COMMONWEALTH OF THE BAHAMAS

2016/CLE/gen/FP/00196

IN THE SUPREME COURT

Common Law and Equity Division

B E T W E E N

GRAND BAHAMA AIRPORT COMPANY LIMITED

Plaintiff

AND

WESTERN AIR LIMITED

Defendant

Before: Mr. R. Dawson Malone
Assistant Registrar (Acting)

Appearances: Mr. Harvey O. Tynes, Q.C. with Mrs. Tanisha Tynes-Cambridge of Tynes & Tynes for the Defendant/ Receiving Party

Mr. Robert K. Adams of Delaney Partners for the Plaintiff/ Paying Party

Hearing Date: 7th January, 2021

Costs – Review of Taxation – costs on a party and party basis - Leading Counsel Rule – Order 59 rule 26 (2) RSC – Order 59 rule 31 RSC

The Defendant was successful in its defence to the action and was awarded costs of the action with such costs to be taxed if not agreed. The order was not certified fit for leading or two counsel and accordingly, the decision to allow such costs (i.e. whether for leading or two counsel) is in the discretion of the taxing master. After hearing Counsel in respect of the same, it was held that this matter was not one which fell within the category of cases in which costs for leading and or two counsel should be allowed on a party and party basis. Consequently, the taxing matter adjudged an hourly rate for one counsel of considerable experience as appropriate and the taxation proceeded on that basis. The Defendant filed a review of the taxation seeking a reconsideration of the allowances as it related to *inter alia* the decision to allow for one counsel and in default thereof or in any event, an increase in the rate allowed or hours allowed.

Held:-

(1) In the absence of the judge certifying costs for leading and junior counsel (or by agreement of the paying party), the taxing master in conducting a taxation on a party and party basis may make such allowance upon the exercise of his or her discretion. In the exercise of that discretion and by virtue being bound by the decision of Allen J in the case of **Parker v Roberts** [1997] BHS J No. 85, for the purposes of Order 59 Rule 26 (2) RSC and the quantum to be allowed, the taxing master is required to determine whether in all the circumstances of the particular case, the action could have been effectively and capably handled by a hypothetical counsel or whether this is a matter which required the services of counsel with the degree of skill, expertise and knowledge of senior counsel (at [*25*] to [*32*]).

(2) In any event, if the test as outlined in the leading English case of **Juby v London Fire and Civil Defence Authority and Saunders v Essex County Council**, April 24, 1990 (unreported) is applied (whether it was appropriate or reasonable to instruct a leading counsel and junior having regard to the factors listed by Evans J in that case) the allowance for leading and junior counsel would still be refused (at [*33*]).

(3) The hourly rate of $700 per hour allowed for Counsel in the circumstances of this case is reasonable and shall stand (at [*36*]).

(4) The hours allowed for each item under review are reasonable and shall stand save for item No. 9 which is increased by 2.5 hours resulting in an additional allowance of $1,750 (at [*39*] particularly [*39 (b)*]).

(5) The Defendant's costs of the action now stand taxed, reviewed and allowed in the sum of $110,696.00 (at [*40*]).

Bastian v Lyford Cay Co. [1994] BHS J. No. 48 *followed*
Halsbury's Laws of England, 4 ed., Vol. 37, at paragraph 745 *applied*
Juby v London Fire and Civil Defence Authority [1990] Lexis Citation 2078 *considered and applied*
Parker v Roberts [1997] BHS J No. 85 *applied*
R v Dudley Magistrate's Court, ex parte Power City Stores Limited et al (1990) 154 JP 654 *distinguished*
Smith v Buller [1875] L.R. 19 EQ 473 *considered and applied*
Supreme Court Practice 1999 (the "White Book"), **Volume 1**, page 1183, **paragraph 62/A2/12** *considered and applied*
Tynes v Dencil Barr et al, Civil Appeal No 51 of 2001 considered
W.T. Potts [1935] 1 Ch 334 considered

RULING
Review of Taxation

Malone, Assistant Registrar (Acting):-

Background

1. The Plaintiff, as operator of the Grand Bahama International Airport commenced this action contending *inter alia* that the Defendant, a freight and passenger operator in Freeport, Grand Bahama had breached its obligations in failing to pay certain fees allegedly due pursuant to a lease and a license agreement between the parties.

2. The Honourable Mrs. Senior Justice, Estelle G. Gray-Evans by Judgment dated 24th July, 2019 dismissed the Plaintiff's case and awarded costs to the defendant, such costs to be taxed if not agreed.

