

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**HCA: 1649 of 1998**

**Civil Appeal No. 108 of 2000**

**Privy Council Appeal No. 18 of 2004**

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION BY RAJESH RAMSARRAN FOR REDRESS IN  
PURSUANCE OF SECTION 14 OF THE SAID CONSTITUTION IN RELATION TO THE  
APPLICANT

BETWEEN

**RAJESH RAMSARRAN**

**Applicant/Appellant**

AND

**THE ATTORNEY GENERAL OF  
TRINIDAD AND TOBAGO**

**Respondent**

**Before The Honorable Justice David Harris**

**Appearances:**

Mr. Gregory Armorer instructed by Ms. Dawn Mohan for the Applicant/Appellant  
Mr. Sean Julien, State Solicitor, for the Respondent

**DECISION**

1. The substantive matter was determined in favour of the Applicant/Appellant by the Privy Council, on the 28<sup>th</sup> day of February 2005. Costs were awarded to the Applicant/Appellant at each level of the process and affirmed by the Privy Council. The Privy Council varied upward, the costs order at the Court of Appeal.

## **INTRODUCTION**<sup>1</sup>

2. What is before the Court now is an application by the Applicant/Appellant under the Rules of the Supreme Court 1975 ("**RSC(1975)**") for a review, to a Judge in Chambers against the decision of the Taxing Officer/Assistant Registrar ("Taxing Officer") contained in her Reasons dated 20 October 2010 (and more particularly, her refusal to extend the time for the filing of the Applicant's/Appellant's Bill of Costs for Costs in the Court of Appeal). In this 'Decision', reference to any Order or Rule is that of the RSC(1975) of Trinidad and Tobago unless stated otherwise.
3. The Taxing Officer's decision followed an application by the Applicant/Appellant to extend the time for the filing of 2 bills of costs namely-
  - (i) *A bill of costs for costs in the High Court on an order dated 25 July 2008 and entered on 13 October 2008 in respect of an assessment of damages; and*
  - (ii) *A bill of costs for costs in the Court of Appeal on an order dated 26 November 2001 and entered on 21 December 2001. At first the order was for only 15% of the costs in the Court of Appeal but it was then varied by the Privy Council on 28 February 2005 which ordered, among other things,*

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<sup>1</sup> The following text is a substantial reproduction of aspects the Applicant/Appellants application and written submissions in this matter.

*that full costs be awarded to the Applicant/Appellant for the proceedings in the Court of Appeal.*

4. The Appellant/Applicant submits that since the same issues were involved, one application for an extension of time was filed which dealt with both Bills of Cost.
5. The Taxing Officer delivered her decision on 20 October 2010 and her written reasons are dated 20 October 2010.

### **INITIAL ISSUE**

6. The Assistant Registrar identified the initial issue at paragraph 2 on page 2 of her Reasons i.e. whether the delay by the Applicant/Appellant in presenting the two (2) Bills of Cost for taxation after obtaining the respective cost orders was inordinate, inexcusable and prejudicial to the Respondent.

### **THE BACKGROUND - DECISION OF THE TAXING OFFICER/ASSISTANT REGISTRAR<sup>2</sup>**

7. The Assistant Registrar/Taxing Officer extended the time for the filing of the Bill of Costs for the assessment of damages in the High Court action. In so doing the Taxing Officer in effect found that the delay of 9 months less 7 days in filing that Bill of Costs was not inordinate (paragraph 15 and 21 of the Taxing Officer's/ Assistant Registrar's Reasons).
8. The Applicant/Appellant had made a submission to the Taxing Officer in relation to the Bill of Costs for the Court of Appeal, that -
  - (1) The length of time that has to be measured in considering whether there was any delay is from-
    - (i) The end of the 3 month period after the filing of the order made on the assessment of damages to
    - (ii) The date of filing of the 2 bills of costs.

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<sup>2</sup> See the Applicant/Appellant's application and written submissions.

