

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. 75 of 2006**

**BETWEEN**

**BARBARA JEAN HAMEL-SMITH**

**AND**

**SUZETTE HAMEL-SMITH**

**APPELLANTS**

**AND**

**ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**RESPONDENT**

**PANEL: M. Warner, J.A.  
W. Kangaloo, J.A.  
A. Mendonca, J.A.**

**APPEARANCES:**

**Sir. F. Ramsahoye S.C. for the Appellants**

**Mr. K.Garcia for the Respondent**

**DATE DELIVERED: 18<sup>th</sup> December, 2007**

**Delivered by M. Warner, J.A.**

I have read in draft the Judgment delivered by Warner, J.A. I agree with it and I have nothing to add.

W. Kangaloo  
Justice of Appeal

I also agree

A. Mendonca  
Justice of Appeal

## JUDGMENT

1. In this appeal, the appellants claimed that the failure of a former Assistant Registrar (the Taxing Officer) to deliver a certificate of taxation and the reasons for the review of a taxation which she conducted, in relation to a bill of costs, in H.C.A. 3341 of 1999 (the main action) amounted to a violation of the appellants' constitutional rights. The appellants sought redress by an originating motion dated the 16<sup>th</sup> July 2004.

2. Kokaram J., then a temporary judge, dismissed the appellants' motion on the 12<sup>th</sup> May 2006. However, in an effort to address what he perceived to be "the real controversy," he made an order that the next stage of review be proceeded with, before him after service of the application together with necessary amendments on or before the 5<sup>th</sup> June 2006, failing which that application and the application for review of the decision of the Taxing Officer would stand dismissed. The next stage, which the judge described as "the stage II Review" referred to a review of the Taxing Officer's taxation to be carried out by a judge in chambers. The appellants filed a notice of appeal on the 12<sup>th</sup> June 2006.

3. When the appeal came on for hearing however, it was brought to this Court's attention that reasons had been completed by the Taxing Officer on the 31<sup>st</sup> December 2003 and that they formed part of the proceedings in the main action. Indeed, in his judgment the judge observed that "the reasons and certificate" were now available. The initials "M.B" presumably those of the Taxing Officer appear at the foot or end of the Bill. However, we have not been

presented with any evidence of a certificate signed by her certifying the total sum taxed. The Taxing Officer is no longer in the service of the Judiciary.

### **Background**

4. In order to provide the background facts, I refer to the concise summary contained in the judgment of Kokaram J. and for convenience repeat them very nearly as they are presented in that judgment.

#### **Background Facts:**

- i. By an order of Master Doyle dated 28<sup>th</sup> January 2003 the Plaintiff in HCA 3341 of 1999 was ordered to provide further and better particulars of its Statement of Claim in the main action and to pay to the Defendants, (the appellants herein,) their costs of the application for further and better particulars certified fit for counsel, unless agreed by the parties. The appellants presented their bill of costs for taxation pursuant to the said order on 7<sup>th</sup> March 2003. On 3<sup>rd</sup> June 2003 the Taxing Officer taxed the appellants' bill of costs.
- ii. On that taxation the Taxing Officer taxed the sum of \$25,000.00 off the fee on brief for Senior Counsel claimed in the sum of \$50,000.00. Further the sum of \$5,000 was allowed in respect of the sum claimed by the appellants for instructing Attorney's fee in the amount of \$14,000.
- iii. Upon completion of the taxation, the Plaintiff in the action filed a review of the Taxing Officer's decision with respect to those two items. This application was dated 6<sup>th</sup> June 2003 and filed on 25<sup>th</sup> June 2003. The appellants herein delivered their own objections to the taxation. This

was filed on 15<sup>th</sup> July 2003. The appellants sought by their notice to also raise objection to the review on the basis that the Plaintiff had not filed his objections within 14 days of the date of taxation as prescribed by Order 62 rule 33 (2) of the Rules of the Supreme Court 1975 (the RSC.)

iv. By the notice the appellants also requested that the “reasons for any decision on the application for review upon the objection to the review and the complaint that the sums awarded were too low be stated in writing by the taxing officer pursuant to Order 62 rule 34(4).”

v. This review took place before Taxing Officer on 22<sup>nd</sup> July 2003 when the fees to Counsel and Instructing Attorney were even further reduced. A request was also made on that day by the appellants for the reasons for the decision on review.

5. Further requests for the reasons were made both orally and in writing by the appellants’ legal representatives, but the appellants maintain that none was provided. Those, then, are the background facts.

6. Senior Counsel for the appellants contends that the Judge was not entitled to make an order for “the stage II Review” without reasons or a certificate of taxation having been placed before the court prior to the trial of the motion. Counsel further argued that, the judge could not grant a remedy unless he found a constitutional breach.

