

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



Cause No. FSD 104 of 2011 (RPJ)

IN THE MATTER OF THE ESTATE OF JOHN SAMUEL HINDS (DECEASED) AND THE ESTATE OF ESTHER ROSALIND HINDS (DECEASED)

AND IN THE MATTER OF THE GRAND COURT RULES ORDER 85

BETWEEN: PHILLIP BRADLEY HINDS

APPELLANT

AND

- (1) CLIVE MONTRIVELLE HINDS, ADMINISTRATOR OF THE ESTATE OF ESTHER ROSALIND HINDS
- (2) CLIVE MONTRIVELLE HINDS
- (3) JOHN LEVERETTE HINDS III
- (4) THOMAS ANTHONY HINDS
- (5) SHARON HINDS
- (6) NORAHS KCOTSOB LIMITED

RESPONDENTS

ON THE PAPERS

Before: The Hon. Justice Raj Parker

Draft Judgment

Circulated: 22 February 2021

Judgment Delivered: 25 February 2021

HEADNOTE

Costs-taxation-determination that receiving party was out of time-review by judge-Order 62 rr 21, 29 and 30-delay-discretion

1. Phillip Bradley Hinds (PH) applies for a review of the Taxing Officer's decision dated 1st June 2020 not to grant an extension requested within which to commence taxation proceedings and if necessary to commence such proceedings out of time.



2. As his primary case PH argues that a stay was agreed by the relevant parties of the time period in which to commence taxation pending the outcome of a prospective appeal to the Privy Council, which has never come to an end.
3. In the alternative if the stay was automatically terminated by the withdrawal of the Privy Council proceedings and there was a delay in continuing or formally commencing the taxation, then an extension of time should have been granted by the Taxing Officer when all the circumstances were taken into account.
4. PH seeks taxation of his costs incurred pursuant to two interim orders dated 14 November 2012 payable by D1 to D4 in the sum of **US\$13,796.72** and 6 June 2013 payable by D2 to D4 in the sum of **US\$9,065.01**. The interim costs orders arise as a result of the defendants failure to respond to a Request for Further and Better Particulars in November 2012 and to comply with the court's directions for service of witness statements in June 2013.
5. PH was awarded further costs reimbursement in the Court of Appeal. Pursuant to the order of the Court of Appeal dated 9 December 2015, D2 to D4 were ordered in their personal capacities to pay 50% of his costs incurred in the appeal in the sum of **US\$271,122.30**.
6. All the costs were to be taxed on the standard basis if not agreed.
7. PH's bill of costs total is **US\$293,984.03** excluding interest and the costs of the taxations.

Background

8. The proceedings and the subsequent appeal related to the Cayman estate of PH's father (JSH) who died intestate on 4 April 1978. He was survived by his second wife (ERH) and by their only son, PH. D2 (Clive) D3 (John) and D4 (Thomas) were the three children of ERH by her first marriage.
9. She passed away on 11 July 2010 and letters of administration of her estate were granted to D1 (Clive) in his capacity as administrator, also named as D2 (Clive) in his personal capacity. D5 (Sharon) is CH's wife and D6 is a company owned and controlled by her.
10. PH's claim was that various assets, said to be the assets of the estate of ERH, were at the time of ERH's death undistributed and still assets of JSH's estate, of which PH was the sole beneficiary.
11. Following a 7 day trial and a separate costs hearing, by judgments dated 9 July 2014 and 5 December 2014 Foster J dismissed all of PH's claims and ordered him to pay the defendant's costs on the indemnity basis.



12. PH's appeal to the Cayman Islands Court of Appeal (CICA) was successful and the order for costs against him was overturned.
13. No order for the costs of the proceedings was made by CICA, save that D5 and D6's costs of trial were to be paid by PH. These latter costs awarded against PH are not the subject of this application, although they formed part of the communications between the relevant attorneys and the Taxing Officer.
14. However, PH was awarded 50% of his costs of the appeal to be paid by D2 to D4. These costs in the sum of **US\$271,122.30** are pursued in this application, as well as the costs awarded pursuant to the two interim orders.

