

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 44 of 2023**

**B E T W E E N**

**FAIRWAY PROPERTY MANAGERS INC.  
Intended Appellant**

**AND**

**BIMINI BAY HOMEOWNERS ASSOCIATION LIMITED (1)  
RAV BAHAMAS LIMITED (2)  
BIMINI BAY PHASE 1-A2 CONDOMINIUM ASSOCIATION LIMITED (3)  
BIMINI BAY PHASE 1-A3 CONDOMINIUM ASSOCIATION LIMITED (4)  
BIMINI BAY PHASE 1-B1 CONDOMINIUM ASSOCIATION LIMITED (5)  
BIMINI BAY PHASE 1-B2 CONDOMINIUM ASSOCIATION LIMITED (6)  
BIMINI BAY PHASE 1-B3 CONDOMINIUM ASSOCIATION LIMITED (7)  
BIMINI BAY PHASE 1-B4 CONDOMINIUM ASSOCIATION LIMITED (8)  
BIMINI BAY PHASE 1-C1 CONDOMINIUM ASSOCIATION LIMITED (9)  
BIMINI BAY PHASE 1-C2 CONDOMINIUM ASSOCIATION LIMITED (10)  
BIMINI BAY PHASE 1-C3 CONDOMINIUM ASSOCIATION LIMITED (11)  
Intended Respondents**

**BEFORE: Kristina Wallace Whitfield, Registrar**

**APPEARANCES: Mr. Keod Smith, Counsel for the Intended Appellant**

**Mr. Kevin Moree with Mr. Devaughn Rolle, Counsel for the First and  
Second Intended Respondents**

**Mrs. Krystal Rolle, KC with Ms. Kendrea Demeritte, Counsel for the  
Third to Eleventh Intended Respondents**

**DATES: 8 December 2023; 11 March 2024 (Third through Eleventh Intended  
Respondents)**

**11 December 2023; 11 March 2024 (First and Second Intended  
Respondents)**

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*Civil appeal – Taxation – Authority of counsel to appear in taxation proceedings*

The Court granted two costs orders in favour of the intended respondents. The Bills of Costs were filed and a date for taxation set. At the taxation hearings, counsel for the intended appellant raised

preliminary objections relative to the authority of counsel for the intended respondents to act on behalf of the first and third through eleventh intended respondents. Counsel for the intended respondents submitted that the preliminary objections ought to be dismissed and the Bills of Costs taxed.

*Held:* Preliminary objections dismissed.

Taxation proceedings are not the appropriate forum for counsel for the intended appellant to attempt to litigate the issue of counsel for the intended respondents' authority, or lack thereof, as counsel for the intended respondents appeared in the Court of Appeal on behalf of the intended respondents and no objection was taken to their appearance. Further, no application was made to stay the proceedings pending a determination of counsel for the intended respondents' authority to act on behalf of their clients.

The Taxing Master is entitled to rely on and proceed on the basis that by commencing the taxation proceedings on behalf of the intended respondents, counsel warranted that they had the requisite authority to commence the taxation proceedings, unless and until the contrary had been shown.

*Zoya Ltd. v Ahmed (trading as Property Mart)* [2017] Ch 127 considered

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## REASONS FOR DECISION

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### Introduction

1. Pursuant to costs orders dated 30 May 2023 and 12 July 2023 the first and second intended respondents filed Bills of Costs dated 29 August 2023 and 12 October 2023. The October Bill of Costs was amended on 30 November 2023. The third through eleventh intended respondents filed their Bills of Costs on 14 August 2023.
2. The Bills of the third through eleventh intended respondents were set for taxation on 8 December 2023 while the Bills of the first and second intended respondents were set for taxation on 11 December 2023. At each of those hearings, counsel for the intended appellant raised a preliminary objection which, he submitted, prevented the taxation of the Bills of Costs. In summary, the objections related to the authority of Mrs. Rolle, KC and Mr. Moree to act on behalf of the first and third through eleventh intended respondents. I dismissed the preliminary

objections with written Reasons for Decision to follow and I proceeded to tax the four Bills of Costs. My reasons for the dismissal of the preliminary objection are as follows.

