COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 78 of 2012

B E T W E E N

JOHANN D. SWART
WILLIAM S. TAYLOR
LARRY BISWANGER
SCOTT MONCRIEFF

Appellants

AND

APOLLON METAXIDES
(in his personal capacity and as a representative of six others)

First Respondent

AND

SILVER POINT CONDOMINIUM APARTMENTS
(a body corporate)

Second Respondent

BEFORE: **Kristina Wallace Whitfield, Registrar**

APPEARANCES: **Mr. Frederick Smith, KC with Mrs. Pearline Ingraham-Wood and Mrs. Kandice Maycock-Swain, Counsel for the Appellants**

Mr. Edwin Knowles, Counsel for the First Respondent

DATES: **23 January 2024; 28 February 2024; 10 May 2024**

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Civil appeal – Taxation – Stay of taxation – Jurisdiction to grant a stay of taxation - Indemnity principle – Stay of enforcement of Certificate of Taxation - Setting aside Certificate of Taxation – Strike out of Bills of Costs - Rule 35 of the Court of Appeal Rules

Three costs orders were granted in favour of the appellants (the Swart Group) for payment by the first respondent (Metaxides). Accordingly, the Swart Group duly filed their Bills of Costs. Prior to the date set for the taxation of those Bills, Metaxides filed a Motion seeking, essentially: a stay of taxation of the Swart Group's three outstanding Bills of Costs until proof of payment is produced for the Swart Group's five Bills of Costs which have already been taxed and for which Certificates of Taxation have already issued and the three Bills which are to be taxed; secondly, a stay of the enforcement of the Certificates of Taxation issued in respect of those previously taxed Bills of Costs and thirdly, set aside the Certificates of Taxation previously issued and have all of the Bills

of Costs filed in this Court struck out if proof of payment of the Bills is not produced. At the root of the Motion is the belief by Metaxides that the amounts claimed in the collective Bills have not actually been paid by the Swart Group to their attorneys.

In response to the Motion the Swart Group submits that in the absence of an extant appeal / application there is no jurisdiction to grant the stay sought by the Motion. In the alternative, they submit that even if the jurisdiction to grant the stay exists, there are no exceptional circumstances that warrant the grant of a stay of the taxation of their Bills of Costs as all of the issues raised by Metaxides' Motion could be addressed in the taxation.

Held: Metaxides' Motion is dismissed in its entirety. Costs of the Motion are awarded to the Swart Group. I am minded to fix the costs, but will hear the parties on the issue of costs on 21 May 2024. The taxation of the four outstanding Bills of Costs are to proceed in chronological order as per the date of filing on the previously agreed dates.

On the authority of Junkanoo Estates Ltd. et. al. v UBS (Bahamas) Ltd, there is no jurisdiction to grant the stay sought by Metaxides' Motion as there is no extant appeal / application. Even if the jurisdiction to grant the stay of taxation existed, the stay should be refused as all of the issues raised by Metaxides can be addressed during the course of the taxation and, based on the information currently before me as the Taxing Master, I am not satisfied that there has been a breach of the indemnity principle.

Both parties agree that the costs pursuant to the Certificates of Taxation have already been paid. It is difficult to understand what useful purpose would be served by staying the enforcement of a Certificate of Taxation for which the costs have already been paid.

Rule 35(15) provides a process by which a party "who is dissatisfied with the allowance or disallowance in whole or in part of any item by the taxing officer" may apply for a review of taxation. If aggrieved by the "decision of the taxing officer on such review", Rule 35(20) stipulates a 14-day time frame from the date of the Certificate of Taxation by which that aggrieved party should apply to the Court to, inter alia, have the Certificate set aside. Certificates of Taxation having issued, in my view, the only course available to Metaxides to have those Certificates set aside was an appeal to the full Court. I find, therefore, that I have no jurisdiction to accede to the Motion in relation to the setting aside of the Certificates of Taxation.

The Bills of Costs filed by the Swart Group will not be struck out as the issues raised by Metaxides can be raised and addressed during the course of the taxation proceedings.

Adam Stewart et. al. v Cheryl Hammersmith Stewart et. al. SCCivApp. Nos. 108 and 132 of 2022 considered
Adams v London Improved Motor Coach Builders Ltd. [1921] 1 KB 495 considered
Amber Louise Murphy v Hot Pancakes Ltd. et. al. SCCivApp. No. 95 of 2020 considered
Ashley Dawson-Damer v Grampian Trust Co. et. al. SCCivApp. No. 30 of 2022 considered
Bailey v IBC Vehicles Ltd. [1998] 3 All ER 570 considered
General of Berne Insurance Co. v Jardine Reinsurance Management Ltd and others [1998] 2 All ER 301 considered

Johann Swart et. al. v Apollon Metaxides and anor. SCCivApp. No. 78 of 2012 (delivered 26 July 2021) considered
*Junkanoo Estates Ltd. et. al. v UBS (Bahamas) Ltd***.** SCCivApp. No. 24 of 2018 followed
Kenneth L. Kellar and anor. v Stanley A. Williams [2004] UKPC 30 considered
Michael Radford and anor. v Alejandra Frade et. al. [2018] EWCA Civ 119 considered
Tynes v Barr Civil Appeal No. 51 of 2001 considered

J U D G M E N T

Introduction

1. The appellants (the Swart Group) and the first respondent (Metaxides) were residents in the second respondent condominium apartments. Over the course of years (since 2011) they have been involved in heavily contested litigation in all levels of the courts of The Bahamas which resulted in various costs orders, flowing in both directions.