The facts

15. As set out in the affidavit of Tetrina Rivers dated 28 February 2020, on 28 January 2016 Appleby who were then acting on behalf of PH, served the relevant bills of costs, which needed to be objected to before the taxation proceedings were commenced, in accordance with the time period prescribed by GCR Order 62 rule 28, on or before 20 February 2016¹.
16. The paying parties' objections were due to be served by 4:00 PM on 18 February 2016². Tayler Jones on behalf of the paying parties served written statements of objections in respect of all three bills of costs on 18 February 2016 (out of time by a few hours at 9:55 PM).
17. They referenced the fact that PH was seeking leave to appeal to the Privy Council in connection with the Court of Appeal judgment that gave rise to a right to taxation of the appeal costs. Tayler Jones asked Appleby, if the bills were lodged, whether an agreement could be made to approach the Taxing Officer pursuant to Order 62 rule 21 to stay the taxation pending the outcome of the Privy Council proceedings.³
18. On 19 February 2016 Appleby wrote to the Taxing Officer advising that the bills of costs had been served and the objections received out of time and stating '*...if Tayler Jones objections are to be heard..*' sought an extension of time pursuant to order 62 rule 21 (1) within which to commence taxation proceedings of three weeks until 14 March 2016⁴.
19. On the same day Tayler Jones also wrote to the Taxing Officer asserting that valid service under Order 62 rule 27 had not occurred and suggesting that the bills of costs

¹ §26

² §27

³ §§29 and 30

⁴ §31



should be re-served. They also stated that they would not object to any reasonable requests for extensions provided PH would also deal with any such requests in a helpful and constructive manner. They again referenced the fact that the case was headed to the Privy Council and it would seem sensible if PH delayed taxation until the Privy Council proceedings were concluded⁵.

20. The three week extension of time requested by Appleby for PH was granted by the Taxing Officer the same day by email dated 19 February 2016 stating *'Having considered this request the extension is granted up to and until 14 March 2016'*⁶.

21. Within that time period Appleby then responded to Tayler Jones on 7 March 2016 in respect of the suggestion of a stay stating that they agreed that it would be sensible to approach the Taxing Officer seeking a stay on the taxation of the relevant bills pending the outcome of the Privy Council proceedings and that they would write to the Taxing Officer indicating that the parties had agreed such a stay and requesting her to exercise her discretion to extend time pursuant to Order 62 rule 21.

22. On 8 March 2016 Appleby did so stating

*'Our client ...has agreed to [Tayler Jones] proposal for a stay of taxation pending outcome of the appeal which will go before the Privy Council -see attached correspondence. In the circumstances, I would be most grateful if you would consider exercising your discretion pursuant to GCR Order 62 rule 21 to extend time accordingly for the taxation of the relevant bills of costs'*⁷.

23. There is no evidence that a further extension of time was in fact granted by the Taxing Officer.

24. No steps were taken to remove the stay or commence taxation proceedings even though on 8 August 2017 the parties withdrew the JCPC appeal.

25. In response to a request from the Taxing Officer two years later, new attorneys acting for PH, Sinclairs, responded that the stay would have automatically lapsed at that time, but no party took any further steps to progress with the taxation⁸.

*Application for taxation*⁹

26. From August 2018 PH's new and current attorneys, Sinclairs (in which Ms Rivers practices), attempted to liaise with the other attorneys, principally Tayler Jones and Appleby (PH's previous attorneys), to attempt to understand and agree information

⁵ §32

⁶ §33

⁷ §§35 and 36

⁸ Correspondence between Sinclairs and Taxing Officer dated 19 August 2019.

⁹ §§40-59



and compliance with costs orders. Work was done to attempt to cure alleged deficiencies with the bills of costs and the service process.