The Taxation

3. The Defendant lodged its Bill of Costs on 23rd August, 2019 by which it claimed the total sum of $213,871.00 compromised $696.00 for disbursements and $213,175.00 for professional services.

4. At the commencement of the taxation, Counsel was advised of Counsel for the Plaintiff's representation of the firm of Callenders & Co. in which I am associated with (my appointment as a taxing master being a temporary acting stint) and also that a colleague in the said firm may also have undertaken legal services/work for the Defendant. Learned Senior Counsel Mr. Tynes, Q.C. and learned Counsel Mr. Adams both advised that their respective views were that such

circumstances do not give rise to actual bias and to the extent that a person may allege (founded or not) apparent bias, Counsel waived any possible objection to the taxation being conducted by myself in the capacity as taxing master.

5. The taxation commenced on 21st October, 2020 and continued on the following days: 30th October, 2020; 2nd November, 2020; 4th November, 2020 after which costs were taxed and allowed in the total sum of $108,946.00.

The Review

6. By Summons filed on 6th November, 2020 the Defendant sought to review the taxation with the grounds of objections set out in a schedule thereto.

7. The allowances which are under review are items claimed for professional charges / legal fees for tasks undertaken by Counsel throughout the proceedings (save for items 26 and 27 which I shall discuss later) namely 1 – 3, 9, 15 – 18, 22 - 30, 32, 33, 37 - 41, 45, 46, and 55 by which the objections relate to all items under review to which I set out verbatim under the rubric "*Submissions by the Parties*" hereinafter.

8. In response, on 19th November, 2020 the Plaintiff filed Answers to the Defendant's Objections, by which the Defendant submits that all objections outlined in the review ought to be rejected and accordingly dismissed.

9. The review was listed for hearing on 7th January, 2021 at which time the court heard from Counsel and adjourned to rule.

Submissions by the Parties

10. In this review, the Defendant's objections to the taxation are as follows:

> "The Taxing Master failed to have due regard to the provisions of Order 59 rule 26 (2) of the Rules of the Supreme Court which mandate that all costs be allowed as were necessary or proper for defending the rights of the Defendant.
>
> To the extent that the English practice was relevant the Taxing Master failed to have due regard to the principle established in the case of R v Dudley Magistrate's Court regarding the instruction of leading Counsel; that the correct question is not whether the case was well within the capabilities of junior Counsel but rather whether or not it was reasonable to instruct leading Counsel.
>
> The Taxing Master failed to have due regard to the importance of the case to the Defendant as a tenant of the Plaintiff in a contractual relationship which was likely to last for another 33 years and could result in the Defendant being required to pay several millions of dollars to the Plaintiff.
>
> The Taxing Master failed to have due regard to the issues which the trial Judge was required to determine at the trial and that in awarding costs to the Defendant the trial Judge did not order that the Defendant's costs should be limited to only one of the two Counsel who had appeared on behalf of the Defendant at the trial.
>
> The Taxing Master failed to accept that less time was spent by leading Counsel when he acted jointly with junior Counsel who billed at one-half the rate of leading Counsel. It was therefore unreasonable to make no allowance whatsoever for junior Counsel in cases where junior Counsel acted jointly with leading Counsel while simultaneously reducing the number of hours allowed for leading Counsel and also reducing the rate of leading Counsel to $700.00 per hour.

As for the failure of the Taxing Master to allow costs in respect of the attendance of junior Counsel at the 2 day trial, the Taxing Master failed to recognize that the role of junior Counsel at the trial was far more than the clerical role of keeping an accurate record of the proceedings."

11. In addition to the foregoing, by way of oral arguments Learned Senior Counsel, Mr. Tynes, Q.C. sought to supplement the Defendant's objections by submitting in summary, as follows:

11.1 Order 59, Rule 26 (2) of the Rules of the Supreme Court is not restrictive but should be read as expansive;

11.2 in the case of **Parker v Roberts** [1997] BHS J No. 85, Allen J (as she then was) commencing [35] and then in citing at [36] the case of **W.T. Potts** [1935] 1 Ch 334, dicta of Farwell J at 339, that in terms of what is "*proper*" costs for allowance during a taxation in application of the aforesaid rule, such that employing leading Counsel fall within the same;

11.3 the hourly rate of $700 amounts to a "*triple whammy*" or triple penalty for the Defendant who claimed $1000 per hour and in most instances allowed less hours despite the junior being disallowed and in the absence of allowing junior counsel the hours allowed should have been increased.