2. Most of those costs have been taxed. However, four Bills of Costs remain outstanding in the Court of Appeal: one in favor of Metaxides filed on 21 October 2021 and the other three in favor of the Swart Group filed on 25 October 2021, 21 June 2022 and 23 June 2022.

3. I set the outstanding Bills of Costs for taxation before me in chronological order according to the date of filing. This resulted in the first Bill set to be taxed being that of Metaxides on 23 January 2024. The Swart Group's outstanding Bills were set for dates thereafter.

4. On 15 January 2024, Metaxides filed a Notice of Motion seeking an Order that:

> **"1. Unless the Appellants, as the Receiving Parties in the taxations of bills of costs listed below, do produce for inspection (subject to any necessary redaction of material which concerns the merits or advice on the original action or of any appeal)**
>
> > **(i) the original signed letters of engagement or other original evidence of the terms of their retainer with the firm of Callenders & Co in relation to each of the bills of costs filed for taxation herein on 2 August 2013; 14 April 2014; 16 August 2017; 21 January 2019; 21 January 2019 (sic); 25 October 2021; 21 June 2022; and 23 June 2022; which all such bills of costs have been taxed or appointed to be taxed and**

> **(ii) contemporary evidence of banking electronic receipts of payments made by the Appellants, namely Johann Swart, Larry Biswanger, William Taylor or Scott Moncrieff of the sums alleged by the said bills of costs to have been paid by the Appellants to their attorneys, namely, as claimed, a total $2,196,699.87 paid for the Court of Appeal action and a total of $1,472,139.76 paid for the Supreme Court action, with a grand total of $3,668,839.63.**
>
> **all further proceedings for the taxation of the said bills be stayed.**
>
> **2. The evidence required by paragraph 1 above must be verified by affidavit by a person with direct knowledge of the facts deposed, namely Johann Swart, Larry Biswanger, William Taylor or Scott Moncrieff.**
>
> **3. All enforcement of any certificate of taxation in respect of the said bills be stayed pending compliance with paragraph 1 & 2 above.**
>
> **4. All further proceedings for the taxation of any of the said bills and all such enforcement be stayed pending the determination of this application.**
>
> **5. If the Appellants fail to comply with paragraph 1 and 2 above the certificates of taxation made herein in favour of the Appellants shall be set aside and all the bills filed by them for taxation herein shall be struck out."**

5. In summary, the Motion seeks to: firstly, stay the taxation of the Swart Group's three outstanding Bills of Costs until proof of payment is produced for the Swart Group's five Bills which have already been taxed and Certificates of Taxation issued and the three Bills which are to be taxed; secondly, stay the enforcement of the Certificates of Taxation issued in respect of those previously taxed Bills of Costs and thirdly, set aside the Certificates of Taxation previously issued and have all of the Bills of Costs filed in this Court struck out if proof of payment of the Bills is not produced. At the root of the Motion is the belief by Metaxides that the amounts claimed in the collective Bills have not actually been paid by the Swart Group to their attorneys.

6. The Affidavit of P. Olivea Ingraham filed in support of the Motion filed by Metaxides summarizes the essence of its complaint against the Swart Group's:

> **"9. …systemic pattern of deliberate and abusive practice by submitting bills which claim excessive, unreasonable and unsubstantiated sums; and that the Swart Group has persistently evaded producing proper evidence to substantiate their liability to pay the sums claimed to their own attorneys. By this motion, Mr. Metaxides relies on the evidence of those taxations to support his contention of a systemic lack of integrity in the Swart Group's bills, both taxed and untaxed."**

7. On 23 January 2024, the date set for the taxation of Metaxides' Bill of Costs, counsel for the Swart Group, Mr. Frederick Smith, KC raised a procedural point. In essence, he sought a hearing and determination on the Motion, prior to the taxation of Metaxides' Bill of Costs. He submits that counsel for Metaxides, by filing the Motion, is seeking to obtain an unfair advantage by having his Bill taxed while the Bills of the Swart Group are stayed. Mr. Smith urged that if I was not minded to hear and determine the Motion prior to the taxation of the Metaxides Bill, then I should tax the four outstanding Bills and determine Metaxides' Motion thereafter.

8. In anticipation that the taxation of the outstanding Bills would be vigorously contested, I was of the view that the more logical course would be to hear and determine the Motion, prior to the taxation of any of the Bills and directed counsel to file written submissions in support of and in opposition to the Motion. Those submissions were duly filed on 7 February 2024 and 21 February 2024.