7. It is convenient at this stage to set out the relevant rules. Order 62 rule 1 defines “taxing officer” to mean the Registrar or Assistant Registrar acting in the

discharge of his functions with respect to the taxation of costs. Order 62 rules 32,34 and 35 provides:

**Application to Taxing Officer for Review**

33. 1) ***Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or part of any item by a taxing officer, or with the amount allowed by a taxing officer in respect of any item may apply to the taxing officer to review his decision in respect of that item.***
- 2) ***An application under this rule for review of a taxing officer's decision may be made at any time within 14 days after that decision or such shorter period as may be fixed by the taxing officer.***

***Provided that no application under this rule for review of a decision in respect of any item may be made after the signing of the taxing officer's certificate dealing finally with that item.***

3) ***Every applicant for review under this rule must at the time of making his application deliver to the taxing officer objection in writing specifying by a list the items or parts of items the allowance or disallowance of which or the amount allowed in respect of which, is objected to and stating concisely the nature and grounds of the objection in each case, and must deliver a copy of the objections to each other party (if any) who attended on the taxation of those items or to whom the taxing officer directs that a copy of the objections shall be delivered.***

4) ***Any party to whom a copy of the objections is delivered under this rule may, within 14 days after delivery of the copy to him or such shorter period as may be fixed by the taxing officer, deliver to the taxing officer answers in writing to the objections stating concisely the grounds on which he will oppose the objections, and must at the same time deliver a copy of the answers to the party applying for review and to each other party (if any) to whom a copy of the objections has been delivered or to whom the taxing officer directs that a copy of the answers shall be delivered.***

**5) An application under this rule for review of the taxing officer's decision in respect of any item shall not prejudice the power of the taxing officer under rule 17 to issue an interim certificate in respect of items his decision as to which is not objected to.**

**Review by Taxing Officer**

**34. 1) Where an application is made under rule 33 for review of a decision of a principal clerk acting under rule 13, the review shall be carried out by a taxing officer.**

**2) On reviewing any decision in respect of any item, a taxing officer may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him; and any costs awarded by him to any party may be taxed by him and may be added to or deducted from any other sum payable to or by that party in respect of costs.**

**3) On a hearing of a review under rule 33 a party to whom a copy of objections was delivered under paragraph (4) of that rule shall be entitled to be heard in respect of any item to which the objections relate notwithstanding that he did not deliver written answers to the objections under that paragraph.**

**4) A taxing officer who has reviewed a decision in respect of any item shall issue his certificate accordingly and, if requested to do so by any party to the proceedings before him, shall state in his certificate or otherwise in writing by reference to the objections to that decision the reasons for his decision on the review, and any special facts or circumstances relevant to it.**

**A request under this paragraph must be made within 14 days after the review or such shorter period as may be fixed by the taxing officer.**

**Review of Taxing Officer's Certificate by a Judge**

- 35 1) ***Any party who is dissatisfied with the decision of a taxing officer to allow or disallow any item in whole or in part on review under rule 33 and 34, or with the amount allowed in respect of any item by a taxing officer on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the taxing officer requested that Officer in accordance with rule 34(4) to state the reasons for his decision in respect of that item or part on the review.***
- 2) ***Any application under this rule for review of a taxing officer's decision in respect of any item may be made at any time within 14 days after the taxing officer's certificate in respect of that item is signed, or such longer time as the taxing officer at the time when he signs the certificate, or the Court at any time, may allow.***
- 3) ***An application under this rule shall be made by summons and shall except where the Judge thinks fit to adjourn into Court, be heard in chambers.***
- 4) ***Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the taxing officer but, save as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the taxing officer in relation to the subject matter of the application.***
- 5) ***If the Judge thinks fit to exercise in relation to an application under this rule the power of the Court to appoint assessors, the Judge shall appoint not less than two assessors, of whom one shall be a taxing officer.***
- 6) ***On an application under this rule the Judge may make such order as the circumstances require, and in particular may order the taxing officer's***

***certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the same or another taxing officer for taxation.”***

8. The rules provide a simple procedure for the taxing officer to review his taxation on request (rules 33 and 34) and for review of the taxation of the taxing officer, by a judge (rule 35). There is no express right of appeal.

### **The Constitutional challenge in the instant proceedings**

9. In his written argument Senior Counsel for the appellants emphasised that there was ‘no complaint about delay’ – the matter raised in the appeal focused on the systemic failure in the judicial system which caused the appellants to suffer a breach of their constitutional rights. There was, therefore, denial of due process and a denial of the protection of the law.

