costs was received but apparently accepted that some error in his chambers. The email may have been inconclusive in respect of Mr Hanson's position but his affidavit filed in this matter puts the matter beyond doubt.

[45] There is now this express admission by counsel in his affidavit. In the affidavit filed in support of the defendant's appeal Mr Hanson explicitly states at paragraph 47 (b):

> *That I wish to state as follows…:*
>
> *(a) …*
>
> *(b) the failure to object to them was unintentional, and was a direct result of errors within my office in the preparation of the points of dispute, the copying of the bill of costs which was served which resulted in an incomplete copy being returned to me.*

[46] From all this this court concludes on a balance of probabilities that Mr Hanson was served with the entire bill of costs which means that the Registrar was factually correct when she had decided that the full bill of costs was received. It was in this context that she had to decide whether to permit Mr Hanson to raise issues not included in the points of dispute.

[47] For emphasis, Mr Williams submitted that rule 65.20 tells the paying party what he must do. First, the paying party 'may dispute any item in the bill of costs by filing points of dispute and serving a copy' on the receiving party. Second, the points of dispute must

(a) 'identify each item in the bill of costs which is disputed;'

(b) ‘state the reasons for the objection; and’

(c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.’

[48] Mr Williams stressed that the points that Mr Hanson wishes to raise on appeal cannot now be properly argued because he failed to take those points before the Registrar and where he tried, he failed. He submitted that great deference should be shown to the Registrar’s exercise of her discretion because she and the other Registrars are for all practical purposes the taxing master or taxing judge that exists in other jurisdictions. He also submitted that these ladies have great experience in these matters; they are more abreast of current costs and the like. Therefore, a judge should only interfere where the Registrar has made palpable error in law or fact. He closed by saying that no error has been shown in either law or fact in how the Registrar dealt with the matter and it has not been shown that in those areas in which she has a discretion she exercised it improperly. On these bases, Mr Williams submitted that the appeal had no merit.

[49] Mr Hanson sought to escape from these submissions by submitting that there is a duty on the Registrar to assess each item on the bill of costs even if there are no points of dispute. The court does not agree with this. No points of dispute mean that no issue is jointed with receiving party. Mr Hanson submitted that the reason for this was said to be that she still has a duty to ensure that the costs are reasonable. The court reserves its position in respect of self-represented litigants which was not argued before the court. However, in respect of a litigant represented by counsel this court takes the view that if costs are to be disputed then the procedure must be followed. The costs regime ensures natural justice is met by demanding that the receiving party commences the process by filing and serving his bill of costs on the paying party (rule 65.18). Rule 65.18 (3) states that although the bill of costs need not have a particular form or format it must have sufficient detail and information to justify the amount being claimed. It must have the total amount claimed. Once the bill is served then the paying party must, if

that is what he intends to do, file points of dispute thereby indicating what he intends to contest. If the paying party represented by counsel does not object to an item in anyway then that is a strong indicator that the amount and time claimed is accepted by the paying party as reasonable. Why should the Registrar expend time on an issue that is not in dispute?

[50] While it is true that the Registrar has the discretion under rule 65.23 (6) to permit the paying party to raise matters not in the points of dispute. This court is of the view that that course of conduct is not to be encouraged or countenanced unless very very good reason is shown. The reason for this narrow view is that the costs regime established by Part 65 is designed to make each side know what is being claimed and why, what is being resisted and why. To permit parties without very very good reason to make challenges not indicated in the points of dispute is to distort the process. The procedure is founded on natural justice where each side is told what the other is saying and given an appropriate time to respond to the bill or the points of dispute. To permit the paying party to raise points not included in the points of dispute creates the risk of surprise. Of course, the receiving party may have no objection to the new points of dispute. That would be an important consideration but by itself not determinant. The Registrar needs to consider efficiency and resource allocation to that particular taxation proceedings. We are well passed the days of let justice be done though the heavens may fall. There is no incompatibility between efficiency, justice, fairness and effective use of court time.

[51] In this case the reason advanced before the Registrar was that it appeared that pages 2 to 7 were not served. The Registrar addressed the matter and made a decision which has not been shown to be legally or factually incorrect. The pages were received.