9. On 28 February 2024, Counsel for Metaxides and the Swart Group were provided with an opportunity to make oral submissions. During the hearing of those oral submissions, counsel for the Swart Group relied on the case of **Tynes v Barr** Civil Appeal No. 51 of 2001. Counsel for Metaxides took great exception to this reliance as the case had not been included in the Swart Group's written submissions, thereby depriving him of the opportunity to respond to the case. In the interest of fairness, I directed that Metaxides would be allowed to respond to the case in writing. Metaxides' written reply was received as directed.

10. Following the hearing, I promised Counsel that I would provide them with a written Ruling on the Motion. For the reasons which follow I refuse Metaxides' Motion and direct that the taxation of the outstanding Bills proceed on the tentative dates agreed to during the hearing of 28 February 2024.

Metaxides' Motion

11. Metaxides describes his Motion as a **"deliberately calibrated application to restrain serial abuses of process."** Metaxides' starting point is that the Swart Group engaged their attorneys to prevent them from incurring costs in the amount of $10,335.32 to replace their windows and doors. He says it is inconceivable that the Swart Group would pay their attorneys $3,668,839.63 to avoid a $10,335.32 expense. He calls on the Court to prevent what he describes as a brutally

systemic injustice from occurring by requiring the production of proof of payment of $3,668,839.63 by the Swart Group to their attorneys.

12. Paragraph 10 of the Ingraham Affidavit filed in support of the Motion reads as follows:

> **"10. I have reviewed the files in our Chambers in this matter. The following table sets out the Bills of Costs for taxation filed and served upon these chambers by the attorneys for the Swart Group, with the date of each such bill and the gross sum claimed. The table includes the majority of the bills of costs filed by the Appellants…Where a bill has already been taxed, the table also shows the total amounts allowed on taxation... The final column in the table shows the calculated percentage difference between the amount claimed and the amount allowed.**
>
> **IN THE COURT OF APPEAL … $2,196,699.87**
>
> **IN THE SUPREME COURT … $1,472,139.76**
>
> **Total Claimed in the Court of Appeal and Supreme Court combined: $3,668,839.63"**

13. Metaxides submissions are a multipronged attempt to cast suspicion on the truth and accuracy of the amounts claimed in the Bills submitted by the Swart Group. He submits that the costs ordered were ordered to be paid on a standard party and party basis and therefore the evidential burden of proving the costs claimed is on the receiving party. He further submits that given the significant reduction (between 62% - 77%) of the Swart Group's previously taxed Bills:

> **"54. …the Court cannot rely upon assertions of fact made by or on behalf of the receiving parties which are not corroborated by cogent contemporary evidence of the retainers entered into and of the times spent and of the fees and costs actually incurred with contemporary banking electronic receipts of payments actually made by the Appellants to their attorneys."**

14. The final paragraph of his submissions is as follows:

> **"74. …the <u>First Respondent is seeking disclosure</u> of the Appellants' attorneys Engagement letter and of the baking electronic receipts of payments made by the Appellants to their attorneys <u>for all the sums claimed. This also includes the three Appellants' bills of costs that are currently before this Registrar for taxation.</u>" [Emphasis added]**

15. Paragraph 77 of the Ingraham Affidavit filed in support of the Motion provides:

> **"77. Because of the exorbitant amounts of the bills filed on behalf of the Swart Group and because of manifest falsity of numerous items in those bills and the excessive hours claimed for, and because of the complete absence of cogent evidence of agreement to pay, let alone actual payment by the Swart Group to their attorneys of any,of the sums claimed, Mr Metaxides does not believe that the amounts claimed in the bills filed have actually been paid by the Swart Group to their attorneys or that they represent the true liability of the Swart Group to their attorneys. Nor did the Swart Group pay to theirAttorneys $2,196,699.87 cost in the Court of Appeal. lnstead, he suspects that the Swart Group bills presented for taxation have been systemically padded with times."**

Swart Group's Response to Metaxides' Motion

16. The Swart Group opposes the Motion. They submit that Metaxides' application for a stay is **"fatally defective, frivolous, vexatious, and an abuse of process."** This, they submit, is because:

> **"5. …the Court does not have the jurisdiction to grant the relief sought in the Stay Application … and/or alternatively, even if it did, the Stay Application does not have any merit and accordingly ought to be dismissed…**
>
> **…**
>
> **14. …Swart respectfully submits that this Court has no jurisdiction to order a stay of the taxations in the absence of an extant appeal. The jurisdiction to stay a taxation pending the production of the Requested Document simply does not exist.**
>
> **…**
>
> **24. Swart (sic) secondary submission … is that in any event, the Stay Application is bound to fail on the merits because even if the Court had the jurisdiction to consider the Stay application, Metaxides has not produced any evidence of exceptional circumstances necessitating a stay of the taxations or evidence to show why in the interest of justice the taxation should be stayed."**

17. Essentially, the Swart Group submits that in the absence of an extant appeal / application before the Court of Appeal or the Supreme Court, and I will infer that they also meant to include the Privy Council, I do not have the jurisdiction to grant the stay sought by the Motion. In the alternative, they submit that even if I had the jurisdiction to grant the stay sought, there are no exceptional circumstances that warrant the exercise of my discretion to grant a stay of the taxation of their Bills of Costs as all of the issues raised by Metaxides' Motion could be addressed in the taxation. They submit and accept that as the Taxing Master, I have the discretion to request further documents to satisfy myself as to the reasonableness of a claim and to disallow what I am not satisfied is properly supported.

