COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2008/CLE/gen/00869

BETWEEN

DONNALEE MARIA PEET

Appellant

-and-

MICHAEL BAPTISTE

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Trevor Lightbourn of Sharon Wilson & Co. for the Appellant
Mrs. Nadia Wright of Providence Law for the Respondent

Hearing Date: 22 January 2019

Costs – Taxation - Notice of Taxation - Appellant awarded costs to be taxed – Delay by Appellant to commence taxation proceedings in the Supreme Court – Appellant seeks extension of time - Discretionary power of Registrar to extend time - Deputy Registrar refused extension of time relying on Court of Appeal case of *Glen Alexander Colebrooke et al v The National Insurance Board* (SCCivApp No. 127 of 2008) - Appeal from Registrar - Power of Judge to re-hear application - Whether Application should be granted - Order 59 Rules 19 (3); 14(1)(a) and 14 (3) of the Rules of the Supreme Court applied

The Appellant commenced action against the Respondent seeking damages arising out of a road traffic accident. The Respondent did not file a Defence and on 14 January 2009, Judgment in default of Defence was entered in favour of the Appellant. Damages were assessed by Registrar Meeres and, on 23 April 2014, she awarded costs to the Appellant to be taxed if not agreed.

By letter dated 1 May 2014, Counsel for the Appellant wrote to Counsel for the Respondent enclosing a prepared Bill of Costs for the Appellant. Counsel for the Respondent did not respond to the Appellant's Bill of Costs. The Appellant did not file her Bill of Costs within the three months as stipulated by the Rules.

In the meantime, the Respondent filed an appeal against Registrar Meeres' assessment. On 22 February 2016, the Court of Appeal dismissed the Respondent's appeal and upheld the Ruling of Registrar Meeres. On 11 May 2016, the Appellant commenced taxation proceedings in the

Supreme Court and the Court of Appeal. Taxation in the Supreme Court was set for hearing on 12 September 2017 before Registrar Misiewicz. The Appellant applied for an extension of time to commence the proceedings since the time for doing so had long expired. Registrar Misiewicz refused the extension of time relying on the judgment of the Court of Appeal in **Colebrooke et al v The National Insurance Board** (SCCivApp No. 127 of 2008).

Being aggrieved by the decision of Registrar Misiewicz, the Appellant appealed to this Court.

HELD: Granting an extension of time to the Appellant to commence taxation proceedings in the Supreme Court with Costs of this application to the Respondent

1. An appeal from a Registrar to a Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter as though it came before him for the first time: see **Commentary 58/1/2 of the Supreme Court Practice 1970.**

2. The Judge hearing the appeal, in exercising his discretion, is in no way fettered by the previous exercise of the Registrar's decision but will of course give it such weight it deserves. **Evans v Bartlam** [1937] 2 All ER 646 at 649 per Lord Atkin applied.

3. Order 59 Rules 19(3), 14(1)(a) and 14(3) of the Rules of the Supreme Court give the Registrar the unfettered discretion to extend time to begin taxation proceedings outside the period limited for doing so. Unquestionably, such discretion must be exercised judiciously and not whimsically or capriciously. In doing so, the Registrar/Court must take into account some considerations namely (i) the duration of the delay; (ii) the extent to which it is explained or excusable and (iii) the degree of prejudice suffered by the paying party, in this case the Respondent: **Glen Alexander Colebrooke et al v The National Insurance Board** (SCCivApp No. 127 of 2008) applying **London Borough of Enfield v P.** [1997] 1 Costs L.R. 73 relied upon.

4. The evidence shows that well within the time period to begin taxation proceedings, the Appellant served her Bill of Costs on the Respondent in an attempt to solicit a response. The Respondent did not respond but filed an appeal. The Appellant should have done the proper thing and file her Bill of Costs for taxation.

5. An appeal does not operate as a stay so the Appellant should have lodged her Bill of Costs within the three months unless time was extended by the Registrar: see Conteh JA in **Michael Wilson & Partners v Sinclair** (SCCivApp No. 40 of 2007).

6. Even though there was a considerable delay of two years and 19 days, the Court, in the exercise of its discretion grants an extension of time to the Appellant to commence taxation proceedings. The Court is of the opinion that the Respondent was not taken by surprise with the Bill of Costs since it was served on his Counsel within the three months stipulated by the Rules. The Respondent has shown no prejudice and none could be inferred.