- (2) The order on the assessment in this matter was filed on 13 October 2008 and the 3 month period ended on 12 January 2009.
- (3) The 2 bills of costs were filed on 5 October 2009. The length of time from 12 January 2009 to 5 October 2009 was 9 months less 7 days.
- (4) Therefore the length of time that has to be considered and evaluated as the possible period of delay was 9 months less 7 days.
9. The Taxing Officer however refused to extend the time for the filing of the Bill of Costs for Costs in the Court of Appeal and the Taxing Officer did so because she found that the delay in filing the Bill of Costs for Costs in the Court of Appeal was inordinate (paragraph 21 of the Reasons), inexcusable (paragraph 29 of the Reasons) and prejudicial to the Respondent (paragraph 33 of the Reasons). The Assistant Registrar found that in the circumstances disclosed in this case, it was reasonable for her to infer prejudice to the paying party even if prejudice had not been expressly shown by the Respondent.
10. Thereafter, the Taxing Officer, in an effort to avoid prejudice to the other party (namely the Respondent) in the matter, proceeded to award some "other sum" to the Applicant pursuant to Order 62 rule 21 (3), which was reasoned by the learned Taxing Officer to be a reduction by 40% of the costs that would have been presented (which was presented out of the prescribed time and an extension of time not allowed) if the Bill of Costs in the Court of Appeal was filed when the order for those costs was made (paragraphs 42 and 43 of the Reasons of the Assistant Registrar).

#### **PARAMETERS OF THE REVIEW OF TAXING OFFICER'S CERTIFICATE BY A JUDGE**

11. The Applicant/Appellant is dissatisfied with the determination of the Taxing Officer and has appealed to a Judge in Chambers, under Order 58 r. 1, to review the decision of the said Taxing Officer<sup>3</sup>. Order 62 r.35 also provides for the powers of a Judge in chambers in relation to a Taxing Officers decision on a Taxation.

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<sup>3</sup> See also Order 62 r. 35 for the limits of the review powers of a Judge in Chambers.

### **THE OTHER ISSUES**

12. The issue in this review/Appeal of the earlier taxation and as identified by the Taxing Officer and confirmed by the Applicant/Appellant, is not just one of the adequacy of the Taxing Officer's ruling on the allowance or disallowance of a particular item(s) or part of an item(s) or the amount allowed in respect of any item by a Taxing Officer.
13. The first issue rather, is the broader legal issue or principle, if you will, as to whether the Assistant Registrar/Taxing Officer ought to have exercised her discretion to allow the Applicant/Appellant leave to present its Bill of Costs after the time provided by the rules for doing so had expired. The Judge is not called upon in the first limb of this matter to review the determination of the allowance or disallowance or the amount allowed on any item(s) or part of them.
14. Is this broader issue referred to in para. 13 above covered by the ambit of Order 58 r.1 on which the applicant relies in this application?
15. Further issues arise as to the adequacy of the quantum awarded, the basis of that award, and the date of the imposition and commencement of the running of statutory interest on the Costs awarded.

### **FINDINGS/CONCLUSION**

16. This first issue is in my view, one that can be properly dealt with on Appeal before the High Court under Order 58 r.1. I have read the reasons of the Taxing officer, the written submissions of the parties and am convinced by the reasoning of the taxing officer with respect to the refusal to extend time to the Applicant for the filing of the Bill of Costs for the Court of Appeal. I do not believe any useful purpose is served by repeating the arguments of the Taxing officer contained in

her written decision/reasons dated 20<sup>th</sup> October 2010 and I hereby adopt it in preference to the arguments of counsel for the Applicant.

17. In the circumstances, the application for the Review pursuant to Order 58 rule 1 of the Rules of the Supreme Court 1975, dated the 21<sup>st</sup> day of October 2010 in relation only, to the setting aside of the Taxing Officers refusal to extend time for the filing of the Court of Appeal Bill of Costs, is dismissed.

18. The effect of the confirmation of the Taxing Officers refusal to extend time and the dismissal of the application to set aside the finding; that the delay of the Court of Appeal Bill of Costs was inordinate, inexcusable and prejudicial to the Respondent; and that costs be awarded in accordance with order 62 Rule 21(3) under some 'other sum' in lieu of taxation for the Court of Appeal Bill of Cost; leaves the Taxing Officer's original determination in place and to the extent that the Applicant/Appellant is dissatisfied with the Taxing Officer's determination and award of any "other sum" - a global sum - pursuant to Order 62 rule 21 (3), and in order to prevent prejudice to the Respondent in the substantive matter and in this application, the Court adopts the reasoning set out in paras. 35-47 of the Taxing Officer decision/reasons dated the 25<sup>th</sup> day of October 2010 and affirms the Taxing Officers Costs award('other sum') in relation to the Court of Appeal. The "other sum" in effect is the discounted notional accumulation of all the items - into what is in effect now one 'item' - that would have been presented in the Bill of Costs had it been allowed. The Applicant contends that the 'other Sum' is not a Costs award, but an award in lieu of a costs award<sup>4</sup>. I see no logical argument in favour of that contention. The 'Other Sum' provided for under the RSC(1975) "ORDER 62, COSTS, COURT FEES, MARSHALL'S FEES AND CHARGES", is an Award of Costs. It is a sum calculated in a manner other than that prescribed in the usual *inter partes* taxation process, but an award of Costs all the same.