27. Compliance issues arose not only with PH's costs, but also relating to D5 and D6' costs of trial awarded by CICA, which similarly concerned disagreements about extensions of time and stays agreed by the parties.
28. D5 and D6's costs of trial seem to have been somewhat of a bargaining chip between the attorneys. They do not concern this application which is only in respect of PH's costs, and I say nothing about them.
29. On 19 July 2019 confirmation was sought by Sinclairs as to whether the Taxing Officer intended to hear the paying parties objections which had been served out of time on 18 February 2016¹⁰. This is over three years since the same question was raised by Appleby on 19 February 2016.
30. On 25 July 2019 Tayler Jones wrote to the Taxing Officer asserting that the first issue that needed to be determined was whether PH should be granted an extension of time to file bills that accord with Order 62, if such an extension was requested, which to date it has not been ¹¹.
31. Sinclair's wrote to the Taxing Officer on 2 August 2019 stating that in fact an extension of time had been granted on 19 February 2016 up to 14 March 2016 and a stay agreed by the parties on 7 March 2016 at the suggestion of Tayler Jones and advised to the court on 8 March 2016¹².
32. On 16 August 2019 the clerk of the court acting as the Taxing Officer indicated that there were deficiencies with PH's bills of costs which remained (even although narratives for the bills had been submitted more than three years after they were due). The point was also made that as no extension of time to file bills had been made in accordance with Order 62, no further taxation would be allowed to continue.
33. On 19 August 2019 Sinclair's wrote to the Taxing Officer enclosing a copy of the order of the Privy Council dated 8 August 2017 showing that the appeal was withdrawn and stating that the stay on taxation would have automatically lapsed at that time, but that no party or attorneys took any further steps to progress with the taxation(s) prior to Sinclair's seeking to resolve the outstanding costs matters. There was then a further gap in which the matter was not progressed of five months.
34. On 30 January 2020 Sinclairs wrote to the Taxing Officer asking for confirmation as to whether the stay on the taxation of PH's costs is now lifted and the taxation proceedings could proceed.

¹⁰ §43

¹¹ §45

¹² §46

35. On 31 January 2020 a response was received from the Clerk of the court as Taxing Officer that PH's taxation could not proceed because the matter was out of time¹³.
36. On 4 February 2020 Sinclairs indicated their surprise at this determination when a stay of PH's costs had been agreed between the parties and approved by the court and asked for reasons as to why the stay was inoperative.
37. Sinclair's wrote again on 5 February 2020 to the Taxing Officer and pointed out that Tayler Jones had acknowledged that during the period of the agreed extension of time within which to commence taxation proceedings, ie before 14 March 2016, a stay was agreed by the parties. The stay had never been formally determined by either the court or the parties which is why the Taxing Officer's guidance had been sought when Sinclair's was instructed¹⁴.
38. The Taxing Officer responded on 24 February 2020 making reference to Order 62 rule 28 (2) which sets out the timelines for filing applications for taxation. Reference was made only to the request made by PH for an extension in March 2016. No further extension was applied for and no bill of costs filed. The matter was therefore out of time and was a proper case for summary dismissal as contemplated by order 62 rule 28(3). However, the parties would be given one more opportunity to file their application to have the matter completed with compelling reasons to be given as to why the court should consider and proceed with the taxation, which was by then three and a half years out of time. The application was to be made within seven days with submissions no later than 2 March 2020, with the alleged deficiencies in the bill of costs to be addressed¹⁵.
39. On this latter point Ms Rivers states that the alleged deficiencies had been remedied by the provision of narratives to the bills of costs on 19 July 2019 and signed certificates to the bills of costs on 2 August 2019 and there could be no prejudice to any of the parties¹⁶.
40. The court makes no determination on whether the deficiencies have been adequately addressed and I say no more about them.
41. PH made his application on 2 March 2020. On 1st June 2020 the Taxing Officer refused the application. On 12 June 2020 PH applied for a review by this court.