Discussion

18. In my view, the issues raised by Metaxides' Motion require my determination as follows: firstly, whether I have the jurisdiction to stay all further taxation proceedings pending production by the Swart Group of evidence of payment of the costs in relation to Bills of Costs which have already been taxed and which have yet to be taxed and, if so, should I exercise that jurisdiction. Additionally, whether I have the jurisdiction to stay all further taxation proceedings pending production by the Swart Group of evidence that $3,668,839.63 has been paid by the Swart Group to its attorneys relative to costs orders arising from this Court and the Supreme Court and, if so, should I exercise it.

19. Secondly, whether I have the jurisdiction to stay the enforcement of Certificates of Taxation pending the production of proof of payment by the Swart Group of $3,668,839.63 and, if so, should I exercise that jurisdiction.

20. Thirdly, whether I have the jurisdiction to stay the taxation of the Swart Group's Bills of Costs and enforcement thereof, pending my determination of Metaxides' Motion and if so, should I exercise the jurisdiction.

21. Fourthly, whether I have the jurisdiction to set aside the Certificates of Taxation issued by this Court in favour of the Swart Group and to strike out all Bills filed in this Court by the Swart Group, if the Swart group fails to provide proof of payment of $3,668,839.63.

22. The Motion seeks to delve into Bills of Costs and Certificates of Taxation taxed before and issued by another Registrar, in some cases, nearly 10 years ago. The Motion also asks me to consider Bills of Costs filed in this Court more than 10 years ago and the cumulative effect of Bills filed in the Supreme Court.

23. I do not accept, as posited by counsel for Metaxides, that I have already effectively granted the stay sought by the Motion by adjourning the taxations to hear the Motion and therefore I consider the stay application below.

Stay of taxation of outstanding Bills of Costs pending proof of payment of costs relating to Bills of Costs which have already been taxed (in the Court of Appeal and in the Supreme Court) and are to be taxed (in the Court of Appeal)

24. In my view, the only matters properly before me are the outstanding taxations which relate to the Bills of Costs filed on 21 October 2021 (in favor of Metaxides) and the Bills of Costs filed on 25 October 2021, 21 June 2022 and 23 June 2022 (in favor of the Swart Group). Those Bills claim $153,112.00, $195,721.50 and $128,339.00, respectively, and $477,172.50, cumulatively.

25. In response to the Swart Group's claim that the Court does not have the jurisdiction to grant the stay sought in the absence of an extant appeal / application, counsel for Metaxides, during his oral submissions, submitted that it is unnecessary for an appeal to be extant in order for the Court to grant the relief sought. The Court, he submits, always has the jurisdiction to prevent an abuse of its process. He submits that if the proof of payment is produced, the basis of the Motion falls away and the taxation can proceed.

26. Metaxides' position is, simply, unless and until proof of payment is produced, the taxation proceedings relative to the Swart Group's three outstanding Bills of Costs should not commence.

27. The Court of Appeal has considered the issue of a stay of taxation proceedings recently in the cases of **Amber Louise Murphy v Hot Pancakes Ltd. et. al.** SCCivApp. No. 95 of 2020, **Adam Stewart et. al. v Cheryl Hammersmith Stewart et. al.** SCCivApp. Nos. 108 and 132 of 2022 and **Ashley Dawson-Damer v Grampian Trust Co. et. al.** SCCivApp. No. 30 of 2022. The principle of law to be extracted from these cases is that a stay of taxation may only be granted in exceptional circumstances.

28. In **Amber Louise Murphy** the paying party sought a stay of taxation proceedings pending the determination of an application for restitution which had been filed in the Supreme Court. In **Adam Stewart** the paying party sought a stay of taxation pending a determination of its application for special leave. In **Ashley Dawson-Damer** the paying party sought a stay of taxation proceedings pending the outcome of its appeal to the Privy Council. In each case the application for a stay was denied.

29. In **Junkanoo Estates Ltd. et. al. v UBS (Bahamas) Ltd.** SCCivApp. No. 24 of 2018 the appellants sought a stay of taxation of five outstanding Bills of Costs. The Court held:

> **"30. …<u>there is no appeal pending in the Court of Appeal nor at the Privy Council which relate to the subject matter of these Bills of Costs. Therefore, there is no basis upon which to grant a stay of the taxation of these Bills of Costs</u>."**
> **[Emphasis added]**

The Court refused Junkanoo Estates' application for a stay of taxation on the basis that there was no extant appeal and therefore no basis to grant the stay.