[52] As it has turned out Mr Hanson’s complaint is that the Registrar did not permit him to argue points not set out in the points of dispute. It seems to this court that

the Registrar had good reason for not permitting Mr Hanson to raise points not set out in the points of dispute.

[53] The possibility of an internal error that led to the pages going missing was not placed before the Registrar and so there was no need for her to consider that possibility. The Registrar is not required to conjure up possibilities in order to relieve a party of their obligation to act within the rules. She is required to act fairly and justly. That means that she is to address the arguments made to her and decide those arguments on the basis of the evidence and the law. That is precisely what the Registrar did in this case.

[54] In this court's view the Registrar exercised her discretion appropriately. It is nothing to the point if the court would have decided differently. She had a proper evidential basis to reject the probability that the paying party was not served with the full bill of costs and as we now know she was absolutely correct on that. This point about appellate restraint when dealing with the exercise of a discretion – and the conduct of taxation has a high discretionary component - was reiterated by Morrison JA (now President of the Court of Appeal) in **Andrew Hamilton and others v The Assets Recovery Agency** [2017] JMCA Civ 46. In that case the court accepted the submission of counsel that '[an appellate] court should ordinarily defer to judges in the court below on discretionary matters, save in those cases in which it concludes that the exercise of the discretion was palpably wrong' (paragraph 69). Having concluded that the Registrar's conduct was not wrong the court will consider whether what Mr Hanson now wants to argue would be successful if the appeal proceeded.

[55] To be as succinct as possible the complaint is that the time spent on the matter was excessive. It was also said that since Mrs Kitson QC did not actually appear in court then no award should be made regarding her time spent on the matter. No authority or rule or practice for the latter conclusion.

[56] The matter here involved the Insolvency Act. Although passed in 2014 it only came into force in 2016. It is still new. There have not been many applications

under this statute before the courts. The statute is based on Canadian legislation. This means that Canadian cases may be of some relevance to the meaning and operation of the statute. It is well known that it is prudent to read through an entire statute or at least become familiar with its provisions before attempting to answer any question based on the statute. Sometimes connected parts of a statute are separated by several sections. At other times an initial interpretation of one provision has to be altered when another provision is considered. There is the question of thinking time as one ponders the meanings of and interaction of a number of provisions.

[57] It was stated earlier that when conducting taxation the Registrar is obliged to have regard to rule 65.17. That rule requires the Registrar to take account of:

(a) importance of the matter to the parties;

(b) whether time spent was reasonable;

(c) whether it was appropriate to have senior attorney at law or an attorney with specialised knowledge;

(d) the care, speed and economy with which matter was prepared;

(e) the novelty, weight and complexity of the matter

[58] In light of a statute that has completely changed the thinking and practice in relation to insolvency in Jamaica the court cannot see anything wrong with engaging Queen's Counsel to assist in the matter. The fact that she did not appear in court is beside the point.

[59] Let us not forget that Mr Raju was asking for the ambitious order of appointing a receiver over the property of another. This is not a power lightly exercised since it involves removing parts of the incident of ownership of property out of the hands of the owner and placing them in the hand of a third party. Such an appointment may trigger a landslide of consequences for the affected party including the possibility of other creditors moving in on him. The blot on the person's reputation

can be long lasting and make it difficult to secure credit in the future. It is not a run of the mill application. A misstep by the person against whom the order is sought may lead to the order being made.

[60] The court had before it the application heard by Edwards J and on the notice of dispute of application for receiving order, it was indicated at the foot of page two that the firm of Grant, Stewart, Phillips & Company were the attorneys at law. The note goes one to name Mrs Kitson QC along with Mr Suzanne Risden-Foster and Mr David Ellis as the attorneys within the firm who may be contacted. This was an indication that Mrs Kitson was involved in the matter.

[61] Mr Hanson swore in his affidavit that at some point he spoke to Mrs Kitson who told him that Mr Kevin Williams and Mr David Ellis had conduct of the matter. According to Mr Hanson this means that Queen's Counsel was not involved in the matter. This is strained reasoning. Everyone in the practice of law knows or ought to know that senior lawyers especially Queen's Counsel are not going to be involved in the minutiae where there are juniors assisting them. The court does not have Mrs Kitson's side of the conversation but no adverse inference can be drawn simply from the fact that she referred him to her juniors.