7. Order 62 of the Old English Rules is, in material parts, the same as Order 59 of our Rules. It provides for a penalty for failure to draw up the Bill of Costs: see **Commentary 62/21/2 of The Supreme Court Practice 1970.**

RULING

Charles J:

Introduction

[1] The sole issue before this Court is whether Donnalee Maria Peet ("the Appellant in these proceedings") should be granted an extension of time to commence taxation proceedings against Michael Baptiste ("the Respondent in these proceedings").

[2] The Appellant previously made an application to extend time to commence taxation proceedings before Deputy Registrar, Carol Misiewicz ("Registrar Misiewicz") who, on 12 September 2017, refused the application and ordered the Appellant to pay costs in the sum of $1,500.00 to the Respondent. It was submitted to me that Registrar Misiewicz did not give written reasons for her refusal. This is not so because a perusal of the Court's file shows that she refused the application for extension of time. She stated that, even though she has the discretion to extend time to commence taxation proceedings, she was bound by the Court of Appeal decision in **Glen Alexander Colebrooke et al v The National Insurance Board** (SCCivApp No. 127 of 2008), a case relied upon by learned Counsel for the Respondent, Mrs. Wright. Registrar Misiewicz did not give any more reasons for her decision.

[3] The Appellant, being aggrieved by the Ruling of Registrar Misiewicz, filed a Notice of Appeal against the Ruling on 15 September 2017.

Brief facts

[4] By a Specially Indorsed Writ of Summons filed on 26 May 2008, the Appellant commenced action against the Respondent seeking damages arising out of a road traffic accident. The Respondent did not file a Defence. On 14 January 2009, Judgment in default of Defence was entered in favour of the Appellant. Damages were assessed by Deputy Registrar, Marilyn Meeres ("Registrar Meeres") and, on 23 April 2014, she awarded costs to the Appellant to be taxed if not agreed.

[5] By letter dated 1 May 2014, Counsel for the Appellant wrote to Counsel for the Respondent enclosing a prepared Bill of Costs for the Appellant. Counsel for the Respondent did not respond to the Appellant's Bill of Costs. The next step which should have been taken by the Appellant was to file her Bill of Costs in the Supreme Court Registry so that taxation may commence. She did not do so.

[6] In the meantime, the Respondent appealed the Assessment Order of Registrar Meeres. On 22 February 2016, the Court of Appeal dismissed his appeal and upheld Registrar Meeres' Ruling. On the same day, the Court of Appeal awarded costs of the Appeal to the Appellant and costs in the Supreme Court remained undisturbed.

[7] Less than three months after the Court of Appeal decision, the Appellant commenced taxation proceedings in the Supreme Court on 11 May 2016.

[8] Taxation in the Supreme Court was set for 12 September 2017 before Registrar Misiewicz. The Appellant applied for an extension of time to commence the taxation proceedings. Registrar Misiewicz refused the application and ordered the Appellant to pay costs of $1,500.00 to the Respondent.

[9] In her Ruling which is found in the Court's file, Registrar Misiewicz said that while she has the discretion to extend time to commence taxation proceedings, she was bound by the Court of Appeal decision in **Colebrooke**. She did not give any more reasons for her decision. I agree that the Registrar as well as this Court are bound by decisions of our Court of Appeal. **Colebrooke**, in my view, affirms that the Registrar of the Supreme Court has the discretionary power to extend time unlike the Registrar of the Court of Appeal. The Court of Appeal laid down some circumstances that the Registrar must take into account before deciding whether to grant an extension of time namely (i) the duration of the delay; (ii) the extent to which it is explained or excusable and (iii) the degree of prejudice suffered by the paying party; in this case, the Respondent. In **Colebrooke**, the Court of Appeal found that given the length of the delay, the inexcusable reasons for the delay and

the prejudice which the court is entitled to infer from the unjustified delay, the application for extension of time to start taxation proceedings, is refused.

Jurisdiction to re-hear appeal

[10] It is not disputed that an appeal from the Registrar to a Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter as though it came before him for the first time: see **Commentary 58/1/2 of the Supreme Court Practice 1970.**

[11] The Judge hearing the appeal, in exercising his discretion, is in no way fettered by the previous exercise of the Registrar's decision but will of course give it such weight it deserves. In **Evans v Bartlam** [1937] 2 All ER 646 at 649, Lord Atkin puts it this way:

> **"I wish to state my conviction that, where there is a discretionary jurisdiction given to the court or a judge, the judge in chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v Cooper [1936] WN 205; Digest Supp*., with which I entirely agree".** [Emphasis added]

[12] Therefore, I shall consider this case as an actual rehearing being of the opinion that Registrar Misiewicz did not give sufficient reasons for me to give her decision the weight it deserves.