## **Background**

3. The first and second intended respondents are the Homeowners' Association and Developer, respectively, of Bimini Bay, while the third through eleventh intended respondents are nine of eleven sub associations of the parent Homeowners' Association.
4. The intended appellant:

**“7. ...is the owner of a single unit in Bimini Bay being Unit 41033 in Bimini Bay Phase 1-C-41 (“Phase 1-C4”). Phase 1-C4 was not a plaintiff in the proceedings in the court below and as such Unit 41033 was not a unit represented by the 3rd through 11th intended respondents<sup>1</sup>.”**

5. The background to the action which gave rise to the costs orders may be gleaned from the headnote of the Court's substantive judgment and is as follows:

**“The 3<sup>rd</sup> through 11<sup>th</sup> respondents commenced an action seeking to enforce certain property rights as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The matter was set down for hearing. Prior to the hearing date, the parties reached an agreement on the issues before the court and agreed to prepare a Consent Order to reflect their agreement. The Consent Order was signed on 21 March 2022 by the learned judge below and filed on 22 March 2022. The Consent Order addressed all of the relief sought by the 3<sup>rd</sup> through 11<sup>th</sup> respondents.**

**On 21 March 2022 the intended appellant, an owner of a unit in Bimini Bay, but not a unit represented by the 3<sup>rd</sup> through 11<sup>th</sup> respondents, filed a Summons, seeking to be added as a party to the Supreme Court action. At the hearing of the Summons a preliminary objection was taken on the ground that the Supreme Court was functus officio. The preliminary objection was upheld and the intended appellant's application was dismissed.**

**The intended appellant sought leave to appeal below; that application was refused and the application for leave to appeal was renewed in this Court.”**

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<sup>1</sup> Fairway Property Managers Inc. v Bimini Bay Homeowners Association Ltd. et. al. SCCivApp. No. 44 of 2023 para 7

6. The application for leave was listed for hearing before the Court on 30 May 2023. On that date Mrs. Rolle, KC and Ms. Kendrea Demeritte appeared for the third through eleventh intended respondents and Mr. Moree appeared for the first and second intended respondents. The intended appellant had not served its submissions on the intended respondents and the matter was adjourned. Counsel for the intended respondents sought the costs of the adjournment. The Court awarded the intended respondents the costs thrown away by that day's adjournment, to be taxed if not agreed, and the application for leave was adjourned to 19 June 2023.
7. On 19 June 2023, again, Mrs. Rolle, KC and Ms. Kendrea Demeritte appeared for the third through eleventh intended respondents and Mr. Moree appeared for the first and second intended respondents, respectively. At the hearing of the substantive application, both Mrs. Rolle, KC and Mr. Moree made submissions before the Court. The Court reserved its decision and delivered judgment on 12 July 2023, denying the application for leave to appeal and awarding costs to the intended respondents.
8. The intended respondents duly filed their Bills of Costs and, as noted, the Bills were set for hearing on 8 and 11 December 2023, respectively. By letters dated 30 November 2023 counsel for the intended appellant advised as follows:

**“We have been instructed by Mr. John Grunow of Fairway Property Managers Inc. (“Fairway”) to request of the Court an adjournment of the upcoming Taxation of the Bills of Costs as he has been diagnosed yesterday evening with COVID which is highly unlikely to clear up such that he would (sic) in a position on behalf of Fairway to attend to the matters related to two Bills of Costs both filed herein by Messrs. Rolle & Rolle on 14th August 2023 [filed herein by Messrs. McKinney Bancroft & Hughes on 29<sup>th</sup> August 2023 and 12<sup>th</sup> October 2023], the Court’s Notice of which was emailed to us last Friday.**

**We have been told that Mr. Grunow, who resides in Key Largo, Florida, is not able to make the 2 hours’ drive to the Bahamas Consulate in Miami, Florida to swear an Affidavit addressing this request or to be able to review and respond to the respective Affidavits complete attending to this request made last evening.**

**In the meantime, our Client has also instructed us to ask the Court to require respective Directors of the 3rd through 11th Intended Respondents [Directors of the 1<sup>st</sup> Intended Respondents, Bimini Bay Homeowners Associations Ltd (“BBHAL”)], in pursuance of, inter alia, Rules 35(2), 35(4), 35(7), 35(9), 35(10) and 35(12)(e) of the Court of Appeal Rules as well as Registrar’s duty to ensure that the party who claims that it is receiving costs in relation to the filed Bill of**

**Costs, do produce Affidavit Evidence sworn to by each of them that they, as Boards of Directors of juridical entities, had met and resolved to engage Messrs. Rolle and Rolle led by Mrs. Krystal Rolle KC [sworn to by the Board of Directors of BBHAL as a juridical entity, had met and resolved to engage Messrs. McKinney Bancroft & Hughes led by Attorney Mr. Kevin Moree] and instructed that firm and Attorney to defend as against Appeal No. 44 of 2023, incur professional charges that are recoverable by that Attorney as set out in the said Bills of Costs.**