19. On the question of the Statutory Interest applicable to the items making up the cost award or as in this case, the 'other sum' awarded; whereas section 25 of The

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<sup>4</sup> See para 38 of the Respondent's written submissions for their reasoning.

Supreme Court of Judicature Act Chap. 4:01 provides in the circumstances there described, for exercise of a discretion on the part of the Court in determining the rate, the date, or the application of interest at all; It appears that in the instant matter, the award of interest under section 25A, makes no allowances for the exercise of a discretion in the award, the interest rate or the period covered by the interest award. The section provides simply, for the award of 12% interest from the time of entering up the judgment.

20. For the purposes of this matter, the question is, I suppose; from the time of entering up what Judgment and when is a judgment 'entered up'? Does the interest start running from the date of the original substantive Judgment (Incipitur) as contended by the Applicant/Appellant, or does it run from the date of the Registrar's certificate (Allocutur<sup>5</sup>), or further still, can it run from some other shorter date determined by the Taxing Officer as was done in the instant case?<sup>6</sup> The authorities on this point support the position that a judgment is entered up from the time the judgment is pronounced - the Incipitur - and even before the judgment is registered<sup>7</sup>.

21. Costs are presumably incurred at different times during the course of a trial and the order for costs are made at Judgment. Unless the Court is shown authority to the contrary, I remain unconvinced that the interest commences running at any time other than from the date the order for Costs is entered up – the Incipitur rule - which in the instant case is year 2000 for the High Court Action and more particularly, 2001 for the Court of Appeal.

22. In **Lystra Linette v Shastri Kumar Manohar-Maharaj** CVA No. 68 of 1995 the Registrar referred to the English case of **Hunt v R M Douglas (Roofing) Ltd (1990) 1 AC 398, HL**, where it was held that interest on costs should run from the date of

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<sup>5</sup> See Lord Denning MR in Jifford v Gee [1970] 2QB 130, 140-146 ; see also the English Judgments Act 1838 (1&2 Vict. C. 110)

<sup>6</sup> See reasoning for this adjustment to the commencement of interest in K v K (Divorce Costs:Interest)[1977] Fam. 39.

<sup>7</sup> See Electricity Supply Nominees Ltd v Farrell and others[1997] 1 WLR 1149; Pauls Agriculture Ltd v Smith(1993) 3 All ER 122.

the order entitling the party to costs (the incipitur rule) and not from the date of the taxing master's certificate (the allocatur rule). However, he opined that it would have been unreasonable in that case to allow interest to run from the date of the order entitling the Petitioner to costs. Instead he awarded interest from the date of his judgment until payment.

23. A similar approach was adopted by the Assistant Registrar in **Trinbago Roofing v The Attorney General Civ App 138 of 1996** where she cited the Canadian case of **Mintz v Mintz** (1984) Carswell Ont.471 in which the taxing officer reduced the rate of interest on the cost significantly, because the receiving party failed to present the bill of costs for taxation by 2 years after obtaining the order and having regard to the high interest rate payable on the amount to be taxed (in that case 17% per annum). The taxing officer found that the paying party would have been prejudiced if interest were to accrue at that rate. The taxing officer reduced the rate of interest on the Costs significantly, due to the failure by the receiving party to present the bill of costs for taxation by 2 years after obtaining the order and having regard to the high interest rate payable on the amount to be taxed (in that case 17% per annum). The taxing officer found that the paying party would have been prejudiced if interest were to accrue at that rate. The Court notes however, that there is no authority for the taxing officer in Trinidad and Tobago to vary the statutory interest rate nor is there clear authority to vary the date at which the interest commences running. However, in the instant case, the Assistant Registrar ordered that it would be unreasonable to allow the interest at the fixed rate of 12% per annum to run from the date of the order (January 28, 2000) bearing in mind there had been a delay of 9 years and instead awarded the said statutory interest at the rate of 12% per annum, to accrue from May 13, 2010 (the day of her judgment – Allocatur - until payment. There is no doubt some injustice would be done to the paying party to have to bear the interest burden of a 9 yr. delay, which for the greater part was caused by the Applicant, albeit under a misapprehension of the law with respect to the time for filing and taxing a Bill. The Taxing Officer however, was of the view that the Rules and Law allowed for the



said interest burden/prejudice to be alleviated by varying the commencement of the interest.

