**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**CRIMINAL DIVISION**

**INDICTMENTS 3/13 & 3A/13**

**AARON JOHN BERNARDO**

**v.**

**REGINA**

**Appearances:** Ms. Nicole Petit, Senior Crown Counsel, for the Crown
Mr. Nick Hoffman of Harney Westwood & Riegels for Aaron Bernardo

**Before:** Hon. Justice Richard Williams

**Heard:** 27 November 2017

**Draft Judgment circulated:** 1 December 2017

**Date of Judgment:** 15 December 2017


**HEADNOTE**

***Indemnity costs award in criminal proceedings – taxation – taxing officer setting aside default costs certificate - requirement to comply with the preconditions set out in GCR O.62, r.22(5) for an application to discharge a default costs certificate to be properly brought before a taxation officer - jurisdiction of the Grand Court to review decision of Taxing officer on application – inherent jurisdiction of Grand Court***

**JUDGMENT**

**The Initial Proceedings and Costs Order**

1. On 4 January 2013 Aaron John Bernardo ("the Applicant") was charged with robbery and possession of an imitation firearm with intent. On 23 January 2013 Indictment No. 3/13 was laid against the Applicant with one count of robbery and one count of possession of an unlicensed firearm. On 16 August 2013, at a dismissal argument listed before Henderson J. in relation to the indictment, the Crown indicated an intention to offer no

evidence in relation to robbery and possession of unlicensed firearm and to amend the indictment to include one count of handling stolen goods. The new Indictment No. 3A/13 was signed by the Director of Public Prosecutions ("the DPP") on 24 September 2013. On 11 December 2013 the Applicant was found not guilty of handling stolen goods ~~robbery~~ by a jury. The Applicant had to pay for his own legal representation throughout, because he was unable to obtain Legal Aid as he fell outside of the means test.

2. On 31 October 2014, following an application made by the Applicant, I ordered that the Crown pay reasonable costs incurred by the Applicant for the period 13 March 2013 to 18 August 2013 in relation to Indictment 3/13. In my Judgment I made clear that I was making no order for costs incurred prior to the conclusion of the hearing on 13 March 2013 and post the hearing of 16 August 2013.


**The Present Application and the Parties' Positions**

3. The application before me is brought by the Applicant's Summons filed on 1 November 2017. In the Summons the following orders are sought:

   (i) grant of an extension of time to the Applicant pursuant to GCR O.62, r.30(3) to make an application for review of the Taxing Officer's decision under GCR O.62, r.30(1);

   (ii) a declaration that the decision of the Taxing Officer to set aside a Default Costs Certificate issued on 12 February 2016 was not made on a proper basis;

   (iii) further or in the alternative, a declaration that the Applicant's Bill of Costs served on 4 January 2016 was properly served;

(iv) further or in the alternative, the Applicant be granted extension of time to serve a Bill of Costs under GCR O.62, r.28(2); and

(v) such further orders as the Court thinks fit.


4. At paragraph 1.1 in the Applicant's Written Skeleton Argument dated 22 November 2017 the orders sought were slightly varied to the following:

(i) an extension of time in which to bring an application for review of a Taxing Officer's decision under GCR O.62, r.30 and/or inherent jurisdiction of the Court[1];

(ii) a declaration that the Taxing Officer's decision to set aside the Default Costs Certificate was not made in accordance with the relevant requirements and was, therefore, invalid; and

(iii) Directions for the ongoing conduct of the taxation or, in the alternative, the determination of the Judge of the issues in taxation in accordance with GCR O.62, r. 30(6).

5. At paragraph 2.13 in the Applicant's Skeleton Argument dated 22 November 2017 he sought an order that the Court set aside the Taxing Officer's decision and either (a) order that a new Taxing Officer remake a decision on the Crown's application; or (b) determine the Crown's application for itself under GCR O.62, r.30(6). At paragraph 4.6 in the Skeleton Argument the Applicant submits that the Court should reinstate the Default Costs Certificate and award the costs of the proceedings in accordance with GCR O.62, r.30(6).

[1] My emphasis by underlining.

6. It appears that, at the outset of his oral submissions, Counsel for the Applicant accepted that arguably GCR O.62, r.30(1) might not apply to the circumstances of this case as the Court was not dealing with a situation where a party was dissatisfied with the amount of any costs certificate. It was submitted that the Court's jurisdiction to review came about under its inherent jurisdiction to regulate its own proceedings. Counsel conceded that even when considering an application pursuant to the inherent jurisdiction, the Court may have regard to any delay in bringing the application following the decision of the Taxing Officer which the Applicant seeks to have the Court review. He contends that although GCR O.62, r.30(3) states that the application must be made within 14 days for an application for review pursuant to GCR O.62, r.30, if the application is brought under the inherent jurisdiction the Court should have regard to the background and is not restricted to 14 days. In the oral submissions, the Applicant again seeks an order the Court should dismiss the order of the Taxing Officer and reinstate the Default Costs Certificate.