10. The refinement of Counsel’s argument is evident, because when one examines the nature of the relief sought in the court below, that is, a declaration that the appellants suffered a contravention by the State “by reason of the unreasonable delay and or failure of the Assistant Registrar.” I do not think that the judge can be criticised if the starting point of his judicial exercise was the examination of the guiding principles set out in **Harrikissoon v. The Attorney General of Trinidad and Tobago (1979) 31 WIR 348 at 349.** He cited the following passage:

***“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or***

*fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves contravention of any human right or fundamental freedom.”*

11. He also referred to recent compatible judgments handed down by the Privy Council. In particular, the case of **Boodoo v. Attorney General P.C. 8 of 2003**, in which it was held that the breach of a litigant’s constitutional rights occasioned by the delay in the delivering of a judgment can only arise if the delay renders nugatory the right pursued by the litigant of the benefit of the decision or makes a mockery of the person’s right to have a determination of the matter by a competent court.

12. Accordingly, Kokaram J. held that the appellants’ right to review was not lost; they were not left without a remedy as the framers of Order 62 of the R.S.C had catered for the incidence of delay by conferring powers on the Registrar or a Judge in chambers (Rule 35(2) to grant extensions. There were, accordingly, no special circumstances arising such as the denial of a fair hearing or arbitrary exercise of state power.

13. I agree with judge’s assessment of the relevant law. In sum, a defendant must be able to show that the delay has caused such prejudice that a fair trial is

no longer possible. In some cases prejudice will be inferred from substantial delay.

14. One way in which the effects of delay may be mitigated is that interest on costs would run from the date when the judgment was pronounced (See **Hunt v. R M Douglas (Roofing) Ltd. 1990** AC 398 HL). As a matter of general interest, I note that on the hearing of an application, the judge may exercise all such powers and discretion as are vested in the taxing officer in relation to the subject matter of the application (**rule 35(4)** and **Madurasinghe v Penguin Electronics (a firm) [1993] 3 All ER 20**

15. I am of the view therefore, that the appellants have not proven that they were prejudiced either inferentially by reason of substantial delay or by delay which was less extreme.

16. That is not to say however, that this Court in any way countenances the tardiness on the part of the Taxing Officer. Six months had elapsed before there was any response.

17. If, on the other hand, the argument as now formulated is premised on the denial of the constitutional guarantee of due process and the right to protection of the law, then similarly the question of unfairness is still the critical issue. The matter must however be approached in the light of the proceedings as a whole (See observations of Lord Steyn in **Ferguson v. the Attorney General of Trinidad and Tobago, Privy Council Appeal No 11 of 2000.**) to the effect that there is a close link between the three guarantees of due process, protection of the law and a fair hearing since the concept of a fair trial is common to them all.)

18. The protection of the law which the appellants enjoyed was the right to apply to the courts of justice for such remedy as the law gives to them. Access to the court of justice is itself protection of the law. (See **Attorney General v McLeod [1984] 1 WLR 523 at 531**)

19. 'Due process' as spelt out in **Boodram v. Attorney General [1996] 47 WIR 459** at 494 has two elements the right to protection against abuse of power and the requirement that when powers are exercised by the state against the individual they are not to be exercised arbitrarily. The inquiry in the context of this case would lead to an examination of the rule 34(4) in some detail.

20. On a fair reading, rule 34(4), (see before) having regard to the phrase "he may state in his certificate or otherwise, ..."the reasons for his decision," there seems to be no impediment to the incorporation of reasons in the certificate of taxation, The case cited below although, it related to the taxation of a bill, as distinct from review, is of assistance.

21. **R v. District Registrar, Kingston-upon-Hull ex parte Norton [1944] 1 All ER 546**, it was held that the taxing master's 'allocatur' need not be a separate document, but may be indorsed on or written at the foot of the bill of costs, provided that the bill of costs together with the 'allocatur' contains the name of the case or matter; the name of the party whose costs are to be taxed, the amount at which costs are taxed and the signature of the taxing officer. The issue was resolved on the basis of substance, rather than form. Whereas the practice has always been to issue the certificate in a separate document, this has however arisen as a matter of convenience.

22. Similarly, the Malaysian Court of Appeal, in **Tan Boon Bak Trading Sdn Bhd v Chua Choong Yin [2004] 3 CLJ 695** a taxation case, adopted a purposive construction in determining when time should begin to run. It was held that a 'certificate', could come in any form – in the form of an allocatur or in a reasoned judgment in support of the taxing officer's decision.

23. However Fung J. sitting in Chambers in the Hong Kong Court of Appeal in **Cheng Sun Lam v Lai Kam Man [2007] HKEC 638** held that the master's written decision was different from the certificate. He further held that absence of the certificate was a serious breach and in those circumstances ordered that the review be heard afresh. I respectfully disagree with that rigorous approach. It is evident that the rules do not require a 'precise verbal formula.' I should also mention that in the three jurisdictions, the Rules which dealt with taxation of costs were similar to the local rules.

