

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 94/89

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN BASIL MORGAN PLAINTIFF/APPELLANT
AND CARIBBEAN STEEL
COMPANY LIMITED DEFENDANT/RESPONDENT

Mrs. Ursula Khan for the appellant

Mr. David Henry instructed by Nunes, Scholefield,
DeLeon & Company for the respondent

24th, 25th September, 1990

CAREY, J.A.

Over the last two mornings we have listened to some interesting arguments dealing with taxation which is not a matter with which this court is often troubled. The appeal lies against an order of Master Reid whereby he set aside the Registrar's Certificate of Taxation dated the 1st day of June and ordered as a consequence that the Registrar of the Supreme Court proceed to tax afresh the bill of costs upon due notice being given to the parties.

What occurred in the case was this, when the bill of costs was being taxed, the attorney who appeared for the respondent was not present and the taxation therefore proceeded in his absence. Shortly after that, the attorney for the respondent arrived to find that, unfortunately taxation had already been completed. He had actually passed the attorney on his way in but was unaware of his identity. Eventually he learnt who he was, went after him and endeavoured to persuade him to return, but his efforts were futile. An appeal was therefore taken to the Master to have the certificate of the Registrar set aside.

Mrs. Khan, as I understand what she has been endeavouring to maintain, puts her argument in this way. She says that in so far as taxation goes, the only remedy that lies against the party aggrieved is by way of a review which is governed by rule 30 of part VII of the rules of the Supreme Court entitled General Provisions. That rule provides as follows -

"Any party who may be dissatisfied with the certificate of allocator of the taxing officer as to any item or part of an item which may have been objected to as aforesaid may within 14 days from the date of the taxation or allocator or such other time as the court or judge or taxing officer at the time he signed his certificate or allocator may allow apply to a judge at chambers for an order to review the taxation as to the same item or part of an item and the judge may thereupon make such order as to the judge may seem just that the certificate of allocator or the taxing officer shall be final and conclusive as to all matters which shall have been objected to in manner aforesaid."

From that she argued that once the taxing officer had signed his certificate it made that certificate final and conclusive, that since the respondent was absent and did not object to any item in the bill he could not come before the court to redress any wrong done to him. Rule 30 in my view, has no bearing on this matter. The application that was being made by the respondent to the Master was not one to review any item or part of any item. It is the fact that if a party is not present to object to an item, and has not objected to the item there is no right of review given under the section, but that is altogether a different situation from circumstances where what is being said is that the certificate ought to be set aside because the bill was heard in the absence of one party. Although at one time Mrs. Khan

appeared to have been saying that there was no power in the court to set aside orders made in default, I think at the end of the day she had to concede that there was such a power to open and re-consider a taxation made in circumstances such as this, namely in the absence of one party.

Section 525 of the Judicature Civil Procedure Code Law allows such a reconsideration. It is in the following form -

"Where the judge has proceeded 'ex parte', such proceeding shall not in any manner be reconsidered in the judge's chambers, unless the judge shall be satisfied that the party failing to attend was not guilty of willful delay or negligence; and in such case the cost occasioned by his non-attendance shall be in the discretion of the judge who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such cost as he may think just."

In fact, what the section demonstrates is that there was certainly a power to go back before the Registrar to have him consider the matter but that does not mean that there was no power to go before a judge to have the matter reconsidered in the same way. Mrs. Khan read a passage from Butterworth on costs - (2nd edition) Vol. 1 p. 164 which makes it quite clear as she herself has candidly conceded. I do not think it can be doubted that the Master had the power to act as he did, namely to set aside the order made in the absence of the other party. None of the grounds of Mrs. Khan was directed to show that the onus which was placed upon the respondent was not satisfied. By virtue of section 525 of the Civil Procedure Code, the Master had to be satisfied that the party failing to attend was not guilty of wilful delay or negligence.

On the short point therefore, whether or not there was power in the Master I would hold that the Master had power to set aside the certificate of the Taxing Master. And in those circumstances I would dismiss the appeal with costs.

WRIGHT, J.A.

Quite apart from the concession of Mrs. Khan that the proceedings giving rise to the Certificate in contention were default proceedings I am satisfied that they were indeed default proceedings and as such liable to be set aside. I am satisfied also that the Master had the power and acted properly to set the Certificate aside and to remit the matter for consideration to the Registrar. I therefore concur in the judgment of my brother Carey J.A.

MORGAN, J.A.

I agree with the judgment of Carey J.A. and have nothing further to add.