The Relevant Law

[13] Order 59 Rule 19(3) of the Rules of the Supreme Court ("the RSC") provides as follows:

> **"Subject to paragraph (4) where a party is entitled to require any costs to be taxed by virtue of —**
>
> **(a) a judgment, direction or order given or made in proceedings in the Supreme Court; or**
>
> **(b) rule 10,**

> **he must begin proceedings for the taxation of those costs within 3 months after the judgment, direction or order was entered, signed or otherwise perfected or, as the case may be, within 3 months after service of the notice given by him under Order 21, rule 2 (where he is so entitled by virtue of rule 10(1) or given to him under Order 22, rule 3 (where he is so entitled by virtue of rule 10(2) or (3)).”** [Emphasis added]

[14] O. 59 r. 14(1) (a) of the RSC empowers the Registrar to extend time for the commencement of the taxation process. It provides as follows:

> **“The Registrar may extend the period within which a party is required by or under this Order to begin proceedings for taxation or to do anything in or in connection with proceedings before the Registrar;”** [Emphasis added]

[15] Next, O. 59 r 14(1) (3) provides that:

> “**The Registrar may extend any such period as is referred to in the foregoing provisions of this rule although the application for extension is not made until after the expiration of that period.”**[Emphasis added]

[16] To be succinct, O. 59 rr. 14(1)(a) and 14(1)(3) give the Registrar the unfettered discretion to extend time. Unquestionably, such discretion must be exercised judiciously and not whimsically or capriciously.

Submissions by Counsel

[17] Learned Counsel for the Respondent, Mrs. Wright submitted that subsequent to an Assessment of Damages hearing, an Order dated 23 April 2014 was made granting costs to the Appellant, to be taxed if not agreed. There being no agreement, the Appellant was required to file her Bill of Costs within 3 months from the date of the Order in accordance with Order 59 rule 19(3)(b). This is correct. The Appellant allowed time to expire without filing a Bill of Costs within the requisite time and ended up filing it (without first seeking leave for an extension of time) on 11 May 2016. According to Mrs. Wright, at this late stage, the Appellant is asking the Court to sanction her non-compliance and failure to adhere to the Rules of Court. By simple calculation, Mrs. Wright says, the Appellant took 2 years and 19 days to file her Notice of Taxation and Bill of Costs.

[18] Learned Counsel next submitted that the Appellant had improperly filed her Bill of Costs and other supporting documents without obtaining the leave of the Court to file out of time. This, according to her, is an affront to the authority of the Court and makes the filings a nullity. Mrs. Wright cited the Court of Appeal cases of **Michael Wilson & Partners v Sinclair** (SCCivApp No. 40 of 2007) and **Glen Alexander Colebrooke et al v The National Insurance Board** (SCCivApp No. 127 of 2008) to bolster her arguments. In both cases, the issue before the Court of Appeal was whether the Applicant should be allowed time to proceed to taxation of their respective bill of costs.

[19] In **Michael Wilson & Partners**, Conteh JA said at paragraph 25:

> **"The time stipulation is a requirement of the law and is clearly stated in the sub-rule reproduced at paragraph 7 above. In short, parties cannot, whether unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation or proceedings."**

[20] In the latter case, Mrs. Wright quoted a passage of Allen P. who, in addressing the issue of filing a bill of costs out of time, stated:

> **"Given the length of the delay, the inexcusable reasons for the delay and the prejudice which the court is entitled to infer from the unjustified delay, the application is refused. The applicants are ordered to pay the respondents' costs of the application to be taxed if not agreed."**

[21] Mrs. Wright submitted that given the peculiar circumstances of this matter, that is, the nullity and considering that the Court of Appeal has addressed the issue of late filing of Bills of Costs, this Court should come to the same conclusion as the Court of Appeal and dismiss the application with costs to be awarded to the Respondent.

[22] Learned Counsel for the Appellant, Mr. Lightbourn submitted that although taxation proceedings were not commenced within the time frame prescribed by O. 59 r 19 of the RSC, the Registrar has the power to allow for taxation proceedings outside of the time limits.

[23] Mr. Lightbourn relied on O. 59 rr 14(1)(a) and 14(1)(3) to fortify his argument that the Registrar has the power to extend the time for the commencement of the taxation process. Relying also on O. 62 r 21(1) of the Old English Civil Procedure Rules (still applicable in this jurisdiction), Counsel submitted that if the successful party fails to file his Bill of Costs within the period stipulated in the Rules, the only penalty should be a costs order.