24. I have considered fully, the reasons of the Taxing Officer published in December 2003 and I have drawn on the case law collated. I am of the view that it is clear that only two specific aspects of the Bill remain contentious. A mere mathematical calculation will produce the amount at which costs are to be taxed and allowed. However, the reasons do not meet the requirements of a certificate as set out in the **Norton** case, because the Taxing Officer has not stated the total sum allowed. She has only referred to the disputed items. In that regard, therefore, they are deficient. In my view however, a simple letter to the Registrar ought to have clarified the misconceptions which the parties obviously held. I am however satisfied that there is no bar to the Registrar's completion of the

exercise by certifying the total sum allowed. (See Order 62 rule 1). This exercise is merely a mathematical calculation. The practice in this jurisdiction is that the certificate may be signed by the Registrar or an Assistant Registrar and not necessarily by the Taxing Officer who carried out the review.

25. Counsel for the appellants cited the following cases in which the English rule was considered. It expressly referred to a review of “the certificate or allocatur of the taxing master.” The local rule referred to a review of the “decision”. (The English Rule was later changed). This is the first basis on which the cases may be distinguished.

26. In **Harbin v Gordon [1914] 2 KB 577**, the Master had indicated his intention to allow a sum, but had not done so. The taxation was therefore not concluded, so that a summons to review before a judge, was held to be premature. **Eaves v Eaves and Powell 1956 P. 154** deals with the necessity to give reasons. A taxing officer’s omnibus statement that the “merits of the case and all relevant circumstances were taken into account” was criticised as being “*abbreviated and unduly uninformative.*” In Re **Fraser, (deceased) Leach and another v Public Trustee and others [1958] 1All ER 26**, the taxing officer did not “reach conclusions” and “state his conclusions and reasons” in his certificate. In the case of **Le Brasseur v Oakley (1986) 2 Ch 487**, the rationale was that the Court must be told what the taxing master’s reasons were, in order to prevent the court from dealing with an issue arising out of the taxation, when it has not been fully apprised of all the relevant facts or the ultimate decision of the taxing master or official.

27. No such criticism can be raised in the instant case. The taxation was concluded and while the certificate had not been issued the reasons were published prior to the filing of the motion. The appellants have not lost their right to review and they will be entitled to interest on the sum found due. In the result I am satisfied that there has been no constitutional breach.

28. The only other question which I need address is the submission of counsel for the respondent that although the remedy of judicial review might not have been available to the appellants, they could have sought relief by way of an application under the inherent jurisdiction of the court, for a judge to carry out the review, without reasons.

29. In **Sandback Charity Trustees v. Norton Staffordshire Rly Co. 1877** – 78 Brent L.J. expressed the rule in this way:

***“We cannot grant a mandamus, for the master has never declined to exercise jurisdiction, neither can a writ of certiorari be issued, because the master has jurisdiction and he has exercised it. Then as to the application to review the master’s taxation, Owen v. London and North Western Rly. Co. (1) decided two things. First, the ground on which the Courts exercise jurisdiction in a matter of taxation is that the office of taxing costs is the business of the Court itself; that this office is delegated to one of its officers, and that the Court has necessarily jurisdiction to control this delegated authority and therefore a right to review the master’s taxation.”***

30. In the more recent authority of **Macro (Ipswich) Limited [1996] 1 WLR 145.**), it was held that although the review machinery prescribed by Order 62 rules 33 to 35 was appropriate to challenges in respect of the technical matters concerning the taxation, it was inappropriate to challenges of a general nature

such as, whether to adjourn or extend time. The inherent jurisdiction of the Court could, however, be invoked to make good the want of an express right of appeal.

31. It will not be necessary to address this submission in detail because I am of the view that all that is necessary is that the Registrar or Assistant Registrar issue the certificate. However, I do express the view that I would have had serious doubts about the invocation of the court's inherent jurisdiction, had I found that the reasons were inadequately prepared or if there were no reasons at all.

32. While I would uphold the judge's order refusing constitutional relief, I do not agree that the review by a judge in Chambers (the Stage II Review) could proceed before the certificate is issued. In the circumstances, the Registrar ought to take steps to issue the certificate with despatch. As the certificate has not yet been issued, time for the stage 11 review has not yet begun to run. Once issued, the Appellants, if they wish to pursue the review, will have 14 days for the issue of the certificate or such longer period as the Court may allow, to apply for the review.

The appeal is therefore dismissed with costs.

Margot Warner  
Justice of Appeal