7. In the Written Submissions submitted on behalf of the Crown it was rightly argued that the Court did not have the jurisdiction, pursuant to GCR O.62, r.30, to review the Taxing Officer's decision as no decision in relation to the amount of costs has been made. In the Written Submissions, Crown Counsel did not deal with the issue of a jurisdiction to review based upon the inherent jurisdiction. At the commencement of Crown Counsel's oral submissions she contended that this jurisdiction did not exist. However, at the close of her oral submissions she conceded "*I do not deny that the Court has an inherent jurisdiction*", but added that the Court should not intervene at this stage, save to make an observation to the Taxing Officer that she should resume the process.

**The Background**

8. To enable this case to be put into context there is a need to review the background. At a hearing on 4 October 2016 I had before me a Summons filed by the Applicant in which he sought the following:

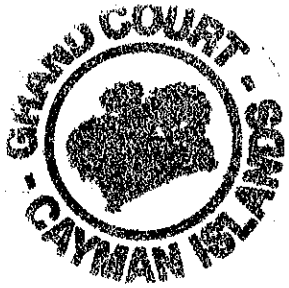
(i) a declaration that a Default Costs Certificate dated 12 February 2016 was validly entered;

(ii) a declaration that the Crown is required to comply with GCR O. 62, r.22(5)(b) & (d) prior to any setting aside of the Default Costs Certificate; and

(iii) an order that the Taxing Master do make a determination on the Crown's application to set aside the Default Costs Certificate within 21 days of the order made under paragraph (ii) above.


9. After hearing from the parties, finding that there had been "*inordinate delay*" and conscious of my responsibilities pursuant to the Overriding Objective, I provided the parties[2] with a written transcript of non-binding observations hoping that they would assist with the progression of the matter in a timely manner. When I did so, I remarked that it was important to recognise that I was not conducting a taxation or acting in the capacity as an ex-officio Taxing Officer. At the time, based on the submissions made and on the papers then before me, I felt that my jurisdiction to make any orders was limited and I did not deem it appropriate to give declaratory relief that might fetter the approach that might be taken by the Taxing Officer. At that hearing, unlike during the present hearing, there were no submissions made to me in relation to the Court having an

[2] The Court indicating that a copy should also be provided to the Taxing Officer by the parties.




inherent jurisdiction to review. In the written observations I set out the background, and for convenience sake I repeat some of that detail herein.

10. On 7 January 2015 the Applicant filed his Bill of Costs, serving the same on the Crown on 9 January 2015. On 6 February 2015 the Crown served its Response to the Applicant's Bill of Costs in which it set out its objections, which were limited to eight emails which it contended were unnecessary.

11. The Applicant contended that the Crown's objections amounted to $805 from the total sum claimed of $33,376.32 and informed the Crown of this in writing on 23 April 2015. In the same letter the Applicant indicated that he was willing to agree with the objections. He also attached a reformatted Bill of Costs to include a paragraph stating the uncontested amount that the Crown agreed to pay the Applicant as that did not appear in the initial version.

12. On 28 April 2015 the formal order for costs reflecting my decision set out in my Judgment of 31 October 2014 was approved. Following correspondence between the parties, on 6 May 2015 the Crown provided the Applicant with a signed Bill of Costs. The Applicant believed that the version needed to be corrected to reflect that, in the interim, the abovementioned formal costs order had been approved and sealed. The Applicant felt that the Bill of Costs returned to him by the Crown was defective as the latter had failed to detail the sum that it agreed to pay in the paragraph dealing with the uncontested amount of costs. The Applicant also felt that the columns "*Paying Party's*

*Response*" and "*Agreed Amount*" should have been completed to detail the Crown's objection. In an email dated 19 May 2015 with chasing emails on 26 May 2015, 2 June 2015 and 11 June 2015, the Applicant drew the Crown's attention to GCR O.62, r.(3) and invited it to fully complete the Bill of Costs.

13. On 18 June 2016 the Crown responded and requested a meeting between Counsel to discuss new objections which they now had. These included the reasonableness of instructing Queen's Counsel, of Counsel's hourly rates and of certain unspecified items in the Bill of Costs. The Applicant sought to address these objections in an email transmitted on 21 July 2015.

14. On 19 August 2015 the Crown responded to the Applicant's email of 21 July 2015 and Counsel representing each party had a discussion on the same day. On 27 August, 31 August, 9 September, 11 September and 23 September 2015 the Applicant sought written confirmation from the Crown about the offer to pay costs which they intended to make. On 23 September 2015 the Crown set out the details of its offer.

15. On 11 December 2015 the Applicant filed a Summons to amend the Order dated 28 April 2015 pursuant to the slip rule. On 15 December 2015 the earlier Order was amended under the slip rule to reflect that the costs were to be taxed, if not agreed, on the indemnity basis rather than on the standard basis. The Applicant served the Crown with a copy of the approved Amended Order and Amended Bill of Costs on 4 January 2016.

16. The Applicant states that, as he had received no response from the Crown, an application for a default costs certificate was filed on 1 February 2016. The Default Costs Certificate was granted on 12 February 2016 and served on the Crown on 16 February 2016.

17. On 1 March 2016, after the expiry date for the Crown to file any application to set aside the Default Costs Certificate[3], it wrote by email to the Taxing Officer (copying in the Applicant's Attorney) requesting an eight day extension because it needed to access a file which may have been archived. The Taxing Officer replied saying that she awaited the Applicant's attorney's response. Although the copies on file do not have the date of filing stamped on them, no issue appears to be taken with the Crown's contention that it filed the application Form 313 and an affidavit in support on 1 March 2016.