While we hope for Mr. Grunow's speedy recovery, we would be grateful if the Court would accommodate Fairway (sic) request for adjournment as well as the Affidavit evidence requested." [Emphasis added]

9. By letter dated 4 December 2023, Mrs. Rolle, KC responded as follows:

**“We hereby acknowledge receipt of the letter from Mr. Keod Smith on behalf of the Intended Appellant seeking to adjourn the Taxation of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents’ Bills of Costs scheduled for Friday 8<sup>th</sup> December, 2023.**

**For the reasons set out below, we vehemently object to the adjournment of the Taxation of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents’ Bills of Costs and respectfully invite the Registrar to proceed with these Taxations as duly scheduled.**

**First and foremost, as is evident from the Judgment of the Court and the Certificate of the Order of the Court dated 12<sup>th</sup> July, 2023, the Court has directed that the Intended Appellant pay the Costs of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents and the Registrar is thereby mandated to Tax those costs. The Intended Appellant has no ability whatsoever to prevent the process of Taxation on any basis and ought not be allowed to delay or frustrate the Taxation.**

**Secondly, while it is wholly unclear from Mr. Smith’s letter what if any misconceived application the Intended Appellant is now intending to make which requires him to attend the Bahamian Consulate, this in any event is of no relevance whatsoever given the fact inter alia that the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents’ Bills of Costs were served on Counsel for the Intended Appellant on 14<sup>th</sup> August, 2023, more than four (4) months ago. This, on any objective basis, afforded the Intended Appellant more than sufficient time to prepare**

and execute any documents he deemed relevant to the Taxation well in advance of his alleged COVID diagnosis.

**Thirdly, with all due respect to Mr. Smith, none of the referenced Rules, namely Rule 35(2), (3), (7),(8) or (10) form the basis for the proposed adjournment of the Taxations and Rule 35(4) speaks to the Registrar’s ability to request documentation relative (sic) items within the Bill of Costs being taxed in the course of the Taxation. The Registrar, and indeed even the Court, has no jurisdiction to question whether Counsel is duly authorized to appear on behalf of the clients they represent because the question of authority is an issue as between Counsel and client. In any event, Mr. Smith’s complaints about Mrs. Rolle K.C’s authority to act on behalf of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents as well as his allegations of conflict of interest have already been dismissed by the Bahamas Bar Association as being “without merit”. A copy of the dismissal letter dated 7<sup>th</sup> March, 2023 is enclosed herewith.**

Fourthly, it is also relevant that the first Bill of Costs scheduled for Taxation relates to costs thrown away by an adjournment of the Intended Appellant’s application on 30<sup>th</sup> May, 2023 in circumstances where the Intended Appellant had failed to properly ready itself for its own application while the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents were ready to proceed. Having filed two (2) failed applications in the Supreme Court and then having had more than a months’ notice of the listing of its application, the Intended Appellant was not ready to proceed.

Fifthly, it is also relevant that the Intended Appellant failed to appear on the Taxations of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents’ Bills of Costs in the Supreme Court relative to these failed applications despite having been duly served with notice of the same. The Intended Appellant, instead after the issuance of the Certificate of Taxation, is seeking to challenge the Taxations and has yet to serve the 3<sup>rd</sup> through 11<sup>th</sup> Respondents with a date for the hearing of its challenge. This request for an adjournment is the Intended Appellant’s pattern of abusive conduct intended to frustrate the 3<sup>rd</sup> through 11<sup>th</sup> Respondents’ entitlement to costs consequent upon the dismissal of three (3) wholly misconceived processes.

**We strongly urge you Madame Registrar not to condone the Intended Appellants abusive and frustrative attempts and to direct that the Taxations of the 3<sup>rd</sup> through 11<sup>th</sup> Intended Respondents' Bills of Costs will proceed on Friday 8<sup>th</sup> December,2023 as duly scheduled.” [Emphasis added]**

**10.** By letter dated 6 December 2023, Mr. Moree responded as follows:

**“We write in response to the letter sent to you from Mr. Keod Smith dated 30 November, 2023 regarding the captioned matter ("the Action") which we were copied on.**