12. In its answers, the Plaintiff contended as follows:

"1. The Taxing Master rightly determined it was not 'reasonable' to allow costs in respect of 'two counsel' on the taxation of the Defendant's Bill of Costs herein on

a 'party and party basis'. Nothing new has been asserted, or otherwise advanced, by the Defendant to justify the Taxing Master departing from, or otherwise revising, the earlier determinations made as to the amounts to be allowed in relation to any of the items of the Bill of Costs that are now made the subject of this review. Accordingly, for the reasons set out below, the objections to the amounts allowed on the taxation of the Bill of Costs ought to be rejected; namely- -

(i) The provisions of Order 59 Rule 26 (2) RSC restricts the amount of costs a Taxing Master may properly allow on a 'party and party' taxation to such costs that were '*necessary or proper for the attainment of justice or for… defending the rights of the party whose costs are being taxed*.'

(ii) In considering whether an item of costs claimed by the Defendant was 'necessary or proper' for the purposes of Order 59 Rule 26 (2) RSC and the quantum to be allowed, the Taxing Master was required to determine whether in all the circumstances of this particular case, this was an Action that could have been effectively and capably handled by a hypothetical counsel or whether this is a matter which required the services of counsel with the degree of skill, expertise and knowledge of Mr. Harvey Tynes QC's standing; Parker v Roberts, Bahamas Supreme Court Action No. 1201 of 1994 at paras. 34 – 50, per Allen J (as she then was).

(iii) In doing so, the Taxing Master must also 'apply an objective standard of reasonableness', Harvey Oscar Tynes v Dencil Barr et al, Civil Appeal No 51 of 2001 at page 3, line 25 to page 4, line 1.

(iv) On a 'party and party' taxation, the Taxing Master is appropriately not concerned with matters arising from the individual client's wishes. To be taken account, are matters relevant to the individual client's interests, objectively viewed. The costs claimed must be shown to have been

reasonably incurred and must be reasonable as to the amount.

(v) Factors affecting the decision to incur the cost of engaging 'leading counsel' were considered by Evans J of the English High Court in Juby v London Fire and Civil Defence Authority [1990] Lexis Citation 2078. His Lordship listed them as follows:

- The nature of the case;
- Its importance to the client;
- The amount of damages likely to be recovered;
- The general importance of the case;
- Particular requirements of the case (special expertise);
- Other reasons why an experienced

and senior advocate may be required.

(vi) In Roberts' case, Allen J did not identify, or otherwise refer to, factors such as importance of the case to the client, amount of damages likely to the recovered, general importance of the case as being relevant to deciding whether it was reasonable to instruct leading counsel and a junior (two counsel). Emphasis was placed on the question of whether a hypothetical counsel could have capably and effectively handled the case.

(vii) The dicta of English High Court is not binding upon the Taxing Master of The Bahamas Supreme Court. Thus, the Taxing Master was not obligated to follow the dicta of Evans J of the English High Court in R v Dudley Magistrate's Court, ex parte Power City Stores Limited et al (1990) 154 JP 654, that it no longer appears to be correct under English law for the taxing master to ask the question whether the case could have been handled by a hypothetical counsel possessed of reasonable competence when determining whether the costs of leading counsel (or two counsel) ought to be allowed. The relevant question is whether it was appropriate or reasonable to instruct a leading

counsel and junior having regard to the factors listed by Evans J in the London Fire and Civil Defence Authority case.

(viii) The Taxing Master was, and remains, bound to follow the decision of Allen J in Roberts' case. It must ask whether, in all the circumstances, this is an Action that could have been capably and effectively handled by a hypothetical counsel, who is a member of utter bar, based on an objective assessment of the relevant facts. This is the correct approach to determining whether the costs of leading counsel plus a junior ought to have been allowed.

(ix) Objectively assessed, it is clear that this is an Action that could have been capably and effectively defended by a hypothetical counsel representing the Defendant. Thus, as stated above, the Taxing Master rightly concluded the cost of two counsel (leader plus junior) ought not to be allowed on a party and party taxation of the Defendant's Bill of Costs in this particular case.