18. On 8 March 2016 the Crown served the Applicant with the Form No. 313 Application to Set Aside Costs Certificate along with a supporting affidavit sworn by Crown Counsel both dated 1 March 2016. In the affidavit the Crown contended that the Applicant had not acted upon the Costs Order dated 28 April 2015 until 4 January 2016. In fact the initial Bill of Costs was actually filed on 7 January 2015 following the orders I made which were contained in my Judgment dated 31 October 2014. Regrettably there is relevant background detail missing in the affidavit, as there is no mention of the fact that following discussions between the parties and the Amended Order for Costs made on the indemnity basis dated 15 December 2015, a further Bill of Costs was served on the Applicant on 4 January 2016. Crown Counsel failed to detail in the affidavit any of the

[3] O.62, r.5 - directs the paying party to lodge the application within 14 days of service of the Default Costs Certificate.


events outlined in paragraphs 10 to 15 above. Due to the absence of this relevant detail in the affidavit, the Crown's contention that the Applicant was out of time for bringing the action and that, as a consequence, the Default Costs Certificate should be set aside unless the Taxing Officer extended time for the application to be filed was based on an incomplete version of the events. The affidavit also set out the reasons why taxation should be conducted.

19. On 8 March 2016 the Applicant wrote to the Taxing Officer setting out his agreement to the requested extension of time for filing of the application to set aside the Default Costs Certificate to 9 March 2016, whilst at the same time highlighting alleged non-compliance with O.62, r.22(5)(b) or (d). Subsection (b) required the Crown to lodge a Bill of Costs signed and completed in accordance with O.62, r.27(3), namely by setting out in column 4 therein the detail about the extent to which it agreed with and accepted liability to pay the amounts claimed in the Bill of Costs. Subsection (c) required the Crown to pay into Court the whole amount specified in the Certificate. Both of these requirements were also to be complied with within 14 days of the service of the Default Costs Certificate; hence the requirement for an extension of time. Counsel for the Applicant indicated that the application to set aside was "*still not compliant with the rules to allow you to consider an application for an extension of time.*"

20. The Applicant wrote to the Taxing Officer on 18 March, 24 March, 6 April and 30 May 2016 seeking an update about the status of the adjudication of the application to set aside the Default Costs Certificate, and in the first communication, about whether the

Respondent had complied with GCR O.62, r.22 (5)(b) or (d). The impression given from the correspondence is that the issue was not whether there should be a reasonable extension of time, but whether the application to set aside had actually been properly brought as GCR O.62, r.22 (5)(b) or (d) had not been complied with. Of course, pursuant to GCR O.62, r.21(1), a Taxing Officer has the discretion to extend the time for the lodging of the Bill of Costs signed completed in accordance with GCR O.62, r.27(3) and for the payment into Court of the whole amount specified in the Certificate. It appears that the last time that the Taxing Officer wrote to the parties had been on 1 March 2016. It is unclear why the Taxing Officer had failed to properly case manage the Crown's applications concerning the setting aside of the Default Costs Certificate.


21 I made a number of observations at the 4 October 2016 hearing. I considered the delay in concluding the proceedings and I found that it had occurred "*because the Crown has sought to file an application to set aside the Default Costs Certificate out of time.*" I reminded the parties that, unless it was set aside, the Default Costs Certificate remained in place and that the Taxing Officer may extend the period within which a party is required by the GCR to commence or do anything in connection with the proceedings for taxation, and she may do this on such terms (if any) as she considers just. I also commented at the October 2016 hearing that GCR O.62, r.22(5) sets out the four procedural requirements when such an application is made. I indicated that it was a matter for the Taxing Officer to determine whether the application to set aside had been properly brought or whether there should be an extension of time for the requirements to be met. I stated, at that time on the more limited submissions then made before me, that it

would be inappropriate for me to fetter the discretion of the Taxing Officer in the ongoing proceedings which were arguably still before her, until she had determined the leave to extend application and, if granted, then the set aside application.

22. Despite the Crown making the application for an extension of time on 1 March 2016, it seemed that the then Taxing Officer failed to do anything of any substance to progress the matter until she sent the letter dated 26 January 2017 to Crown Counsel (copied into the Applicant's former Counsel). I have made enquiries with the present Taxing Officer and, rather surprisingly, have been informed that there is no taxation file for this case. I am therefore unable to deduce what information was provided to and considered by the Taxing Officer. These difficulties are compounded by the fact that the former Taxing Officer indicated in the letter that she was unable to provide reasons for her decisions having regard to GCR O.62, r.29(6). I do not know whether my observations[4], including my view that the application which required a determination by the Taxing Officer was the Crown's application to set aside the Certificate requiring the Taxing Officer to first decide whether that application had been properly brought and, if not, whether there should be an extension of time for any outstanding requirements to be met, were actually provided to or reviewed by the Taxing Officer

23. In Crown Counsel's oral submissions she contended that the Taxing Officer may have acted under her own motion and set aside the default costs certificate, under GCR O.62, r.22(4)(a), by making a finding that the Applicant was not entitled to it. There is no