30. Relying on the Court's decision in **Junkanoo Estates,** I find that I have no jurisdiction to grant the stay sought by Metaxides' Motion as there is no extant appeal. This finding does not prejudice Metaxides as all of the issues raised by him relative to, inter alia, bill padding,

reasonableness, duplicity and excessiveness can be raised and addressed during the taxation proceedings.

31. Even if I found that I had the jurisdiction to grant the stay sought, I would have declined to exercise my discretion as there are no exceptional circumstances that would warrant my granting a stay of taxation of the Swart Group's Bills of Costs. I make this finding for the following reasons.

32. Firstly, counsel for Metaxides sought to persuade me that the sums claimed are so unreasonable that they amount to a **"deliberate and abusive practice [of] submitting bills which claim excessive, unreasonable and unsubstantiated sums**." To do this he presented, what he termed a "birds eye view" of the costs claimed over the course of the litigation since 2011, in both this Court and the Supreme Court.

33. In my view, that approach is incorrect. The Bills of Costs filed in the Supreme Court and the resulting Certificates of Taxation are not before me. Certificates of Taxation have issued with respect to all but three of the Swart Group's Bills of Costs which have been filed in this Court. As noted above, the sum claimed by those three Bills amounts to $477,172.50. In my view, this is the appropriate starting point.

34. As Taxing Master, I am governed by Rule 35 of the Court of Appeal Rules. Sub-rule 4 provides:

> **"35. (4) The taxing officer may request such further documentation or submissions to substantiate a disputed or questionable claim and such further documentation shall be filed within seven days of the request, failing which the Registrar may disallow the disbursement in question."**

35. The right to request further documentation to **"substantiate a disputed or questionable claim"** is a right reserved to the Taxing Master to satisfy himself/herself that the sum claimed is necessarily and properly incurred for the attainment of justice. The issue of the reasonableness of a claim can properly be ventilated in the taxation. All of the issues raised by Metaxides to warrant a stay of taxation (inter alia excessiveness, duplication, bill padding, costs previously disallowed being resubmitted) are issues which may be raised and addressed during the taxation process. Indeed, that is the purpose of the taxation proceedings; so that the Taxing Master can consider **"whether or not the claim by counsel is reasonable or excessive"** bearing in mind the factors stipulated by Rule 35(12)(a-g) and any other relevant circumstances.

36. In support of my position, I rely on the dicta of Barnett, P in the case of **Johann Swart et. al. v Apollon Metaxides and anor.** SCCivApp. No. 78 of 2012 (delivered on 26 July 2021). In that case, the Swart Group appealed the then Registrar's refusal to strike out Metaxides' Bill of Costs. Barnett, P stated as follows:

> **"17. If the claim by Metaxides is excessive the Registrar ought not allow it. But the mere fact that the Bill presented is excessive or contains claims which are not recoverable should**

> **not be a basis for depriving a litigant of his entire claim which the court has already determined he is entitled to recover.**
>
> **…**
>
> **22. The Registrar was satisfied that the taxation could continue and in that process she could determine what charges were excessive or unreasonable, or could not properly be recovered. That is what taxation usually does. The matters complained of by Swart are matters that can easily be resolved on a taxation."**

37. Secondly, I do not agree with counsel for Metaxides that in the absence of proof of payment, the Swart Group is in violation of the indemnity principle.

38. The Swart Group submits that proof of actual payment is not required, rather it is the liability to pay. They further submit that Metaxides is not entitled to a copy of its engagement letter. Evidence of payment, they submit, is not a prerequisite for taxation proceedings to commence, rather the Taxing Master's overarching consideration, once the taxation proceedings have commenced is reasonableness.

39. May LJ, in the case of **General of Berne Insurance Co. v Jardine Reinsurance Management Ltd and others** [1998] 2 All ER 301, discussed the indemnity principle. He stated:

> **"…[s 60(3) of the Solicitors Act 1974] … is said to enshrine a common law principle to which the label 'the indemnity principle' has been given. <u>The principle is simply that costs are normally to be paid in compensation for what the receiving party has or is obliged himself to pay</u>. They are not punitive and should not enable the receiving party to make a profit. Another guiding principle of taxation is that contained in Ord 62, r 12, which provides that on a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party. <u>Thus amounts which the receiving party is obliged to pay his own solicitors may nevertheless not be recovered on a taxation on a standard basis if they were not reasonably incurred or not reasonable in amount.</u> [Emphasis added]**

40. The Privy Council, in the case of **Kenneth L. Kellar and anor. v Stanley A. Williams** [2004] UKPC 30 stated:

> **"17. The parties agreed on the basic proposition that costs were taxed between party and party on the indemnity principle, that is to say, the costs recoverable by the receiving party are limited to those which he is liable to pay to his own solicitor, subject to the limitation that they were reasonably incurred and were reasonable in amount…" [Emphasis added]**

41. Although said in the context of consideration of a brief fee, in the case of **Tynes v Barr**, Churaman JA stated as follows:

> **"We are told by Mr. Smith that Taxing Masters are now not allowing "Brief Fee" to counsel unless a fee-note or a receipt is first produced. We do not think that the learned Chief Justice intended to lay down a rule of such rigidity; rather we think the learned Chief Justice was somewhat staggered by the enormity of the item. Nor, we would add, did Mr. Evans suggest in argument before the learned Chief Justice that a fee-note or receipt was an essential prerequisite. We think that the true principle upon which Taxing Masters should act is the principle of reasonableness. Whether or not a fee-note or a receipt is in existence is merely evidence of what was paid or agreed to be paid. It cannot be decisive of what should be allowed on Taxation. Indeed, if that were so the matter can easily lead to abuse and injustice. The proper basis ought to be in our view that, irrespective of whether a fee-note or receipt is produced and irrespective of what appears therein, Taxing Masters ought to apply an objective standard of reasonableness; the nature of the claim, an assessment of the complexity of the matter including whether or not knotty points of law were involved, the degree of research and such like matters would all be proper matters for consideration on Taxation…" [Emphasis added]**

42. Counsel for Metaxides submits that **Tynes v Barr** was an appeal from a decision of Sawyer, CJ (as she then was). He submits that Sawyer, P, in drafting Rule 35(8) must have had in mind the Court's decision of **Tynes v Barr.** In the circumstances, he submits, that **Tynes v Barr** assists his case, not the Swart Group.

43. The facts of **Adams v London Improved Motor Coach Builders Ltd.** [1921] 1 KB 495, as gleaned from the headnote of the case, are as follows:

> **"The plaintiff was a member of a Trade Union which provided, amongst other benefits, legal aid for members in connection with their employment. The plaintiff had duly paid all his contributions to the Union and was entitled to**

> **the benefits. The Union's funds were allocated to, amongst other objects, that of providing the legal aid mentioned above. According to the usual practice the plaintiff laid his claim against his employers, the defendants, for wrongful dismissal before the executive council of the Union, and they decided to give him legal aid, and instructed a firm of solicitors, who were the general solicitors to the Union, to act for him in the matter. The plaintiff gave no written retainer to the solicitors. There was no agreement with the solicitors that the plaintiff was not to be liable to them for their costs. They issued a writ on his behalf, and conducted the action to trial, instructing counsel on his behalf during the preliminary stages and at the trial. The plaintiff recovered judgment in the action against the defendants:-**
>
> **Held, that the plaintiff was entitled to judgment with costs.**
>
> **By Bankes and Atkin L.JJ.: On the ground that the Union, acting on the plaintiff's behalf, engaged the solicitors to act for him, and they became his solicitors, and he was liable to them for payment of their costs, there being no agreement with them that he should not in any circumstances be liable to them for their costs; and that liability was not excluded upon the assumption that the Union also undertook to pay the solicitors costs.**

44. Lord Justice Bankes, in considering the indemnity principle, stated:

> **"The principle upon which costs as between party and party are allowed is that the costs are awarded to the person claiming them as an indemnity. That being the principle, it follows that anyone who is not in a position to claim to be indemnified is not entitled to an order for party and party costs…"**

45. Bankes LJ's determination that the solicitors were engaged to act for the plaintiff by the Union was arrived at by considering the following: who engaged the solicitors? He found that it was the Union. The Union having engaged the solicitors, on whose behalf were the solicitors engaged? He found that they were engaged to act for the plaintiff. Upon what terms were they employed? He found that it was essential to the defendants' case that they **"establish that the terms upon which the solicitors were engaged included the term that under no circumstances should they look to the plaintiff"**. He then said:

> **"… When once it is established that the solicitors were acting for the plaintiff <u>with his knowledge and assent</u>, it seems to me that he became liable to the solicitors for costs, and that**

> **liability would not be excluded merely because the Union also undertook to pay the costs. <u>It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs...</u>" [Emphasis added]**

46. In the more recent case of **Michael Radford and anor. v Alejandra Frade et. al.** [2018] EWCA Civ 119, McCombe, LJ relied on the case of **Adams** and stated as follows**:**

> **"36. The decision in Adams is clearly determinative of a large number of cases where solicitors may be instructed on a litigant's behalf, without formal retainer by the litigant…For the reasons given by Bankes and Atkin LJJ in that case, the facts indicate that, absent any other retainer during the course of the solicitor/client relationship, <u>'the ordinary deduction from the employment of a professional man…is that the person accepting the agent's services is bound to renumerate the agent'…</u>" [Emphasis added]**

47. Both sides rely on the case of **Bailey v IBC Vehicles Ltd.** [1998] 3 All ER 570. In that case a costs order was made in favour of the plaintiff who had been injured during the course of his employment with the defendant company. The claim was settled before trial and the defendants agreed to pay damages and costs. The plaintiff's Bill of Costs was submitted but objected to by the defendants who requested that the plaintiff provide evidence that the Bill was not in breach of the indemnity principle. The District Judge (sitting as the Taxing Master) found that the defendants were entitled to the discovery. The plaintiff's appealed that decision to a judge of the High Court. The Judge disagreed **"on the basis that there was nothing in the available information which could lead to an inference that the indemnity principle had not been observed by the plaintiff's solicitors."**