2. Upon an objective consideration of the factors listed by Evans J in the London Fire and Civil Defence Authority case against the circumstances of this particular case, it also abundantly clear the costs of leading counsel plus a junior ought not to be allowed because –

(i) The Plaintiff's claims against the Defendant were contractual in nature. There claims were uncomplicated and did not involve consideration of any knotty points of law. Indeed, a cursory review of the Statement of Claim and Defence filed manifestly supports this assessment of the nature of this case.

(ii) It can be said of almost every case litigated before the Supreme Court that it is a matter of 'importance' to the parties. Invoking the judicial process to seek redress and the defending claims against advanced claims advanced are always

serious matters. The degree of importance varies from case to case. In an instance, where one's liberty is a stake in respect of a serious criminal charge, the importance to the client could be properly described as high, such as in the case of R v Dudley Magistrate's Courts ex parte Power City Stores Limited et al (1990) 154 JP 654 (very serious allegations of falsifying documents to pervert the course of justice).

(iii) Unlike the defendants in the Power City Stores case, there is no assertion on the part of the Defendant that the importance of this case to them was similar in terms of severity or potential financial impact. Indeed, it could not have been properly asserted by the Defendant to have been the case. The Plaintiff's claim was for the Defendant to pay over fees the Defendant had levied and collected and continued to collect from the passengers that passed through their terminal. It could hardly be said that the Defendant would have suffered perilous financial consequences had their defence of the Plaintiff's claim failed. In any event, the size of the claim is merely one of several factors that would be taken into account; it is not, by itself, determinative of the question whether it is appropriate to instruct two counsel (leader plus junior counsel).

(iv) Yet again, a cursory review of the pleadings in this case, cannot support a conclusion that the case was of general importance. The central question was whether the Plaintiff was entitled to collect from the Defendant payment of certain fees by virtue of the terms of an agreement made between them. This case did not feature any issues of general importance to the public.

(v) Neither the prosecution nor defence of the claims advanced in this case necessitated counsel possessed of 'special expertise'; this is also borne out by the pleadings. In this regard, it is also noteworthy that the entire trial involved the cross-examination of a mere two witnesses; each party

called one witness. The trial was conducted over a period of 2 days. On Day 1, trial commenced at 10:12 a.m. After the usual luncheon adjournment, the proceedings were adjourned at 4:02 p.m. On Day 2, trial commenced at 10:13 a.m. After the usual adjournment, trial was adjourned at 3:31 p.m.

(vi) There are no other identifiable reasons which made it either necessary or proper to instruct two-counsel (leader plus junior) in this particular case.

3. The Defendant's assertions that the Taxing Master –

(i) reduced the rate of 'leading Counsel to $700 per hour';

and/or

(ii) failed to recognize the role played by junior counsel at the two-day trial;

are each based on a flawed premise. In making those assertions, the Defendant has erroneously failed to recognize that, in light of the Taxing Master's determination that, objectively assessed, one member of the utter bar with some years of experience could have effectively handled the defence of this Action on behalf of Western Air Limited it inexorably followed that neither the hourly rate of leading counsel would be allowed nor the fees of second counsel/junior counsel would be allowed."

13. In addition to the foregoing, by way of oral arguments, Learned Counsel, Mr. Adams submitted, as I understand it, that on a review unless there is a new matter of principle or fact that was not previously argued before the taxing matter or matters considered that the allowance made should stand. The correct interpretation of the aforesaid rule is to limit luxuries

and charges not necessary to attain the interest of justice. The interpretation and or usage of the **Roberts v Parker** case by Learned Senior Counsel, Mr. Tynes, Q.C. was incorrect as Allen J was referring to the discussion of Farwell J when allowances for leading Counsel should be permitted in the context of English cases and to the extent that local authorities have set out the considerations they ought to be followed. However, even if the English decisions are followed, Mr. Adams contended that the case before the court falls short of justifying the allowance of leading and junior counsel in this case.

Discussion

14. A party who is dissatisfied with a taxing master's allowance (or disallowance) of any item or sum allowed in respect of any item in a bill of costs may apply to the taxing master for a review of the decision in respect of the same pursuant to **Order 59, Rule 31** of the **Rules of the Supreme Court**.

15. Given that the objections relate to the majority of the allowances claimed in the Bill of Costs, it seems appropriate to set out some general principles of law as it relates to firstly what are costs on a party and party basis and what is the approach to conduct of a taxation by a taxing master.