[4] Which both parties had asked the Court to make with the view that they would ensure that they were provided to the Taxing Officer to assist her.

indication on the material before me that Taxing Officer was invited to or intended to make to make any decision about the Certificate on her own motion. One may be entitled to ask, why the Taxing Officer would take such a course when she was aware of the Crown's application to set aside, albeit improperly brought, which was purportedly already before her. The fact that the Crown had "applied" to the Taxing Officer to set aside the Certificate meant that the Taxing Officer should not have considered whether to set aside, even on the GCR O.62, r.22(4)(a) ground until the GCR O.62, r.22(5) requirements had been complied with. If I am wrong, and the Taxing Officer did go on and make a decision on her own motion without informing the parties that she intended to do that and without affording both of them the opportunity to make submissions on the issue, it would in any event have been unjust and that may justify review by this Court. Any decision reached by the Taxing Officer would have been based on the incomplete affidavit evidence provided to her by the Crown, especially when she was forming a view of each partiy's conduct in relation to the Bill of Costs.[5]

In her letter of 26 January 2017, the Taxing Officer stated that she dismissed the application for extension of time pursuant to GCR O.62, r.22(5). Regrettably, apart from referring to that rule, the Taxing Officer failed to specifically identify what application she was referring to. Having regard to the rule she referred to, in the absence of further detail or reasons, it is evident that the Taxing Officer was referring to an application by the Respondent to extend time to comply with the lodging and payment into Court requirements for a paying party who seeks to set aside a Default Costs Certificate.

[5] See footnote at end of this Judgment concerning the inclusion of this paragraph in the final copy of this Judgment.

Therefore, it appears that in January 2017 the Taxing Officer refused to give the Crown an extension of time to file its application pursuant to GCR O.62, r.21(1).

25. Despite refusing an extension of time relating to O.62, r.22(5), the Taxing Officer stated in the letter that she had gone on to set aside the Default Costs Certificate dated 12 February 2016. This decision is incompatible with her approach taken when dismissing the application for an extension of time pursuant to GCR O.62, r.22 (5). The result of the refusal to grant an extension of time was that the Taxing Officer did not afford the Crown the opportunity to have additional time to properly bring its application to set aside the Default Costs Certificate. If the application was not properly brought within the GCR, one has to ask on what jurisdictional basis was the application to set aside the Certificate considered and the order to set aside made? As I stated before, having regard to the concession in the Applicant's email of 8 March 2016 concerning the granting of an extension for the filing of the application to set aside the Certificate, the Taxing Officer should have been aware that the issue before her was not whether leave to extend should be given in relation to filing of the application form itself. The issue was whether further time should be given to the Crown to afford it an opportunity to fully comply with the requirements set out in GCR O.62, r.22(5), as only then would the application be properly brought and only then could consideration be given as to whether the Default Costs Certificate should actually be set aside.

26. In the January 2017 letter, the Taxing Officer also stated that she granted an extension of time for the Applicant to commence taxation by serving the Bill of Costs on the Crown

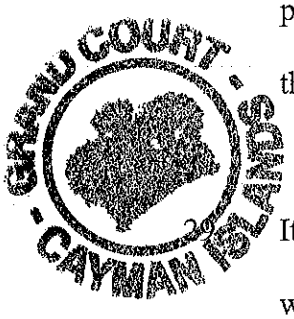
by or on 6 February 2017. For the Taxing Officer to conclude that such an application was before her, she must have relied upon the incomplete and unbalanced content in the affidavit filed by Crown Counsel dated 1 March 2016[6]. The same could be said if, as is suggested as being a possibility but without any evidential basis by the Crown, that the Taxing Officer had set aside the Certificate pursuant to GCR O.62, r.22(4)(a)[7]. When having regard to the force of this submission I note that during the hearing the Crown stated that the ground which should have been the ground for setting aside adopted by the Taxing Officer was under GCR O.62, r.2(4)(b) rather than under GCR O.62, r.22(4)(a). Therefore, if the Taxing Officer had been provided with the background detail (which can be found at paragraphs 10 to 15 in this Judgment) she would have been informed that the taxation had already been properly commenced by the service of the first Bill of Costs of 7 January 2015[8].

27. I conclude with some regret that, on the papers before me, the belated decision of the Taxing Officer contained in her letter dated 26 January 2017 displays a lack of understanding of the facts and issues raised by each party in the case, as well as poor case management. The delay in this matter now being before me is due to the above as well as the failure by the Taxing Officers to promptly respond to Counsels' written requests for updates about the status of the various applications and for information about the decisions made by the Taxing Officers.



[6] See paragraph 18 above.
[7] Please see foot note at the end of this Judgment.
[8] The revised further Bill of Costs was served on 4 January 2016 by the Applicant.