Powers of Taxing Officers

42. The relevant Rules are contained in Part V of the GCR (1995 Revision).

¹³ §54

¹⁴ §57

¹⁵ §58

¹⁶ §60





Extensions of time (O.62; r.21)

21. (1) *The Court or the taxing officer may extend the period within which a party is required by or under this Order to commence proceedings for taxation or within which a party is required to do anything in or in connection with such proceedings on such terms (if any) as it thinks just and the Court or the taxing officer may do so although the application for such extension is not made until after the expiration of that period.*
(2) *Where no period is specified by or under this Order or by the Court for the doing of anything in or in connection with proceedings for taxation a taxing officer may specify the period within which the thing is to be done.*

Commencement of taxation proceedings (O.62, r.28)

28. (1) *Proceedings for the taxation of costs shall be commenced by lodging the following documents with the taxing officer –*

- (a) an application for taxation in such of Forms 301 to 304 as may be appropriate; GCR 1995 (Revised)/Amended 01.01.02 374*
- (b) a bill of costs completed and signed by each of the paying parties in accordance with rule 27(3);*
- (c) any statement of objections received from the paying party;*
- (d) any reply to the Statement of Objections relied upon by the successful party;*
- (e) where a party is entitled to require taxation of any costs directed to be paid by any award made on an arbitration under any Law or pursuant to any arbitration agreement and no order of the Court for enforcement of the award has been made, a true copy of the award; and*
- (f) where a party is entitled to require taxation of any costs directed to be paid by any order, award or other determination of any tribunal or other body constituted by or under any Law or Regulation, a true copy of the order, award or determination, as the case may be.*

(2) Where a party is entitled to recover taxed costs or to require any costs to be taxed by virtue of –

- (a) a judgment, direction or order given or made in proceedings in the Court; or*
- (b) rule 5;*
- or (c) an award made on an arbitration under any Law or pursuant to an arbitration agreement;*
- or (d) an order, award or other determination of a tribunal or other body constituted by or under any Law,*

he must commence proceedings for the taxation of those costs either within 3 months after the judgment, direction, or order was filed or the award or other determination was signed or otherwise perfected or, within 3 months after his right to taxation arose in accordance with rule 9, whichever is the later.

(3) The taxing officer may summarily dismiss any application for taxation which is made out of time.



This review

43. Since the amount of costs awarded was nil this is an application properly brought under GCR Order 62, rule 30.

Review by the Judge (O.62, r.30)

30. (1) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision.

(2) In the event that the taxation was conducted by a Judge in his capacity as an ex officio taxing officer, the review shall be conducted by a different Judge.

(3) An application under this rule for review of the taxing officer's decision must be made within 14 days after the decision to be reviewed or within such other period as may be fixed by the taxing officer.

(4) Every applicant for review under this rule must at the time of making his application

- (a) deliver to the Judge his objections in writing specifying what is objected to and stating concisely the nature and grounds of the objection in each case;

(b) deliver a copy of the objections to all parties affected by the application;

(c) if the applicant is the paying party, pay the amount as taxed into court; and

(d) serve notice of payment into court on every party referred to in subparagraph (b) above.

(5) 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 other period as may be fixed by the Judge, deliver to the Judge 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 any other party who was entitled to receive notice under paragraph (4).

(6) A review under this rule shall be inquisitorial in nature and the Judge may receive further evidence and may exercise all the powers which he might have exercised on an original taxation, including the power to award costs of the proceedings before him.

(7) In the event that the Judge considers that he cannot properly review the taxing officer's decision without hearing oral submissions, he shall fix a hearing date and any party to whom a copy of the objections was delivered under paragraph (4) shall be entitled to be heard in respect of all or any of the objections notwithstanding that he did not deliver written answers to the objections under paragraph (5).