16. It is common ground in this matter that the costs which are to be allowed are that of a taxation on a party and party basis and so far as is relevant, the applicable rule is Order 59 Rule 26(2) of the Rules of the Supreme Court provides as follows:

> "[C]osts to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

17. The commentary in **Halsbury's Laws of England, 4 ed., Vol. 37**, at paragraph 745 which relates to Order 62 of the English Supreme Court Rules (Order 59 Rule 26 RSC equivalent) expounds on the perimeter of the rule as follows:

> "On a taxation on the party and party basis there are to be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included. In practice, however, it is a fiction that taxed costs are the same as costs reasonable incurred, but the law does not recognize the difference between the sum which it awards as costs on the party and party basis and the larger sum which in fact a litigant has to pay.
>
> The costs which are allowed on taxation on the party and party basis include the costs reasonably incurred in obtaining the assistance of solicitors and counsel, and experts, the expenses of the various steps in the action, of interlocutory proceedings, of the trial or hearing and of the proceedings up to the signing of judgment. Cost which would otherwise be recoverable are not disallowed by reason only that they were incurred before action brought."

18. Sir R. Malins, V.C. in **Smith v Buller [1875] L.R. 19 EQ 473** at 475 upheld the plaintiff's objection that drawings and sections with explanatory notes for exhibits to their affidavits commissioned by the successful defendant while being convenient were not necessary. The learned Vice Chancellor in upholding the objection, postulated, inter alia, that during a taxation on a party and party basis:

> **"Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.**
>
> **. . . if the defendants give greater facilities for the conduct of the case than are strictly necessary, they ought not to be allowed to throw them upon the Plaintiff."**

19. Allen J (as she then was) in the case of **Parker v Roberts [1997] BHS J No. 85** conducted a review by a judge after a taxation and a review of taxation by a taxing master. After citing Order 59, Rule 26(2) at [**34**], the learned Judge directed Herself as follows:

> **"35 In considering what the proper remuneration of leading counsel in this matter is, one must determine whether in all the circumstances this is a matter which could be capably and effectively handled by a hypothetical counsel or whether this is a matter which required the services of leading counsel with the degree of skill, expertise and knowledge of counsel of Mr. Seligman's standing."**
>
> **36 In Re W.T. Potts 1935 1 Ch 334 Farwell J. said at p. 339:-**
>
> > **"The truth of the matter is that each case must depend upon its own facts, and in order to see whether the employment of leading counsel is justified or not, one has to consider the whole of the facts, remembering**

> always that leading counsel may he a luxury for which an opponent, or the estate of a bankrupt should not be made to pay and that on the other hand, in some cases the employment of leading counsel may be a proper precaution to take is order to ensure that the case of the person in question may be fully and properly presented to the Court, and that the Court may have every assistance possible in a difficult case in arriving at a proper conclusion." "

20. Then further at [47], in applying the foregoing, Her Ladyship surmised as follows:

> ". . . , I am of the view that a proper remuneration for Counsel in this matter would be one fixed on the basis of a hypothetical counsel. That is, in the words of Pennycuick J. in Simpson Motor Sales (supra) at page 833, "counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation."

21. The simplest interpretation of the foregoing principles as I understand them is that a taxation on a party and party basis is one in which the court is to allow costs which were necessary and proper for the attainment of justice on behalf of the receiving party. It is not a full indemnity. In ascertaining how to achieve this a variety of guidance is discerned from the authorities. Firstly, the receiving party may be entitled to Counsel of its choice as well as the use of resources at its disposal to conduct the litigation as conveniently as possible however when it comes to determining what is recoverable on a taxation, what may have been incurred in not recoverable. Accordingly, the first step is to ascertain a reasonable rate to be applied and that is determinative based on what a competent and capable Counsel would charge. Thereafter each item claimed is to be considered and to whether the item

claimed was reasonably required and then what is the reasonable charge. No luxuries would be allowed.

22. Having conducted the taxation as I understand the process, the remit of the review before the court is to "*reconsider*" the items identified in the summons for review and to take into account the objections (or reasons) for the same.

23. I now turn to consider the reasons for the objections (set out above and summarized here) which while of particular length amount to one objection which relates to not allowing costs for leading and a junior counsel on the taxation is contrary to Order 59 rule 26(2) of the Rules of the Supreme Court and or contrary to **R v Dudley Magistrate's Court**, the judge did not limit the costs order to one counsel, failed to increase time for one counsel if only one was to recover, and the role of a junior counsel was required.