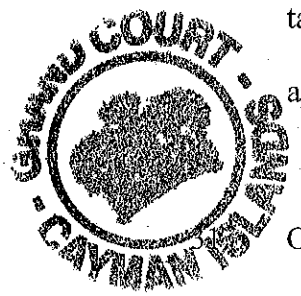
28. The Applicant understandably did not see the need to file yet a further Bill of Costs. I find no correspondence from him to the Taxing Officer or to the Crown prior to 8 February 2017. It would have been helpful for him to have expressed his concern about the direction prior to the 6 February 2017 deadline. However, this may not have taken place because it appears that the letter was not sent to the Counsel who had conduct of the Applicant's case at the time.




29. It is rather disappointing to see that the Crown wrote to the Taxing Officer by email, without copying the Applicant in, seeking a dismissal of the application for costs as two days had passed since the 6 February 2017 deadline. It is common courtesy for Counsel to inform opposing Counsel that they intend to make such an application to give an opportunity for compliance or, at the very least, let them know about an application when it is made. Regrettably, the manner in which the application to dismiss was brought compels me to remind parties of the concerns raised about the need for ethical conduct by Counsel prior to making default applications by Murphy J. in ***Blooming Caribe Limited v Grand Cay Investments Limited*** Cause No.113 of 1999. Thankfully the Crown's application to dismiss has not been considered by a Taxing Officer.

30. On 20 March 2017 the Applicant's attorney wrote to the new Taxing Officer informing her that the January letter had been incorrectly sent to the Applicant's former Counsel. The attorney rightly pointed out that the Taxing Officer had not been empowered to set aside the Default Costs Certificate as the requirements for bringing such an application set out in GCR O.62, r.22(5) had not been fully complied with. The attorney also

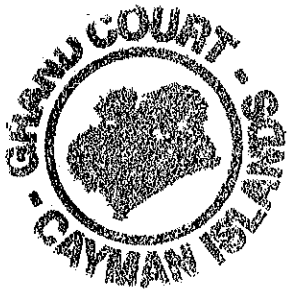
highlighted his view that the provision in GCR O.62, r.29(6) about a Taxing Officer not giving reasons related only to the procedure in the taxation process and not to the setting aside pre-taxation issue. An explanation was sought as to why the properly obtained Default Costs Certificate had been set aside, especially when the GCR O.62, r.22(5) requirements had not been fully complied with. In the alternative, the Taxing Officer was invited to extend the time for the service of the Bill of Costs or deem that it had already been served on 4 January 2016. This alternate suggestion, although clearly still of a view that the Bill of Costs had been served back in January 2016, was no doubt made with a view to moving the taxation forward in line with the principles and approach enshrined in Overriding Objective. It is a great pity that the Crown and/or the Taxing Officer did not take up that opportunity, as it may well have prevented the need for the current application before me.




On 24 March 2017 Crown Counsel wrote to the new Taxing Officer, and therein made reference to the Applicant's letter of 20 March 2017. In the letter Crown Counsel renewed the application to dismiss. In the letter it was contended that the request of the Applicant's attorney was not one upon which the Taxing Officer had the jurisdiction to act, and if she did so she would be acting *ultra vires*. In the letter it was contended that the authority to set aside the Default Costs Certificate was based on GCR O.62, r.22(4)(a), namely that the Applicant was not entitled to the Default Costs Certificate. In the hearing before me, it is not that ground for setting aside which the Crown contends could have been the ground for setting aside adopted by the Taxing Officer, but instead it was the subparagraph (b) ground, namely there is good reason why a taxation should be

conducted. Regrettably, the Taxing Officer failed to state in her letter of 26 January 2017 upon which ground she was setting aside the Default Costs Certificate. If there had been a proper and balanced review of all of the facts by the Taxing Officer, it is hard to see how the lack of entitlement ground could be possibly established, and therefore the only ground to be considered could have been the good reason ground. If I am wrong, then the Taxing Officer made the finding of lack of entitlement based on the incomplete affidavit evidence from the Crown without telling the parties that is what she was considering and not affording the Applicant an opportunity to make submissions. In such circumstances this Court may review the matter on application if justice requires it to do so.

32. On 8 May 2017 the Applicant wrote seeking a response to the issues raised in the March letter. The Taxing Officer replied indicating that a response had been given in April 2017, but it appears from an email sent on 26 May 2017 that neither Counsel received that communication. On 13 June 2017 the Taxing Officer stated that:




> *"In relation to the above matter.... as it has therefore been viewed and decided that I feel obliged to recuse yourself[9] on the basis that my predecessor already expressed a view of the matter and the best suited view to refer the matter to the Courts/Judge who is seized of the case."*

I am not clear why the current Taxing Officer felt it appropriate to *"recuse"* herself from the taxation. I am not clear why she feels that I am seized of the taxation, I have made a Costs Order and the taxation proceeding should ordinarily then be conducted by the Taxing Officer. The position being taken by the Taxing Officer makes this case unusual as it means that the taxation process will not progress before a Taxing Officer unless the

[9] This appears to be a typographical error, as should be "myself."

Court intervenes, and the case may result in an unjust outcome unless the Court becomes involved under its inherent jurisdiction.

33. On 28 June 2017 a further letter was sent by the Applicant's attorney to the Taxing Officer. In that letter it was correctly pointed out that the Taxing Officer has a quasi-judicial function and it was not right for her to simply recuse herself for the reasons she gave. The Taxing Officer was again invited to rule upon the issues raised in the 20 March 2017 letter.