24. The Taxing Officer in the instant case further cites in support of her position; **Pauls Agriculture Ltd[sic] v Smith** (1993) 3 All ER 122 and states that the case authority confirms that a Taxation Officer is empowered to reduce a Bill to compensate for the prejudice suffered by the paying party. The court in that case affirmed that the Rule relied on in that case conferred a jurisdiction on the taxing master to deprive a successful party of any significant measure of his costs where the delay was inordinate and inexcusable or where the delay has been shown to be prejudicial to the unsuccessful party in the action.
25. In that case the successful defendants appealed from a judgment of the chief taxing master in relation to a determination made by him to disallow part of the costs of the action pursuant to his powers under the U.K. RSC Ord. 62 R 28 (4) which stated as follows *"Where a party entitled to costs ....(b) delays lodging a bill of costs for taxation, the taxing officer may ...(ii) after taking into account all the circumstances (including any prejudice suffered by any other party as a result of such...delay...and any additional interest payable under section 17 of the Judgments Act 1838 because of the ...delay), allow the party so entitled less than the amount he would otherwise have allowed on taxation of the bill or wholly disallow the costs."*
26. The Rules of the Supreme Court (1975) of Trinidad and Tobago, in my view, simply do not contain such express (or implied) and detailed provisions that provide for the discretion to moderate the impact of the statutory interest regime on a paying party.
27. That interest on costs run from the date of the Judgment (Incipitur), is a common law rule (and codified in the Supreme Court Rules 1975) and has not been altered by the said Rules or any revision of those rules.<sup>8</sup> A closer look at the Rules and Law

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<sup>8</sup> See Lord Ackner in **Hunt v R.M.(Roofing) Ltd** [1990] 1 A.C. 398, H.L., the history of this Rule runs from the 1838 Judgments Act to the 1965 revision of the UK Supreme Court Act where the removal of a mere footnote to one of the rules, created some confusion thereafter in the construction of the rule.

of Trinidad and Tobago does not in my view show any change in that common law position.

28. The Canadian authorities cited in the decision of the Taxing Officer in this case can be distinguished in that they disclose a statutory authority to “...disallow or reduce the amount of interest accrued on an award of costs”<sup>9</sup>. However, notwithstanding the enabling statutory provisions in Canada, in **Mintz v Mintz**, the Court did not interfere with either the rate of interest (17% in that case) or the date of the commencement of the interest, but, creatively, in its reckoning, sought to alleviate the prejudice by reducing the actual dollar amount of the ‘other sum’ award, by an amount equal to the accrued interest for the period of the delay (which in that case was 284 days).
29. Applying this principle to the instant case in the context of Order 62 rule 21(3), the taxing master would determine the extent of the delay occasioned by the Applicant, and from that, applying the 12% interest on the amount claimed on the allowed Bill (or the “other sum”), together with any other relevant considerations including any mitigating factors, arrive at a figure that fairly awards costs and alleviates the ‘prejudice’ notwithstanding the application of the 12% interest and the Incipitur rule. In the instant case the Taxing Officer in my view could legitimately have entered into similar considerations as did the court in the **Mintz case** and further reduced the ‘other sum’ awarded. She did not, and this too, is also acceptable in this process. I do not propose here, to interfere with the subtle rumination that attended the deputy Registrar/Taxing officer's deliberations in the instant case.
30. The application of the Allocatur rule was given life in the UK Court of Appeal case of **K v K**(*Supra*) (per Lord Denning MR). The House of Lords, in the subsequent **Hunt case**, with express reference to that case, concluded that **K v K** was wrongly decided and that the Incipitur rule prevails with respect to the award of interest on costs.

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<sup>9</sup> See Re: The Income Tax Act, Grant R. Wilson and Her Majesty The Queen, 2000 CarswellNat 650, 2000D.T.C. 6267, [2000]3 C.T.C. 56 at paras 28-30. This case considered **Mintz v Mintz**, *Supra*.

31. It is contended by the proponents of the Allocatur rule, that interest should be payable whenever money is wrongly withheld from one who is entitled to it. Lord Ackner in the said **Hunt case** went on to expand on the underlying basis for the support of the application of the Allocatur rule that underpinned the decision in the **K v K case**, that; *"when the costs sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be wrongfully withholding the money until it is fixed. So in all fairness interest should only run from the date of quantification:.."*

<sup>10</sup>.