[62] The court is of the view that proposed ground of appeal, namely, that the matter was not that complex, senior counsel was not required and the time spent was no excessive cannot succeed on an appeal. The time spent on new and complex legislation does not seem unreasonable. The statue has over 300 sections. The court has had to read the statute for other cases. The statute now emphasise rehabilitation. It introduces new ideas and concepts. It requires reading and rereading plus reflection to see how the sections fit together. The times indicated are not so unreasonable that a reasonable Registrar would necessarily disallows them had they been disputed before her.

[63] Finally, Mr Hanson made the claim that he identified arithmetical errors in the final costs certificate and this means that the appeal should be heard. The court agrees with Mr Williams that if there are indeed arithmetical errors then those can

be corrected using the slip rule. There is no need for an appeal to correct what are obvious arithmetical errors.

[64] The court therefore concludes that there is no merit in the proposed appeal. Therefore, there is no need to allocate time and resources to hear it. Also there is no need to hear the application to extend time within which to file the appeal.

[65] The court's decision may seem harsh but the court has in mind the England and Wales Court of Appeal decision in **Mitchell v News Group Newspapers Ltd** [2014] 2 All ER 430. This was one of the first cases after the reforms of Lord Justice Jackson were introduced in 2013. One of the matters addressed by Jackson LJ was the question of costs and the need for more robust case management. The Master of the Rolls stated:

> ***[38]*** *In the 18th Implementation Lecture on the Jackson reforms delivered on 22 March 2013, Lord Dyson MR said in relation to r 3.9 that there was now to be a shift away from exclusively focusing on doing justice in the individual case. He said:*
>
> *25. In order to achieve this, the Woolf reforms and now the Jackson reforms were and are not intended to render the overriding objective, or rule 3.9, subject to an overarching consideration of securing justice in the individual case. If that had been the intention, a tough application to compliance would have been difficult to justify and even more problematic to apply in practice. The fact that since 1999 the tough rules to which Lord Justice Brooke referred have not been applied with sufficient rigour is testament to a failure to understand that that was not the intention.*
>
> *26. The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing*

justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.

27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.'

[39] *We endorse this approach. The importance of the court having regard to the needs and interests of all court users when case managing in an individual case is well illustrated by what occurred in the present case. If the claimant had complied with para 4 of PD 51D, the master would have given case management and costs budgeting directions on 18 June and the case would have proceeded in accordance with those directions. Instead, an adjournment was necessary and the hearing was abortive. In order to accommodate the adjourned hearing within a reasonable time, the master vacated a half-day appointment which had been allocated to deal with claims by persons who had been affected by asbestos-related diseases.*

[40] *We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle 'de minimis non curat lex' (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an*

insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

[41] *If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.*

[66] The point being made here is that there is now a hardening of position regarding the litigant who misses deadlines or in the present case misplaced a served document.

[67] Lord Dyson apparently was keeping track of what first instance judges were doing as reported in the law reports. His Lordship was undoubtedly concerned that some first instances judges were not adhering to the 'new' robust standard. His Lordship observed:

> ***[46]*** *The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as 'the culture of delay and non-compliance' will continue despite the introduction of the Jackson reforms….*
>
> ***[47]*** *We recognise that there are those who will find this new approach unattractive. There may be signs that it is not being applied by some judges….*
>
> ***[48]*** *We have earlier said that the court should usually grant relief for trivial breaches. We are not sure in what sense the judge was using the word 'unintentional'. In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. We share the judge's desire to discourage satellite litigation, but that is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders. In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under r 3.9. In other words, once the new culture becomes accepted, there should be less satellite litigation, not more.*
>
> ***[49]*** *The other decision to which we wish to refer is that of Andrew Smith J in* Raayan Al Iraq Co Ltd v Trans Victory Marine Inc *[2013] EWHC 2696 (Comm), [2013] All ER (D) 225 (Nov). The claimant applied for an extension of two days for the service of its particulars of claim. In substance, the application was for relief from sanctions*

under r 3.9. The judge acknowledged that the list of circumstances that was itemised in the earlier version of the rule had gone. Nevertheless, he proceeded 'somewhat reluctantly' to apply the old checklist of factors. We accept that, depending on the facts of the case, it will be appropriate to consider some or even all of these factors as part of 'all the circumstances of the case'. But, as we have already said, the most important factors are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