48. On appeal, the Court of Appeal acknowledged the submission of the plaintiff before the Taxing Master that he **"lacked jurisdiction to make the order for discovery".** The Court of Appeal said: **"This submission was rejected, and was not renewed before us…"** as counsel for the plaintiff accepted that:

> **"…The taxing officer is exercising a judicial function, with substantial financial consequences for the parties. To perform it, he is trusted properly to consider material which would normally be protected from disclosure under the rules of legal professional privilege. <u>If, after reflecting on the material available to him, some feature of the case alerts him to the need to make further investigation or causes him to wonder if the information with which he is being provided is full and accurate, he may seek further information.</u> No doubt he would begin by asking for a letter or some form of written**

> **confirmation or reassurance as appropriate. If this were to prove inadequate he might then make orders for discovery or require affidavit evidence. It is difficult to envisage circumstances in which the party benefiting from the order for costs will not have been anxious to provide the required information, but if all else fails, it would theoretically be open to him to order interrogatories. However, if the stage has been reached where interrogatories might reasonably be ordered, the conclusion that the receiving party had not been able to satisfy the taxing officer about the bill, or some particular aspect of it, would seem inevitable. This jurisdiction having been acknowledged, an emphatic warning must be added against the over enthusiastic deployment of these powers, particularly at the behest of the party against whom the order for costs has been made. As [the High Court judge] recognised, the danger of 'satellite litigation' is acute. As far as possible consistent with the need to arrive at a decision which does broad justice between the parties, it must be prevented or avoided, and the additional effort required of the parties kept to the absolute minimum necessary for the taxing officer properly to perform his function…" [Emphasis added]**

49. The authorities are clear that the test of what may be recovered on taxation is governed by the indemnity principle and does not relate to only costs actually paid, but also costs liable to be paid, subject to the reasonableness of those costs. Counsel for Metaxides did not submit any evidence that the Swart Group entered into an arrangement with their attorneys that they would not be liable for the costs incurred in the litigation. Rather, he relies on his belief that it is wholly unreasonable to have paid $3,668,839.63 to your attorneys to avoid paying a $10,335.32 expense.

50. In my view, the sum of $3,668,839.63 is not the starting point, for the reasons outlined above, but rather the starting point is the cumulative sum of the three outstanding Bills of Costs in the amount of $477,172.50. A summary of those Bills of Costs are as follows.

51. The Bill filed on 25 October 2021 was filed pursuant to the costs order granted in favour of the Swart Group, following an appeal by Metaxides against the decision of the judge below to uphold the Deputy Registrar's decision to set aside a Certificate of Taxation issued by the Supreme Court.

52. Following the dismissal of his appeal, Metaxides sought to appeal that dismissal to the Privy Council. The Court refused Metaxides application for conditional leave and made a costs order in favour of the Swart Group. That costs order gave rise to the Bill of Costs filed on 23 June 2022.

53. Metaxides sought clarification of the costs order of the Court's judgment dated 16 May 2017. The Court dismissed the application and by separate written judgment ordered Metaxides to pay the costs of the Swart Group. That costs order gave rise to the Bill of Costs filed on 21 June 2022.

54. In each of the above instances the Court was moved by applications on behalf of Metaxides and defended by the Swart Group. At the taxation I will be tasked with determining whether the sums claimed by the Swart Group were necessarily and properly incurred for the attainment of justice in the circumstances of each case, bearing in mind the principles of reasonableness and the factors stipulated by Rule 35(12)(a-g).

55. The argument that it is wholly unreasonable that the Swart Group have paid their attorneys $3,668,839.63 to avoid paying a $10,335.32 expense is disingenuous as the outstanding Bill filed by Metaxides claims costs of $146,981.00 in defending the Swart Group's appeal to the full Court, following the then Registrar's refusal to strike out one of Metaxides' Bills.

56. Additionally, according to paragraph 10 of the Ingraham Affidavit, the sum of $3,668,839.63 includes $1,472,139.76 in costs claimed in the Supreme Court. Of the $2,196,699.87 costs which have been claimed in this Court, $477,172.50 has not yet been taxed. Further, of the $2,196,699.87 costs which have been claimed in this Court, the Swart Group has been allowed $507,446.91 on taxation and review. This figure represents approximately 30% of costs claimed in this Court.

57. Having reflected on the material presently before me, there has been no feature of the case with respect to the three outstanding Bills which would cause me to wonder if the information provided is accurate or a breach of the indemnity principle.

58. For all of the above reasons, I find that I do not have the jurisdiction to grant a stay as there is no extant appeal and even if I had the jurisdiction to grant the stay of taxation I would have declined to do so as all of the issues raised by Metaxides can be addressed during the course of taxation and based on the information currently before me, I am not satisfied that there has been a breach of the indemnity principle.