[24] Order 62 of the Old English Civil Procedure Rules is, in material parts, the same as O. 59 of our Rules. It provides that "*the penalty for failure is loss of cost for drawing the bill and attending the taxation*": See **Commentary 62/21/1 of The Supreme Court Practice 1970.**

[25] Mr. Lightbourn emphasized that the object of the power is to extend time with a view to the avoidance of injustice to the parties. In this regard, he relied on the English Court of Appeal case of **Atwood v Chichester** (1878) 3 QBD 722. At page 723, Bramwell L.J. said:

> **"When sitting at chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by delay may be compensated for by the payment of costs. This I think a correct view."** [Emphasis added]

[26] Learned Counsel Mr. Lightbourn asserted that an example of such award of costs for delay can be seen in the English Court of Appeal case of **Eaton v Storer** (1882) 22 ChD 91 where no Reply was delivered by the Plaintiff despite the time for doing so had been extended on two previous occasions by the court. The Plaintiff subsequently made application for leave to deliver a Reply which the Vice-Chancellor dismissed with costs, being of the opinion that there had been gross delay in putting in so simple a pleading as a Reply. The Plaintiff appealed and the Court of Appeal, in granting the appeal, held:

> **"…[T]he usual course is to give the Plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules**

> **from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till the 25th of July. The application ought to have been granted on the terms of the Plaintiff paying the costs of it."**[Emphasis added]

[27] Counsel also cited the Bahamian Case of **Canadian Imperial Bank of Commerce v Wells & another** [2013] 1 BHS J. No. 79 where the then Assistant Registrar (Ag.), Camille Gomez stated at paragraph 10 of her Ruling that:

> **"The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted."**

[28] In **Wells**, the Court found that although there was a delay of two years, "*the court does not find the delay inordinate or inexcusable in the circumstances and further, that upon conducting a balancing exercise any prejudice presumed to be suffered to the Plaintiff by the delay are outweighed by the reason for the delay*."

[29] In the present case, learned Counsel Mr. Lightbourn also argued that there is no prejudice to the Respondent in acceding to the Appellant's application since he cannot say that he is taken by ambush or surprise that the Appellant is seeking to enforce her cost order. Counsel asserted that while the Bill of Costs was not filed until the outcome of the Court of Appeal hearing, Counsel for the Respondent was well aware of the Bill of Costs having received it on 2 May 2014, that is, about one week after the Order for Costs was given by Registrar Meeres on 23 April 2014. Then, further payment in respect of the Bill of Costs would not have been made in any event until after the hearing in the Court of Appeal.

Discussion

[30] The present application for extension of time to commence taxation proceedings is governed by O. 59 rr 19(3); 14(1)(a) and 14(1)(3) of the RSC and not by the Court of Appeal Rules. There is a striking difference between the two Rules. Unlike the Registrar of the Supreme Court who has a discretionary power to extend time

outside of the time limited for doing so, the Registrar of the Court of Appeal has no such power to extend the period for filing the Bill of Costs for taxation after the three months period has already expired (Rule 35 (24) (a) of the Court of Appeal Rules). She may nevertheless grant extensions to begin taxation proceedings prior to the expiration of that time. However and clearly, the Court of Appeal has the power pursuant to Rule 9 of the Court of Appeal Rules to validate the late filing of the Bill of Costs, thereby curing the irregularity. Neither the Court of Appeal Rules nor the Rules of the Supreme Court lay down any specific considerations which the court may take into account when exercising its discretion. Thus, guidance is derived from common law cases.

[31] For example, in the Bahamian Court of Appeal case of **Colebrooke et al** [supra], the learned President, Mrs. Justice Allen referred to a plethora of cases which set out some relevant circumstances which ought to be considered in order to grant an extension of time within which to commence taxation. At paragraph 15, she said:

> **"The case of London Borough of Enfield v P. *[1997] 1 Costs L.R. 73,* although recognized as a leading authority with respect to delays in commencing taxation proceedings, is largely based on the UK's rules which provisions are not found in our Court of Appeal Rules. Notwithstanding that, the case sets out what the relevant circumstances are for granting an extension of time within which to bring taxation, and I adopt them here. The circumstances were said to include the duration of the delay; the extent to which it is explained or excusable; the degree of prejudice suffered by any other party and any additional interest."** [Emphasis added]

[32] At paragraph 17, the learned President continued:

> "In the case of **Pamplin v Fraser (No.2) (Q.B.D.) [1984] 1385, 1390, Parker J. commented on the discretion to grant extensions and specifically, on the question of prejudice. He said:**
>
> > **"There is ample authority that extensions should not be lightly granted and in the present case no justification for the delay was shown….**