34. On 17 October 2017 the Applicant's new attorneys wrote to the Crown, indicating that they would be referring the matter back to this Judge. On 25 October 2017 the Crown replied indicating that there was no right to appeal the issues in question and that in any event the 14 days limitation period for doing so had expired. In the letter the Crown made an open offer to settle for $9,000. On 30 October 2017 the Applicant declined the offer, reminding the Crown that the order for costs was on the indemnity basis. On 30 October 2017 the Crown reiterated in a letter that there was no jurisdiction for the matter to be reviewed by the Grand Court. Crown Counsel also stated in the letter that:

> *"I can indicate that we are unable to pay the sum you have requested and if you are fortunate to have a hearing in this matter, we will have to challenge all of the items in your Bill of Costs. As you will be the aware, we do not have a separate fund to accommodate such payments. However, we are prepared to see if there can be a settlement which approaches a middle ground between the two proposals. If any such figure were to be agreed, we will also have requested nondisclosure agreement between the parties."*

35. On 1 November 2017 the Crown sent an email increasing the offer to settle to $16,000. On the same date, in an email in reply, that offer was rejected by the Applicant and a sealed copy of the Summons and supporting affidavit in relation to the applications before me were attached. On 21 November 2017 the Crown increased its offer to settle to $20,000.


**The Court's Jurisdiction to Review the Decision of the Taxing Officer**

36. Although initially contending that the Court did not have jurisdiction to hear the application, after hearing the submissions made on behalf of the Applicant, Crown Counsel conceded, at end of her oral submissions, that the Court had an inherent jurisdiction to intervene in certain circumstances.

37. The Court, in this case, does not have the power to review the decision of the Taxing Officer pursuant to GCR O.62, r.30[10]. However, as rightly submitted by the Applicant, under exceptional circumstances, the Court may, under its inherent jurisdiction, examine the activities of a Taxing Officer even when that is not expressly provided for in the Rules.

38. In ***R v Taxing Officer, ex p Bee Line Roadways International Limited*** (1982) (The Times, February 2011) Woolf J. found that the High Court had an inherent jurisdiction to control the exercise of the authority of the Court delegated to the taxing master where there was a lacuna in the rules. Woolf J. highlighted the three stage mechanism that

[10] See paragraph 6 above.

needed to be followed by a party to a taxation. The first is the initial taxation. The second is a review by the Taxing Officer into objections in writing made by a party who is dissatisfied. The third is after the Taxing Officer has given his certificate on any such review and stated the reasons for his decision, there can be a review by a judge. It was evident in ***ex p Bee Line Roadways*** that the taxation had never been completed and that the second stage of the procedure not taken place. This meant that they could not move on to the third stage at which a judge could exercise its jurisdiction under the rules. There were no other provisions of the rules which expressly gave any right of appeal or right to review. That is a similar position in the matter before me, where GCR O.62, r.30(1) enables a party, if dissatisfied with the Certificate, to apply to a Judge to review a Taxing Officer's decision, as the Certificate has not been granted due to a taxation not taking place and there is no other provisions dealing with a right to review.



39. At page 6 in ***Bee Line Roadways International Limited*** Woolf J. stated:

> *"Having regard to* [the] *authorities and having regard to the relationship of the functions of the taxing master to those of the High Court as whole, it is my view that, quite apart from the provisions of the rules and the clearly laid down procedure which they contain for review by the taxing master followed by a review by a judge, it is possible for the Court to examine the activities of a taxing master even when they do not fall precisely within the rules. The basis of that power does not, however, lie in Order 53 and the remedy of judicial review. The power is an inherent power of the Court to control its own proceedings conducted by officials of the Court such as taxing masters, as delegates of the judges." (emphasis added).*
>
> *..... In appropriate cases the court can review the matter on application. It will of course do so only when it is satisfied that justice requires it to do*

*so. In the normal way a party must go through the statutory procedure contained in the Rules of the Supreme Court. The rules set out what are regarded as being the appropriate steps to be followed. If they are followed, a party who is dissatisfied will have the right to a review under rule 35. If a party applies under the inherent jurisdiction of the court, the position is very different, and whether any relief will be granted will be very much a matter for careful consideration as a question of discretion. As I have already indicated, the cases will probably be few and far between in which the court will intervene.*

*Having indicated that was my view of the position, the parties considered that it would be practicable and sensible for me to deal with the merits of the application on the basis that the appropriate application had been made to the court under the inherent jurisdiction to which I have made reference. On that basis I have come to the conclusion that this is one of those rare cases where it would be right to intervene. The solicitors acting for the Defendants have raised no objection to the court intervening. .....*

*In my view, although the Master in no way should be criticised for the decision to which he came on the information which he had before him, it seems to me that on the material before me there would be real injustice caused if the Plaintiffs were not entitled to put the evidence which they have before the Master in order to show that this is one of the cases where rule 29(3) does not apply."*