**Mr. Smith has requested that i) the taxation of the Bills of Costs filed in the Action be adjourned and ii) an Order be made requiring the directors of our client, Bimini Bay Homeowners Association Limited ("BBHOA"), file an Affidavit confirming the decision it made to engage our firm to represent it in the Action.**

**We oppose both of those requests and set out the reasons for our opposition below.**

#### **Adjournment**

**No information has been provided about what Mr. John Grunow intends to include in the Affidavit he wishes to file in connection with the upcoming taxations. As the Bills of Costs are limited to the legal work conducted in connection with the Action, it is unclear what evidence from Mr. Grunow would be relevant.**

**In any event, the relevant Bills of Costs were served on 15 June 2023 and 13 October 2023. Fairway Property Managers Inc. ("Fairway") had more than enough time to file any Affidavit evidence and no reason has been proffered as to why Mr. Grunow decided to wait until the proverbial eleventh hour to attempt to file his evidence.**

**Fairway's failure to act with alacrity should not be rewarded by granting an adjournment to the prejudice of our clients.**

#### **Confirmation of Engagement**

**Fairway did not question our representation of BBHOA before the Supreme Court or the Court of Appeal.**

**Therefore, Fairway has waived any right it may have had to challenge our representation of BBHOA and is estopped from doing so at this late juncture.**

**Interestingly, Fairway has made very similar allegations regarding Mrs. Krystal Rolle KC's representations of her clients in this matter. Those allegations were raised before the Supreme Court and Court of Appeal but were not successful. Mr. Smith also submitted a complaint to the Bahamas Bar Association in connection with Mrs. Krystal Rolle KC ' s representation of her clients in this matter; it was dismissed as being without merit. It appears as if Fairway is now attempting to recycle its unsuccessful allegations but with BBHOA as its target rather than Mrs. Rolle KC ' s client.**

**Finally, it is trite that Fairway is not entitled to question the internal processes of BBHOA (Royal British Bank v Turguand 6 E&B 327).**

**Respectfully , this is simply another transparent attempt by Fairway to obfuscate and delay the adjudication of the issues in dispute between the parties. As such, we invite you, Madam Registrar, to refuse the requests made by Fairway and allow the taxations to proceed as scheduled.” [Emphasis added]**

### **Preliminary Objection With Respect to the First Intended Respondent**

- 11.** On 11 December 2023, the date set for the taxation of the first and second intended respondents Bills of Costs, Mr. Smith submitted that the intended appellant is a part owner of the intended first respondent who did not engage Mr. Moree’s firm. He further submitted that no resolution had been passed by the intended first respondent to facilitate Mr. Moree’s engagement.
- 12.** Mr. Smith further submitted that it is a conflict for Mr. Moree to purport to represent the Developer and also the Homeowners’ Association to whom the Developer was required to transfer the ownership of Bimini Bay to; this, he submitted, is why the intended appellant was trying to intervene in the proceedings below. He sought evidence from Mr. Moree demonstrating that he was engaged to represent the first intended respondent. He does not take issue with Mr. Moree’s representation of the second intended respondent.
- 13.** In response, Mr. Moree submitted that he appeared in the Supreme Court and the Court of Appeal on behalf of the first and second intended respondents, and it was not until 30 November 2023, after the issuance of the costs orders in favour of his clients, was an issue raised with respect to his representation of the first intended respondent. Having failed to raise the issue before, he was estopped from raising the issue at this stage.



14. The intended appellant, Mr. Moree says, is simply a member of the first intended respondent and cannot say with any degree of certainty that the Board of the first intended respondent did not engage him.

### **Preliminary Objection With Respect to the Third Through Eleventh Intended Respondents**

15. With respect to the third through eleventh intended respondents, the challenge made by Mr. Smith was slightly different.
16. On 8 December 2023, the date set for the taxation of the third through eleventh intended respondents Bills of Costs, Mr. Smith submitted that Mrs. Rolle, KC was not entitled to represent the third through eleventh intended respondents unless she had been properly retained which, he submitted, could not have occurred as the nine sub associations whom Mrs. Rolle, KC purported to represent were, in fact, his clients. He submitted further that there was no evidence that a resolution had been passed to indicate that Mrs. Rolle had been retained to represent these nine sub associations.
17. Mr. Smith asked that I have regard to the Affidavit of Monique Smith, filed in the court below, in support of his Summons to be joined as a party to the action. However, that Summons was never heard on its merits because, as was noted above, at the hearing of the Summons, a preliminary objection was made and upheld on the ground that the court was functus officio. The Summons was, therefore, dismissed.
18. In response to Mr. Smith, Mrs. Rolle, KC submitted that a third party cannot claim that an attorney is not properly retained. She further submitted that if she was not properly retained it would be a matter between her and the third through eleventh intended respondents. In any event, she submits that the claim by the intended appellant was raised before the Bahamas Bar Association and rejected. Further, Mr. Smith, as counsel for the intended appellant, served all documents relating to the application for joinder (in the court below) and the application for leave to appeal (in the court below and before this Court) on the Chambers of Rolle and Rolle so that it was disingenuous for counsel for the intended appellant to try to now obstruct the taxation of the Bills of Costs of the third through eleventh intended respondents on this basis.