44. Under this rule a broad discretion is given to the court to decide the matter on the basis of written submissions and upon examination of the relevant documentary material which I have agreed to do. The review is 'inquisitorial' in nature. The court has all the powers exercisable on an original taxation.
45. By Order 62 rule 21 (1) the Court may extend the period within which a party is required to commence proceedings for taxation or within which a party is required to do anything in or in connection with such proceedings on such terms (if any) as it



thinks just and may do so although the application for such extension is not made until after the expiration of that period.

46. The question is whether it should do so on the facts of this case.
47. In this case whilst no reasons were given for the Taxing Officer's final decision on 1 June 2020 not to grant an extension of time, it is clear from the communications with the Taxing Officer and her response of 24 February 2020 that she would have been well aware of the arguments made and facts advanced by the relevant attorneys and a summary of reasons was given. There is no duty to give reasons and indeed by order 62 rule 28 (3) an application made out of time may be summarily dismissed.
48. The review is a *de novo* procedure and the court is not fettered by the Taxing Officer's decision, but of course must give due regard to it¹⁷.
49. The court should approach the matter based upon the facts as presented and arguments raised on the papers in accordance with the relevant legal principles to do justice between the parties.

Decision

50. The Certificate of the Order of the Court of Appeal is dated 9 December 2015. In accordance with GCR Order 62 rule 28, taxation proceedings should have been commenced by 9 March 2016 (3 months).
51. PH served his bills of costs on 18 February 2016, with Objections received from the paying parties (only a few hours out of time).
52. Only one application for an extension of time was granted by the Taxing Officer which expired on 14 March 2016. It was at PH's request in order to consider the Objections and put in replies, which was due to expire on 20 February 2016.
53. The 8 March 2016 Appleby communication to the Taxing Officer would have reasonably been understood by all parties copied to have meant that a further extension was requested which would have expired when the referenced stay expired, which was expressly dependent upon the outcome of the Privy Council appeal.

'Our client ...has agreed to [Tayler Jones] proposal for a stay of taxation pending outcome of the appeal which will go before the Privy Council -see attached correspondence. In the circumstances, I would be most grateful if you would consider exercising your discretion pursuant to GCR Order 62 rule 21 to extend time accordingly for the taxation of the relevant bills of costs '.¹⁸(my emphasis).

¹⁷ *General Shopping* (unreported) 2019 Kawaley J §§12-14

¹⁸ §§35 and 36 of *Rivers 1* dated 2 March 2020



54. There is no evidence that a further extension of time was in fact granted by the Taxing Officer.
55. The parties withdrew the JCPC appeal on 8 August 2017 and the stay would have automatically lapsed at that time. On the evidence before me it did not require any further communication or agreement between the parties and I have seen none to suggest that the stay did not lapse at that time on the plain terms of the correspondence copied to the Taxing Office.
56. The stay did not have to be formally determined as it was contingent upon the outcome of the Privy Council appeal. There was no question of the Taxing Office lifting or approving the stay. It was simply notified of it.
57. The relevant attorneys may have proceeded on the basis that the stay was still in operation but it is now clear it was not.
58. Accordingly the position was that either time expired on 14 March 2016, or on an indulgent analysis of the non-response from and failure to follow up with the Taxing Officer, an implicit extension of time was granted by the Taxing Officer which expired when the outcome of the Privy Council proceedings were known on 8 August 2017.
59. On this basis no steps were taken to progress matters until almost two years later in July 2019.
60. This is a serious delay for which no good explanation has been provided. There were then further delays until the end of January 2020.
61. There are good policy reasons for abiding by the Grand Court Rules and commencing and concluding taxation proceedings within a reasonable period of time, so that parties can rely upon a certainty of outcome without undue delay and so that debts that arise from the taxation of costs ordered to be paid are settled. That is why compelling reasons need to be shown as to why the court should allow the taxation to proceed in this case and the Taxing Officer was right to require them.
62. I have decided that notwithstanding the delays I have set out above, the just result in this case is to allow PH's taxation of his costs to proceed for the following reasons.
 - a) This is not a case where there was a failure to commence taxation proceedings at all. Bills of costs were served by PH on 28 January 2016 to allow time for the paying parties' objections to be prepared and lodged in accordance with Order 62.
 - b) Those proceedings were first extended for three weeks by the Taxing Officer at PH's request and then stayed pending the outcome of the Privy Council case at the paying parties' request. The paying parties have been aware since then of the details of the costs claimed by PH and indeed objections were prepared by the paying parties.