24. In so far as the review seeks to challenge the taxing master's allowance for one counsel only, I shall first consider the relevant objections and answers in that regard and thereafter consider each item under review, whether to allow for leading and junior and/or alternatively to increase the time spent.

I. Two Counsel/ Leading and Junior Counsel Rule

25. Firstly, the Supreme Court Rules are silent on whether there is an entitlement on a taxation where Queen's Counsel may have presented the case and they are similarly silent on whether there is a requirement for a certification for two counsel in order for allowances to be made on a party and party taxation.

26. Guidance from **Supreme Court Practice 1999** (the "**White Book**"), Volume 1, page 1183, paragraph 62/A2/12 sets out a framework as to the "**Leading Counsel and the Two Counsel Rule**". In short, a taxation being conducted on a party and party basis, the discretion to allow for leading and junior counsel and or two counsel is a matter of discretion and to allow the same stands to be answered by the question as "**reasonableness**" and the same "**applied by the taxation officer in the particular circumstances of each case**."

27. The Defendant places heavily reliance on the case of **R v Dudley Magistrates' Court, ex p. Power City Stores Ltd** [1990]140 New L.J. 361 which is cited in the aforesaid passage of the White Book as the authority for the proposition that

> **"[w]ith regard to the instruction of leading Counsel the correct question is not whether the case was well within the capabilities of junior Counsel but rather whether or not it was reasonable to instruct leading Counsel."**

28. The Defendant further seeks to rely upon the Defendant's right to Counsel of its choice having been sued and that having regard to the size of the claim and the ongoing relationship between the parties that hiring leading and junior Counsel was proper and reasonable.

29. The Plaintiff however advanced its principle position that the decision of Allen J (as she then was) in **Parker v Roberts [1997] BHS J No. 85** binds the taxing master in this matter and ought to follow the same notwithstanding the dicta from the case of **R v Dudley Magistrates' Court** to which I am inclined to agree. In this regard, I accordingly direct myself that in considering whether the costs claimed were necessary and proper for the purposes of Order 59 Rule 26 of the Rules of

the Supreme Court, the taxing master is required to determine whether in all the circumstances of this case whether the action could have been effectively and capably handled by a hypothetical counsel or whether this is a matter which required the services of counsel with the degree of skill, expertise and knowledge of senior counsel.

30. Like Allen J directed Herself in **Roberts v Parker**, I consider all of the circumstances of the case so as to ascertain what degree of skill expertise and knowledge would be required. A review of the pleadings and judgment show that,

a. the cause of action before the court was one in which the Plaintiff alleged breach of a lease and operating agreement by which the Plaintiff claimed was due and the Defendant failed to pay;

b. there were no knotty points of law as there was very little in dispute; the judgment itself was sparse as it related to case law, the issues having been defined in the judgment as being (in summary) whether there was a breach and an obligation to pay charges (per [20] of the Judgment);

c. only two witnesses were called and no expert witnesses were called or required;

d. there was limited documentary evidence; and

e. the sum of $371,352.85 plus interest was claimed and the ongoing relationship between the parties could my view be considered of importance.

31. Applying an objective standard, there being no complex points of law, nearly contract simpliciter, having regard to the

documentation, number of witnesses, length of trial and taking into account the size of the claim, on a balance, I hold that it is more likely than not a seasoned/experienced member of the utter bar and not leading and junior counsel was reasonable for the purposes of Order 59 Rule 26(2) of the Rules of the Supreme Court and would be "**necessary and proper for the attainment of justice**" in "**defending the rights of the party whose costs are being taxed**".

32. Another local authority which endorses the approach of "*hypothetical counsel*" is the judgment of Thorne J in the case of **Bastian v Lyford Cay Co.** [1994] BHS J. No. 48. In these circumstances I would find it hard to accept that a taxing master in The Bahamas would be correct to apply English case law in circumstances where local courts have provided guidance especially those which bind the taxing master.

33. However, if I am wrong, I further consider the case of the English High Court decision, cited in the White Book, **Juby v London Fire and Civil Defence Authority and Saunders v Essex County Council**, April 24, 1990 (unreported) which provides an outline of what factors should be considered by the taxing master, when conducting a taxation on a party and party basis, as to whether to allow costs for leading counsel which are as follows: i) the nature of the case, ii) its importance for the client; iii) the amount of damages likely to be recovered; iv) the general importance of the case; v) any particular requirement of the case (i.e. need for legal advice, or for special expertise, e.g. examining or cross examining witnesses); and vi) other reasons why an experienced and senior advocate may be required. As set out above in paragraphs 30 and 31, adopting the same, as well as accepting the submissions of Counsel for the Plaintiff quoted herein at paragraph 12, the

section starting on page 10 at no. 2 ending on page 12 and I hold that this would not be a case in which leading and junior counsel would be appropriate costs permitted on a party and party basis.