### **Discussion**

19. The issue to be decided was whether, as Taxing Master, I should refuse to tax the Bills of Costs of the intended respondents on the basis of Mr. Smith's objection that Mrs. Rolle, KC and Mr. Moree lacked the requisite authority to act on behalf of the first and third through eleventh intended respondents.
20. Halsbury's Laws of England, Legal Professions, Volume 65 (2020) provides as follows:

**“548. The fact that a solicitor was not authorised to institute proceedings is not a defence to those proceedings and, although in special circumstances the correct course may be for the court to strike out proceedings instituted without**

**authority, the proper method of raising the question of want of authority is usually by an application to stay the proceedings.** Accordingly, if a solicitor takes, defends or continues proceedings without the authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority, or the defence will be struck out if they are defended without authority, on the application of a party by motion or summons. Moreover, if proceedings were originally begun or defended with authority, but that authority is revoked and the claim or defence is continued by the solicitor while unauthorised, the position is similar with regard to the proceedings taken during the unauthorised period. If the solicitor has been purporting to act for a claimant the order will direct him to pay the claimant's costs on the standard basis and also all costs which the claimant may have been ordered to pay to the defendant and the defendant's additional costs on the standard basis. If the solicitor has been purporting to act for a defendant a similar converse order will be made as to costs. The court has, however, a discretion, in some cases at any rate, to regularise the proceedings and permit them to continue. Thus, a litigant may by conduct waive his right to have proceedings stayed, and a purported claimant may adopt by ratification proceedings instituted without his authority. Accordingly an application to visit the solicitor with costs, if it is to be made, should be made promptly, although it may be made after notice of discontinuance has been given. If costs are paid by the opposite party to the solicitor on the assumption that he had authority which in fact he did not have, they may be recovered back as money had and received.

**The solicitor may, further, in serious cases, be committed for taking proceedings in the name of a person without authority, and in gross cases, where there is fraud, his name may be struck off the roll.” [Emphasis added]**

21. The case of **Zoya Ltd. v Ahmed (trading as Property Mart)** [2017] Ch 127 aided the consideration of this issue. The following background facts may be gleaned from the headnote of the case:

**“Solicitors acting on the instructions of [John Haastrup], who described himself as [Zoya's] sole director and shareholder, issued proceedings in [Zoya's] name against [Ahmed] for an account in respect of rents collected by him on properties owned by [Zoya], and payments of amounts**

found to be due. [Ahmed] contended that [John Haastrup] had not been validly appointed as the company's director and therefore did not have the necessary authority to bring the proceedings. The master ordered that the validity of [John Haastrup's] appointment be determined as a preliminary issue.

22. Under the rubric “The correct approach to the issues to be tried” the following appears:

“56 Against this background it is clear that the issues of fact which Master Matthews ordered to be tried as preliminary points have significance in two different, albeit linked, contexts. The first is that they are determinative of the question of whether John Haastrup was authorised by Zoya to give instructions to Alpha Rocks [Solicitors] to issue and conduct these proceedings on its behalf...

...

58 The parties disagreed on the correct approach to the burden of proof on the preliminary issues, and devoted a significant amount of time to this in their written submissions. This would become a highly significant issue, if I were to be unable to say that one parties' case or the other does not satisfy the balance of probabilities, but it is an unsatisfactory basis on which to reach a decision. As will appear, I am able to answer the preliminary issues without having recourse to how the persuasive burden of proof lies, but in the light of the submissions that have [been] made on this point, I think that it is appropriate for me to say something about them.

59 Zoya contends that the issues of fact are being tried in the context of a claim by Mr Ahmed that John Haastrup is not (as he claims to be) Zoya's sole director and that he has no authority to act on its behalf. This is a question that is properly to be resolved on an application to strike out the proceedings as an abuse of process on which the burden lies on Mr Ahmed. [Counsel for Zoya] submits that there are good policy reasons why this is so, and relies on the principle that the court is entitled to assume the authority of a solicitor to conduct litigation on behalf of its asserted client until that authority has been disputed and shown not to exist: Warrington J in Richmond v Branson & Son [1914] 1 Ch 968,974.