> **No particular prejudice was shown, but it is clear that mere delay can amount to prejudice and, where, with no possible excuse, the effect of the delay is to keep hanging over the applicant's head…"**

[33] In dealing with the present application, I need to consider not only the issue of delay but prejudice, if any, which such delay might have caused to the party not at fault. As evident from the authorities above, there is inherent in any delay some element of prejudice. But, in **Chapman v Chapman and others** (1985) 1 All ER 757, a case involving an application by the paying party under O. 62 r 7(5) of the English Rules for an order that the receiving party be granted only nominal costs for failing to procure or proceed with taxation, Sir Robert Megarry V.C. said that the only cases in which prejudice may be inferred from delay are those where it was impossible to adduce evidence of prejudice. At pages 766-767, he said:

> **"I have stressed this point in view of what was said in the Pamplin case. "No particular prejudice was shown, but it is clear that mere delay can amount to prejudice' (see [1984] 2 All ER 698, [1984] 1 WLR 1384 at 1390). The power under r 7(5) may be exercised in appropriate cases, and these (in words that I have already quoted) will normally 'only be those where the delay has been inordinate and in and where excusable either specific prejudice is established or the delay is so long that prejudice cab be inferred' see [1984] 2 All ER 693 at 699, [1984] 1 WLR 1385 at 1392). I would read these references to delay which suffices to establish prejudice as referring only to cases where it has become impossible to adduce evidence to the prejudice and not as enabling a paying party to refrain from putting forward such evidence and rely on prejudice being inferred from mere delay. If I am wrong in reading the dicta thus, then with all due respect I must say that I disagree with them."**[Emphasis added]

[34] In the present case, it is unarguable that there has been a delay of 2 years and 19 days by the Appellant in commencing proceedings for the taxation of costs which, in my view, is inordinate. That said, Counsel for the Respondent was served with the Appellant's prepared Bill of Costs in respect of the work carried out by her (Appellant's) Counsel since it was served on her Chambers on 2 May 2014: see Exhibit "IG-1" attached to the affidavit of Indira Gaitor sworn to on 21 January 2019. It is therefore fair to say that the Respondent, through his Counsel, ought not to be surprised that the Appellant was interested in having her costs taxed.

[35] But, in accordance with the Rules, the Appellant should have filed her Bill of Costs for taxation within the three months as stipulated by O. 59 r 19(3). If she could not have done so, for whatever reason, she should have applied to the Registrar pursuant to O. 59 r 14(1)(a) and r 14 (1)(3) for an extension of time. I could only surmise that since there was an appeal of the Assessment Order to the Court of Appeal, the Appellant did not file her prepared Bill of Costs for taxation. I say so because, less than 3 months of the Court of Appeal decision, she commenced taxation proceedings in the Court of Appeal and in the Supreme Court. But, it need hardly be said that courts have reiterated that an appeal does not stay proceedings. Conteh JA in **Michael Wilson & Partners,** at paragraph 65 reverberated that "…*an appeal, is, of course, not in itself, a stay*."

[36] That said, each case must turn on its own facts and circumstances. In the instant case, given the fact that the Respondent had received the Appellant's Bill of Costs since 2 May 2014 and choose not to respond, it is unfair to now turn around and rely on procedural irregularities to deprive the Appellant of her costs on taxation.

[37] So often, I am reminded of the Privy Council judgment in **Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46, a judgment of mine from the British Virgin Islands. At paragraph 1 of the judgment, Lord Collins, in delivering the judgment of the Board, said:

> **"It has often been said that, in the pursuit of justice, procedure is a servant and not a master."**

[38] In the instant case, though the delay was considerable, the issue of its prejudicial effect, if any, on the Respondent, as the paying party, is not readily manifest, except for it being a delay of 2 years and 19 days to file the Bill of Costs. The issue of prejudice was not addressed by the Respondent except in submissions by his Counsel. In any event, as I said before, Counsel for the Respondent was served with an unfiled Bill of Costs. Therefore, any submission of prejudice is unconvincing.

[39] In my considered opinion, the Respondent, after being served with the Bill of Costs, ought to have known that the issue of costs was a live issue between the parties.

Conclusion

[40] For all of these reasons, and in the exercise of my discretion, this is a proper case for me to grant an extension of time to commence taxation proceedings against the Respondent. Accordingly, time is hereby extended to 14 February 2019 for the Appellant to commence taxation proceedings against the Respondent.

[41] Although successful in obtaining the Order sought, the Appellant was responsible for the delay in commencing these proceedings and, therefore, she will pay costs of $3,500 to the Respondent.

Dated this 28th day of January, A.D., 2019

Indra H. Charles
Justice