[50] *Having examined the case by reference to the old checklist of factors, Andrew Smith J concluded at [18] that the 'overriding objective demands that relief be granted and I grant it'. But it seems to us that he may not have recognised the particular importance of the two elements of the overriding objective that are mentioned in the revised version of r 3.9. It is true that at [15] the judge referred to the culture of delay and non-compliance and what Sir Rupert Jackson had said about that in his Final Report. As to the effect of the revision to r 3.9, he said:*

'Nor do I accept that the change in the rule or a change in the attitude or approach of the courts to applications of this kind means that relief from sanctions will be refused even where injustice would result.'

[51] *It seems to us that, in making this observation, the judge was focusing exclusively on doing justice between the parties in the individual case and not applying the new approach which seeks to have regard to a wide range of interests.*

[68] Implicit in all this is the discarding of the nineteenth century view that all ills in litigation are curable by costs. Litigation is expensive and stressful. Lord Dyson was making the point that once it is shown that the litigant has had a fair opportunity to respond to the documents served on him then granting relief from sanctions is not a matter of course. Each adjournment, each delay means necessarily that some other litigant has his matter delayed because the litigant seeking the adjournment has failed to utilise the time and resources allocated to him.

[69] Our CPR as it presently stands encapsulates all that Lord Dyson has spoken about. What is required is robust enforcement of its terms. In this case, the appeal notice was on November 3, 2017. It should have been filed on October 20, 2017. It was fourteen days late. The reason advanced is that it was thought that the date of the final costs certificate (October 24, 2017) was the date of the decision for the purposes of an appeal. This way of looking at the matter is understandable but now shown to be incorrect. In these circumstances an extension of time would be appropriate. However, the proposed appeal has no real chance of success and so there is no need to hear the application for an extension time. This means that the court agrees with Mr Williams' position that the there is no merit in the proposed appeal and so no extended time should be considered.

Conclusion and final disposition

[70] The court concludes that:

(1) contrary to its initial position, that the appeal is out of time because 'date of the decision' means the actual date the decision is made and not the end of the taxation process;

(2) the interpretation of Popplewell J in **Kasir** is correct and makes sense and should be adopted because a contested taxation of bill of costs leads inevitably to specific, discrete decisions on each item on the bill;

(3) time begins to run from the date the decision is made on the specific item;

(4) there is no need to await the completion of the entire taxation before the right of appeal arises;

(5) what has been said at (1) to (4) is supported by the actual wording in rule 65.28 (2) (a) which speaks to each item '**each item in the taxation which is appealed**' thereby reinforcing the point that an appeal is not from

overall assessment per se but from specific items which in turn rests upon specific decision in relation to the specific item (emphasis added)';

(6) the Jamaican CPR has not been amended to speak the specific circumstance of a taxation going over several hearings but there is a solution offered by authors of **Cook on Costs** that may be considered:

> *The practical solution offered by the judge in this case was that the parties could agree and/or the costs judge could order at the start of an assessment that the time for any appeals is extended to a date, either 21 days or some other agreed and ordered period, after the last day of the assessment.*
>
> *CPR 47.14(7) was introduced as part of the April 2013 reforms and resolves part of the difficulty. It specifies that where a detailed assessment is carried out at more than one hearing then the time for appealing does not run until the conclusion of the final hearing unless the court orders otherwise. It is important to ensure that preliminary hearings on specific points of dispute are defined as part of the detailed assessment hearing. However, the position remains the same as before if there is one hearing over a number of consecutive days. In other words the time provisions are more generous where there are a number of discrete hearings than one hearing with many decisions extending over a number of days. Consequently parties should seek confirmation that time only runs on any decision (regardless of the day on which it was reached) from the end of the hearing.*[2]

(7) the proposed appeal has no reasonable prospect of success;

(8) the court need not hear the application for extension of time within which to file the appeal;

(9) costs to the respondent to be agreed or taxed,

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[2] Supra note one

(10) leave to appeal granted.