34. For completeness to the extent that **R v Dudley Magistrates' Court** was issued the same year as **Juby v London Fire and Civil Defence Authority and Saunders v Essex County Council** and the latter sets out the test to be adopted, I prefer the latter as it is unclear whether **R v Dudley Magistrates' Court** remains good law no other later case having been cited and the same not being produced or rules interpreted provided to the court.

II. Time Spent

35. Having reviewed the decision whether to allow two counsel and refused the same, I now turn to consider firstly the appropriate hourly rate as well as each item identified together with the objection review the allowance with a view as to whether or not the same should be increased.

36. The claim for Queen's Counsel in the Bill of Costs is for $1000 per hour and for junior Counsel $500 per hour. Having regard to the finding that a "*seasoned/experienced*" member of the utter bar was appropriate for this matter; having reviewed the minimum fees set out in the Counsel and Attorney Remuneration scale (as updated to 2006) which provides for Counsel and Attorneys of over 20 years standing a sum of $506.10 per hour; and taking into account that the hourly allowances for Queen Counsel on taxations (which I am familiar with) range from $700 to $900 per hour, and Counsel for the Defendant's preparedness to accept $800 in these

circumstances (subject to maintaining the objection that there should be allowance for two counsel) and Counsel for the Plaintiff's suggestion of $500 to $600 per hour, I have reviewed the decision to allow $700 per hour and conclude that the same remains appropriate.

37. As it relates to the objections regarding the taxing master's failure to take into account that less time was spent by leading counsel as having acted jointly with junior counsel; and to having reduced leading counsel's hours and that the rate was wrong; as well as not making any allowance for junior counsel at trial, at the outset, I hold that such objections are, with respect to learned Senior Counsel for the Defendant, inaccurate and a mischaracterization of the basis upon which the taxation was conducted and in any event not the basis upon which a taxation on a party and party basis is to be conducted. Accordingly the review/reconsideration will not consider dual counsel performing functions.

38. In this regard, upon review of each itemized charge in the bill of costs, the document was and is to be considered on a review as to whether it was a necessary task to attain the interest of justice in defending the action and then it was determined what would be a reasonable costs having regard to hypothetical counsel with the requisite skill and expertise.

39. To the extent that it may be claimed (intentional use of the word may as it has placed the court in a position of having to discern the intent by the way in which the schedule to the review is drafted) that by these objections the Plaintiff seeks a reconsideration of the hours allowed for each of the items listed in its application for review, I do so as follows:

a. No. 1 to 3 – these claims relate to the taking of instructions, consideration of the particulars of the claim, historical background, and various letters to which 22.5 hours were allowed. Having considered that the tasks were necessary and the apparent overlap as presented, the time allowed is reasonable given the length of the documents and what was required to defend the action. It therefore ought to stand.

b. No. 9 – having spent considerable time taking instructions and reviewing the documents, history and particulars of claim, the drafting of a defence as filed herein, a total of 5.5 hours was allowed. Upon review of the claim together with the documents and reconsideration of reasonable time spent in drawing and vetting the defence, I hereby increase the allowance by 2.5 hours being the sum of $1,750 thereby bring the total sum allowed to $5,600 representing 8 hours allowed.

c. No. 15 to 18 – relate to the discovery exercise of receipt and review of the respective lists of documents and also the drafting of statements of facts and issues to which 9.25 hours was allowed. The Defendant having previously taken instructions and reviewed the various documents as previously claimed and prepared the defence, a reasonable charge was allowed and ought to stand.

d. No. 22 to 24 - relate to consideration of the Bundle of Pleadings and material issues of fact in dispute as well as the license agreement and business plan in respect of which a total of 7.75 hours was allowed. The Plaintiff having already reviewed the pleadings to compile the bundle and prepared the statement of facts and issues,

the time spent thereafter in trial preparation is proper and what is reasonable in my estimation turns on the details of the documentation and importance and having regard to the short length of the same and its application to the pleading to which Counsel reviewed, took instructions and drafted the defence as well as prepared statement of facts and issues, the sum allowed was reasonable and ought to stand.