Stay of enforcement of Certificates of Taxation pending proof of payment

59. Metaxides' Motion also seeks a stay of enforcement of the Certificates of Taxation issued in favour of the Swart Group, pending proof of payment. At paragraph 12 of the Affidavit of Deandria Jones, filed in opposition to the Motion, she provides that: **"…Certificates of Taxation were issued in relation to the taxed bills of costs <u>and the costs thereof duly paid</u>."** This is an acknowledgement of receipt of payment by the receiving party. During the course of his oral submissions, counsel for Metaxides acknowledged that the taxed costs have been paid.

60. The Court does not act in vain, and it is difficult to understand what useful purpose would be served by staying the enforcement of a Certificate of Taxation for which the costs have already been paid.

61. In the circumstances, I find that I have no jurisdiction to stay the enforcement of the Certificates of Taxation which have already been issued and paid.

Setting aside of Certificates of Taxation if proof of payment not produced

62. Metaxides' Motion seeks to set aside Certificates of Taxation issued by this Court, pending proof of payment. Certificates of Taxation were issued in this Court in favour of the Swart Group on 11 June 2014, 14 November 2014, 11 June 2021 and two Certificates were issued on 28 June 2022.

63. Rule 35(15) provides a process by which a party **"who is dissatisfied with the allowance or disallowance in whole or in part of any item by the taxing officer"** may apply for a review of taxation. If aggrieved by the **"decision of the taxing officer on such review",** Rule 35(20) stipulates a 14-day time frame from the date of the Certificate of Taxation by which that aggrieved party should apply to the Court to, inter alia, have the Certificate set aside.

64. Certificates of Taxation having issued, in my view, the only course available to Metaxides to have those Certificates set aside was an appeal to the full Court, per Rule 35(20). The Certificates of Taxation having issued since 11 June 2014, 14 November 2014, 11 June 2021 and 28 June 2022, Metaxides is now well beyond the time period stipulated for appealing the issue of those Certificates.

65. In the circumstances, I find, therefore, that I have no jurisdiction to accede to the Motion in relation to the setting aside of the Certificates of Taxation already issued in favour of the Swart Group.

Strike out of Bills of Costs filed by the Swart Group if proof of payment not produced

66. In the course of this litigation, in the case of **Johann Swart** (delivered on 26 July 2021), the Swart Group sought previously to have the Bill of Costs submitted by Metaxides struck out on the basis that the Bill was:

> **"4. …fraudulent, dishonest and completely fabricated; and/or offend against the rules against Champerty and Maintenance; and/or are scandalous and/or are an abuse of the process of the Court; and/or, do not reflect nor are they drafted on a party and party basis as ordered by the Privy Council; and/or are grossly disproportionate; and/or are bound to prejudice, embarrass or delay the fair taxation of the said Bills of Costs for inter alia the following reasons..."**

67. The then Registrar refused to strike out the Bill and the Swart Group appealed to the full Court. On appeal the Court determined that **"The threshold question is whether the Registrar has the jurisdiction to strike out a Bill of Costs.".** The Court held that:

> **"16. In this application to strike out the Registrar had to engage in a balancing exercise. Metaxides was entitled to his costs as the Privy Council ordered and the Registrar, as Taxing Master, was obliged to consider the bills presented and determine, as per rule 35(12)…**
>
> **17. If the claim by Metaxides is excessive the Registrar ought not allow it. But the mere fact that the Bill presented is excessive or contains claims which are not recoverable should not be a basis for depriving a litigant of his entire claim which the court has already determined he is entitled to recover…**
>
> **…**
>
> **22. The Registrar was satisfied that the taxation could continue and in that process she could determine what charges were excessive or unreasonable, or could not properly be recovered. That is what taxation usually does. The matters complained of by Swart are matters that can easily be resolved on a taxation.**
>
> **23. There is no reason why the taxation cannot continue…"**

The Court dismissed the appeal by the Swart Group as having no merit.

68. On this authority, I refuse to strike out the Bills of Costs filed by the Swart Group as I am of the view that the issues raised by Metaxides can be raised and addressed during the course of the taxation proceedings.

69. The Swart Group has been awarded its costs. All that remains to be done is the taxation of those costs claimed by the three outstanding Bills of Costs in accordance with the relevant Rules.

Conclusion

70. For all of the above reasons, I dismiss Metaxides' Motion in its entirety. Both sides have asked for their costs of the Motion. It is trite law that costs are in the discretion of the Court. I order that the Swart Group is entitled to the costs of the Motion. I am minded to fix the costs, but will hear the parties on the issue of costs on 21 May 2024.

71. During the oral hearing on 28 February 2024 the parties agreed to certain dates for the commencement of the taxation proceedings, in the event I refused the Motion. The Motion

having been dismissed, I direct that the taxation of the four outstanding Bills of Costs proceed in chronological order as per the date of filing on the previously agreed dates.

Kristina Wallace Whitfield, Registrar