40. In ***Re Macro (Ipswich) Ltd*** [1996] 1 WLR 145 the taxing master had ordered that the taxation proceedings be adjourned until after the substantive appeal of the case in question had been heard. Dissatisfied with the adjournment, the claimant intended to appeal to a High Court Judge. Although RSC O.62 provided a mechanism to review costs in general situations, it did not contain any provisions for appeal in this unusual situation. RSC O.58 gave the right of appeal to the High Court from a master's decision, but it did

not cover an appeal from the decision of a taxing master. At Page 154C, citing Woolf J. in ***Bee-Line Roadways,*** Ferris J. found that under this situation, the High Court had the inherent jurisdiction to control its own proceedings, including proceedings for the taxation of costs conducted by taxing masters as delegates of High Court Judges. Ferris J. accepted that the claimant might appeal to a High Court Judge and allowed the appeal. He stated that *"the inherent jurisdiction of the court can be inferred to make good the want of an express right of appeal."*

41. In ***R v Supreme Court Taxing Office ex p John Singh & Co*** [1997] 1 Costs LR 49, the claimant was dissatisfied with the taxation of costs made in a review by the appropriate authority (a non-judicial officer) in a criminal case. He unsuccessfully appealed to a taxation master. He then asked the taxation master to certify that the decision in the taxation involved a question of principle of general importance to allow him to appeal to a High Court Judge. The taxation master refused to certify and he then applied for judicial review. The Court of Appeal held that, a decision of a taxation master, being a decision made by a superior court, was not amenable to judicial review, but that the High Court had inherent jurisdiction, only to be exercised in exceptional circumstances such as to avoid real injustice, to overturn a decision a taxing master made in the exercise of his discretion to refuse to issue a certificate. In the end, the Court approved the decision of the taxing master not to issue the certificate and the appeal was dismissed.

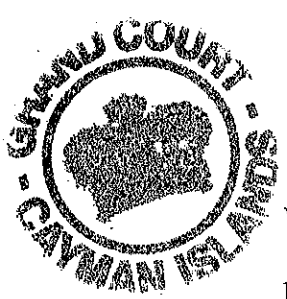
42. In ***R (Brewer) v Supreme Court Costs Office*** [2007] 1 Costs LR 20, the Divisional Court of the Queen's Bench Division was also dealing with the question of a taxing master's

refusal to issue a certificate with the result that the claimant could not appeal to the High Court. Following ***John Singh & Co***, the Divisional Court also held that the High Court could exercise the inherent jurisdiction in rare situations as there was real injustice in that case. The case was remitted to the taxing master who was ordered to conduct a taxation of the costs afresh.

43. In light of the concession made by Crown Counsel towards the end of her oral submissions, it appears that the parties agree, having regard to the above case law, that the Grand Court may intervene in exceptional circumstances where there is a lacuna in the Law to review decisions of a Taxing Officer in order to prevent a real injustice. Unlike in some of the above cases, there is no agreement about whether I should exercise that jurisdiction in this case or to what degree I may interfere with the decisions made and the remaining taxation process. I am satisfied that I have the jurisdiction to review the decision of the Taxing Officer in this case.

**Non Compliance with O.62, r.22(5) Requirements for a Paying Party to Properly Bring an Application to Set Aside a Default Costs Certificate**

44. At paragraph 22 herein I note that, at the October 2016 hearing, I drew attention to the fact that GCR O.62, r.22(5) sets out four procedural requirements which should be fulfilled for an application to set aside a default costs certificate to be deemed properly brought. In October 2016 I indicated that it was a matter for the Taxing Officer to determine whether the requirements were met and, if she found that they were not,



whether an extension of time should be given to the Crown for the requirements to be met pursuant to O.62, r.21(1).

45. Unfortunately, when reading the former Taxing Officer's letter of January 2017 in which she gave her delayed decision, it is evident that she failed to recognise that these requirements must all be complied with before she could go on to consider whether to dismiss the Default Costs Certificate, for only then would the application to set aside be properly before her. The only discretion she had in relation to the requirements, as highlighted by me in October 2016, was to extend the time for the conditions to be met.

46. It is clear from the papers and the submissions made that the requirements in O.62, r.22(5)(b) or (d)[11] have not been complied with by the Crown. It is clear that the Taxing Officer did not make any order granting an extension of time for the requirements to be met, she simply dismissed *"the application for extension of time pursuant to O.62, r.22(5)"*. That decision having been made meant that there was no properly brought application to set aside the Default Costs Certificate before her and therefore she did not have the jurisdiction to make the order to set that Certificate aside.

**Conclusions**

47. In light of the above, the Taxing Officer's decision to set aside the Default Costs Certificate was deficient and invalid. As the current Taxing Officer feels unable to consider whether her predecessor acted incorrectly without the matter first being referred to the Grand Court, an injustice would result if this Court failed to review and intervene.

[11] See paragraph 19 above.

In such circumstances, I am satisfied that this is a case in which a Judge should interfere and overturn the Taxing Officer's decision to set aside the Default Costs Certificate. I also feel it appropriate to overturn the direction of the Taxing Officer requiring the Applicant to serve a Bill of Costs on the Crown by 6 February 2017, as a Bill of Costs and an amended Bill of Costs have already been served by the Applicant. The Taxing Officer was wrong to have found otherwise, even though that conclusion and her decisions may have been based on the unfortunately incomplete detail provided in the affidavit sworn by Crown Counsel[12]. Even if I had not overturned the Taxing Officer's decision to set aside the Default Costs certificate, the setting aside would not have affected the validity of the already properly served Bill of Costs and the taxation proceeding would have been restored to the stage that existed immediately before the Default Costs Certificate was granted.