e. No. 25 and 26 relate to correspondence which predates the action. Counsel was invited to provide authority for correspondence being within the scope of the costs order when it predates the action. When asked whether the claim was for reviewing to use at trial, it was indicated that the costs of preparing the same was claimed. Given the lack of authority for preparation of correspondence prior to litigation being recoverable on a taxation and Counsel for the Plaintiff consenting to the sum of $525 for the same, the allowance should stand.

f. No. 27 to 30 seeks reconsideration of the hours allowed for the review of the lease and operating agreement, the cross examination scheme, documents in the bundle and witness statement. The lease and operating agreement forming the basis of the action, reasonably being considered upon taking instructions, drafting defence, statement of facts and issues, the allowance of 8 hours should stand as reasonable as it would be necessary to be familiar with the same for trial. In terms of cross examination, given the length of the witness statement and familiarity with facts at this point, the allowance of 3.5 hours is reasonable and ought to stand. As to the two documents in the bundle, which time already was

allowed for review of and having regard to the length of the same, the 1 hour allowance ought to stand. Finally the witness statement of Chanan Jones having regard the length and already consideration given to the cross examination scheme with knowledge of the documents and facts in dispute the allowance of 3.5 hours is reasonable and ought to stand.

g. No. 32 and 33 – relate to the preparation of two witness statements on behalf of the Defendant. The Defendant only filed one witness statement that being of Sherrexcia Rolle and did not provide a draft of the witness statement of Rex Rolle. The facts do not appear to be complex and largely follow that of the defence, statement of facts and issues and must invariably contain the information previously gathered from when instructions or the brief was received. In the circumstances, the total allowance for these times was 5.5 and 6.5 hours respectively for a total of 12 hours which in my estimation is reasonable.

h. No. 37 relates to the review of the Plaintiff's skeleton arguments and authorities for trial. This document was not complex and as shown in the judgment itself the law was not in dispute. The allowance of 6.5 hours should stand.

i. No 38 relates to the allowance of the sum of $14,000 (being 20 hours) over the attendance at trial over a period of 2 days. While the court records reflect that hearing was between 10:12 a.m. and 4:02 p.m. on day one and 10:13 a.m. to 3:31 p.m. (even including the lunch adjournment) that time would be about 12 hours, having regard to preparation before hearing, work after court ended on day one, continued preparation throughout

breaks etc and debrief of client, the allowance for 20 hours stands.

j. No 39 relates to the preparation of submissions in response to objections taken to the admissibility of the Defendant's witness statements. The issue was not one of great complexity, the rule on hearsay, and the allowance of 5 hours stands.

k. No 40 and 41 relate to the review of the transcript and preparation of the defendant's closing arguments. The transcript does not reveal a large deviation from the witness statements and does not reveal, in my view, extensive cross examination and having regard to the length of the submissions and the familiarity of the documents already before the court the allowance of 6.5 hours and 6 hours respectively resulting in a total of 12.5 hours stands as reasonable.

l. No. 45 and 46 relates to receipt of the Plaintiff's closing arguments and preparing a reply. Having already considered the evidence from the transcript and prepared submissions, and having regard to the content of the Plaintiff's closing submissions, the allowance of 10 hours stands as reasonable.

m. No 48 relates to the appearance for the taxation. Counsel agreed that the hearing was ¼ day (2 hours), ¼ day (2 hours), ½ day (5 hours), ¼ day (2 hours) for the taxation. In addition Counsel for the Defendant sought 5 hours for the submissions laid over during the taxation to which Counsel for the Plaintiff offered 2 hours. The Court allowed 4 hours for the submissions (having regard to the length of the same and the number of authorities) and

accordingly the total allowed was 14 hours. The total allowed in my view is reasonable and the allowance ought to stand.

Conclusion

40. Having considered the objections and answers as outlined in the foregoing and reviewed the taxation, the additional sum of $1750 is allowed in respect of No. 9, the sum of $108,946.00 initially allowed for the Defendant's costs pursuant to the taxation concluded on 4th November, 2020 be and is hereby increased to $110,696.00 and stands as the allowed taxed costs as outlined in the Defendant's Bill of Costs filed on 23rd August, 2019.

Delivered this 29th day of January, 2021

[Original Signed & Sealed]
R. Dawson Malone
Assistant Registrar (Acting) of the Supreme Court