32. Lord Ackner observed that in applying the Incipitur rule, a satisfactory result cannot be achieved in every case, but, however, that the balance of justice favours the application of the Incipitur rule. In the end, in finding in favour of the application of the Incipitur rule, he noted that *" it is the unsuccessful party to the litigation, who, ex hypothesi, has caused the costs unnecessarily to be incurred"*. I note also, that these are costs that are presumed to have been incurred prior to Judgment with no prospect of interest being applied to those costs prior to Judgment. The RSC (1975) of Trinidad and Tobago and Practice thereto, would have permitted the Respondent to have taken action under Order 62 at an earlier date in order to ensure that the Applicant presented and pursued his Bill in a timely manner or that the applicant/appellant's costs or interest thereupon, be disallowed in part or in whole. The Respondent failed to do so. Although I must admit that as anticipated by Lord Ackner above, this result may not allways be the most satisfactory result, but the Respondent/Defendant in the instant case, sat on its rights, failed to protect itself and mitigate against what they must have known (and in any event, taken to have known) was a bourgeoning interest element of the cost award and it cannot now lie in its mouth to claim prejudice for the entire period.

33. I do not accept the contention of counsel for the Applicant that the circumstances of his late (but not absent) Bill of Costs do not fall within the parameters of Order 62. rule 21 (3). The effect of the Taxing Officer having refused

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<sup>10</sup> See the **Hunt and Douglas case**; see also Lord Denning MR in Jefford v Gee [1970] 2 Q.B. 130, 140-146.

to extend time for the filing of the Bill of Costs under specific provisions of the rules; is, what I refer to here as the '*rule 21(3)-neglect*' of the applicant to procure his costs to be taxed as provided in the said r.21(3). This or any other failure under the rule(or under rule 7.5) does not stand alone, but must also result in prejudice to the other party before the rule is 'triggered'. The attempt to file the 'Bill' does not remove the prejudice already suffered by the paying party occasioned by the refusal and/or neglect in bringing in costs for taxation or procuring same, up to that time. It simply does not also render the rule – 21(3) – inapplicable in cases of delay as opposed to non-presentation, as contended by counsel for the Applicant/Appellant<sup>11</sup>. The fact that the rule speaks of failure to procure or proceed with taxation rather than delay has been held to be of no significance, not least of which, for the reason that a party could avoid the operation of the rule at all times by merely turning up at the eleventh hour seeking to proceed to taxation.<sup>12</sup>

34. Reviewing the UK authorities submitted by counsel for the applicant, it is apparent to me that the UK has a swath of provisions in their Law and Rules that provide for, enable and circumscribe the discretion of the Taxing master, the Costs Judge or the Master, as the case might be, in a manner that the Trinidad and Tobago RSC(1975) simply does not. Further, in the UK, additional legislative enactments apply to certain specific areas of practice such as Probate actions, Matrimonial rules, Petitions under the Companies Act etc. These UK provisions in some instances, include the placing of a burden on the paying party to make an application to invoke the protection against the burden or sanctions of the Rule. The instant case turns on its own peculiar facts and on the specific local provisions of the Remedies of Creditors Act, The Supreme Court of Judicature Act, the RSC(1975) and practice.

35. Finally, Order 62 rule 8(6) and Order 62 rule 7(5) of the RSC(1975) referred to in the Applicant's written submissions, in my view are not applicable in this matter. Rule

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<sup>11</sup> See the reasoning by Parker L.J. in *Jones v Roberts* [1986] The Times L.R. August 2<sup>nd</sup> 1986; see also paras. 31, 32 of the Respondent's written submissions filed on May 27, 2011.

<sup>12</sup> *Ibid.*

8 deals with a solicitor in default. I am not aware of any argument or facts put before the taxing officer or indeed before me, that seek to establish or otherwise disclose culpable default in the solicitor as opposed to the party/client. Rule 7(5) from a practical stand point exhibits little or no difference from the rule relied upon by the Taxing Officer – Rule 21(3). Both rule 21(3) and rule 7(5) provide for a timely determination and award of any “other sum” for costs, to prevent the other party from being prejudiced by further delay. None of the rules cited by counsel in the matter are without difficulties in their construction. In any event, if I were wrong on this, taking these two rules together with rule 21(3); then, rule 21(3) in my view, is the rule that more logically and fairly addresses the facts and circumstances of this case.

**36. For the reasons provided above, THE COURT HEREBY ORDERS;**

37. **(i)** That the Taxing Officer's Court of Appeal Costs award of any 'Other Sum' do stand;

**(ii)** That the statutory interest on the said Costs awarded (the 'Other Sum') do commence from the substantive Court of Appeal judgment awarding costs (Incipitur rule);

**(iii)** That success in this matter being evenly distributed, each party to bear its own costs on this application.

**DAVID C HARRIS**  
**JUDGE**