c) This was complicated and hard fought litigation which has had successes and reversals up to the Court of Appeal and which resulted in professional negligence proceedings against one set of attorneys, which is said to have been PH's primary preoccupation once the stay had been agreed ¹⁹. The costs awarded by the court have reflected the justice of the proceedings at the various stages at which they were awarded.

d) Overall the litigation has taken more than 7 years to conclude and the administration of the estate is apparently still incomplete. The interlocutory costs orders were agreed by consent in 2012 and 2013 and the Court of Appeal order was made in late 2015 ²⁰. It is noted that Taxation is taking place many years after the events which gave rise to the costs orders in question in any case, even if it should have been commenced in 2017. This does not by itself excuse the further delays but is relevant context.

e) Examining the important question of prejudice to the paying parties due to the lapse of time does not result in the court refusing to exercise its discretion in favour of PH. The argument before the court is in general terms. It indicates, by Tayler Jones letter of 2 March 2020 to the Taxing Officer that one of their clients became unemployed and although he then had alternative employment his salary was roughly 60% of his former salary. Another of their clients had bought a property and taken on a significant mortgage whilst at the same time has had to sell a property at a significant loss and had also opened business in 2017 and recorded significant losses from that business in that tax year. No financial details were provided and the two clients were not identified. The third was not mentioned.

Inevitably delays of the kind that have occurred will result in parties having changed financial circumstances, but it seems to me that the issue of prejudice is not sufficiently made out in this case so as to disqualify PH from proceeding with taxation in the circumstances. The three defendants' liability for costs is joint and several. The paying parties have not yet had their liability for such costs determined. It was notified to them in 2016 by PH and all parties should expect that this liability for PH's costs is now dealt with by taxation of PH's costs.

f) The amount being claimed in taxation, being just short of US\$300,000, is a considerable sum. Most of that sum (US\$ 271,122.30) relates to costs awarded in the appeal proceedings which resulted in the overturning of a first instance decision which established PH's rights as a beneficiary to his late father's estate ²¹.

g) It would not in my view be just to deprive PH of the ability to have those costs taxed even though there have been serious delays in this case, which to some extent were

¹⁹ *Rivers* 1 §72

²⁰ *Rivers* 1 § 66

²¹ *Rivers* 1 §75

caused by the changes in attorneys and the misunderstandings that they had formed, notably in relation to the stay .

63. There have been a number of cases where delays of three years (and even longer) have not resulted in a disqualification to proceed with taxation .Instead the courts have considered disallowances or concessions to the amount awarded within the discretion of the taxing officer²² .
64. The essence of the court's task is to make an order that meets the overall justice of the case²³. To do so the court will overturn the Taxing Officer's decision. It would not be proportionate or just to deprive PH of the taxation of his costs.
65. The Taxing Officer has a discretion as to the sum awarded. It may well be the case that the Taxing Officer comes to the view that no interest should accrue during the period of delay and the court notes that PH waves his right to interest on costs from 9 March 2016 until 19 July 2019. The costs of taxation could be another proportionate measure to have regard to.
66. Other than those observations I will leave the matter to the discretion of the Taxing Officer.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT



²² *Stingray* [2007] CILR note 13, *Peet v Baptiste* [2008] CLE/gen/ 00869 (Bahamas Supreme Court), *Less v Benedict* [2005] EWHC 1643, *Loucas v Ioannis* [2006] EWHC 279, *Botham v Khan* [2004] EWHC 2602.

²³ *London Borough of Enfield* [1997] 1 Costs LR 73 page 82