I have considered whether I should go on to deal with the submissions made in relation to the refusal by the Taxing Officer to provide reasons. I feel that, in light of my already reached conclusions concerning the setting aside, I need not. When reaching my decisions, I have also had regard to the detailed argument submitted by the Applicant in relation to the nature of the review that the Court should undertake and of the orders that it should make. The Applicant relies upon the breadth of the powers set out in O.62, r.30 (in particular subsection (6)) and expressed by McCowan J. in ***Madurasinghe v Penguin Electronics*** [1993] 3 All ER 20 where the Court of Appeal was dealing with a comparable rule. The Court of Appeal stated that the Judge had a discretion to reconsider

[12] See paragraphs 18 and 26 above.

the taxation afresh and not be fettered by the approach taken by the Taxing Officer. With this in mind, it is submitted by the Applicant that I should consider the application to set aside afresh and when doing so decline to set aside. However, this is not a case in which there has been a full taxation. GCR O.62, r.30 applies to cases where there has been a completed taxation resulting in a Taxing Officer's cost certificate and where there is dissatisfaction with the amount in that certificate. Rule 30 does not apply to the inherent jurisdiction cases, where the Court is required to review and interfere only if there was an injustice that which could not otherwise be corrected due to a lacuna the law. Accordingly, the broader discretionary powers that exist in the circumstances of the ***Madurasinghedo*** case do not apply to the inherent jurisdiction cases.

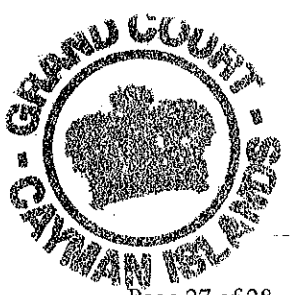
49. I am satisfied that the proper approach that should be taken by this Court is not to usurp the wider functions of the Taxing Officer. Accordingly, I favour the nature of the alternative approach suggested by the Applicant at paragraph 1.1[13] and 2.13[14] in his Written Skeleton Argument dated 22 November 2017, namely to give certain directions but still rely upon the Taxing Officer to have conduct of the taxation rather than resolving all taxation issues.

50. This Court should interfere in this case, at this stage of the taxation procedure, only so far as to ensure that a decision of the Taxing Officer that is contrary to justice is reviewed and overturned when there is no other means of doing so. The relief that this Court should grant is a matter for careful consideration. In this case, having overturned the

[13] See paragraph 4 above.
[14] See paragraph 5 above.

Taxing Officer's decision to set aside the Default Costs Certificate, I remit the matter back to the present Taxing Officer. If an application to set aside the Default Certificate is properly made having regard to the requirements set out in O.62, r.22(5), it would then be a matter for the Taxing Officer to consider firstly whether such an application should be heard by granting an extension of time for the O.62, r.22(5) requirements to be met and secondly what the outcome of any properly brought setting aside application would be. As there appears be no current application to set aside made by the Crown in compliance with O.62, r.22(5), if no such application is hereafter properly and promptly brought or the Taxing Officer does not seek to make an order to set aside pursuant to GCR O.62, r.22(4)(a) if she feels empowered to do so under her own motion, then the Applicant would be able to proceed to recover his costs in the normal way by enforcing the Default Costs Certificate.

51. In any event, it would not be appropriate for me to consider an application to set aside the Default Costs Certificate, as I am not satisfied that such an application has been properly brought due to non-compliance with O.62, r.22(5). Before reaching the decision not to take the broad approach commended by the Applicant and to not consider an "*application*" to set aside the Default Costs Certificate, I have had regard to the submissions made by the Applicant about the open negotiations between the parties, the conduct of the taxation proceedings to date by the Crown in a case in which the cost orders is made on the indemnity basis and the Overriding Objective.



52. I have not considered the issue of costs relating to this hearing. If a party wishes to make an application for costs then they would need to file an application in the normal way.

.....

**The Honourable Mr. Justice Richard Williams**
**JUDGE OF THE GRAND COURT**

## Footnote

Following circulation of the draft judgment pursuant to GCR O.1, r.12 and Practice Direction No. 1/2004, on 12 December 2017 the Court received detailed written comments from Crown Counsel. On 13 December 2017 Mr. Hoffman wrote to the Court drawing attention to the Practice Direction and rightly characterised some (but not all) of the comments made by Crown Counsel as an attempt, without making the appropriate application, to introduce evidence and extended submissions that were not before the Court at the time of the hearing. The majority of the submissions related to GCR O.62, r.22(4), and although they did not refer to subsection (b) it appears that they are references to GCR O.62, r.22(4)(a). Upon review of the written comments in relation to the draft judgment submitted by each party, I have made the necessary amendments of the nature set out in paragraph 1.2 of the Practice Direction. Upon review of the draft judgment, I have also deemed it appropriate for completeness sake to add additional comment, limited by reference to the evidence that was before the Court at the hearing and the submissions made at the hearing, in relation to GCR O.62, r.22(4)(a).