60 Mr Ahmed disagrees. He contends that the burden of proof lies on Zoya, because it is Zoya who invokes the aid of the law by issuing proceedings and it is Zoya who substantially asserts the affirmative of the issue, i.e. that John Haastrup is the sole shareholder and director of Zoya authorised to give instructions for the commencement and conduct of proceedings on its behalf. As I understand his case, Mr Ahmed asserts that this has become an issue because there is an implicit allegation to that effect in the claim form and the particulars of claim, which has been challenged by him. In support of this case, Mr Burton submits that the burden is always on a claimant to establish that it is properly before the court in the sense that a validly authorised person has given valid instructions for proceedings to be issued in its name, and he relies on *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307.

61 A company, whether English or Liberian, can of course only act through its agents. The agents who will normally be authorised to give instructions for the conduct of litigation on its behalf will be its directors, and the agents who will be authorised to implement those instructions will be its solicitors. In this case John Haastrup claims to be the only director authorised to give instructions on behalf of Zoya, and Alpha Rocks represent that they are solicitors authorised to conduct this litigation on its behalf.

62 In my view, it is well established that, in this kind of case, it is not normally open to a defendant to raise want of authority as a defence to the action: Lord Atkinson in *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112,148 and Chadwick LJ in *Sutton v GE Capital Commercial Finance Ltd* [2004] 2 BCLC 662, para 48. Thus the mere fact that somebody has gone off on a frolic of their own, using without authority the name of a company to sue to recover a debt said to be owed to that company, may mean that the proceedings turn out to be an abuse, but does not of itself mean that the money is not owed to the company in whose name the proceedings have been brought. It follows that the issue is not normally whether a claimant has proved that money is payable (whether or not after the taking of an account), but rather is whether or not the court's process has been properly invoked to establish that this is the case.

**63 The consequence of this is that, where an issue arises as to an agent's authority to act on behalf of a corporate claimant, the proper course is to have that issue determined at an early stage of the proceedings. In the Russian Commercial Bank case [1925] AC 112, 130 Viscount Cave (with whom Lord Atkinson, Lord Sumner and Lord Wrenbury all agreed) expressed the point in the following terms:**

**'I do not think that it is open to the defendants to raise this question by way of defence to the action. If the defendants desired to dispute the authority of Mr Jones to commence these proceedings in the name of the plaintiff company, their proper course was to move at an early stage of the action to have the name of the company struck out as plaintiff and so to bring the proceedings to an end. The decision of Warrington J to that effect in Richmond v Branson & Son [1914] 1 Ch 968 is not affected by the decision of your Lordships' House in Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307, where the alleged plaintiff was incapable of giving any retainer at all.'**

**64 This does not mean that the court will necessarily refuse to decide the question of whether a solicitor has commenced or continued to conduct proceedings without proper authority unless an application to strike out is actually issued. As the Court of Appeal explained in John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113, the court always retains jurisdiction to decide at any stage that the action was unauthorised and should be dismissed as an abuse: Greer LJ, at p 131, Slessor LJ, at pp 145-146, and Roche LJ, at p 147. It has been reiterated on many subsequent occasions that this continues to be the correct approach: see e g Airways Ltd v Bowen [1985] BCLC 355, 358f-359a, per Kerr LJ and Sutton's case [2004] 2 BCLC 662, paras 48-49, per Chadwick LJ.**

**65 It also does not mean that, in dealing with a contention that the proceedings amount to an abuse of process on these grounds, the court approaches the evidential issues in the same way that it would approach a standard application to strike out a claim or a statement of case without a full trial under CPR r 3.4(2). Where the issue is whether the proceedings are an abuse for want of authority, the court must determine all relevant issues on the balance of**

probabilities, even though the questions are being determined before the trial: cf the Airways Ltd case [1985] BCLC 355, 360c-i.

66 In the present case, the issue of authority was raised by Mr Ahmed in his defence, but not as a reason of itself why the money may not be due and owing. Indeed, although no application to strike out or dismiss the proceedings as an abuse of process has been issued, it was clear from [Counsel for Ahmed's] skeleton argument that dismissal or strike out on this ground was relief that he would seek in the event that the court determines the preliminary issues in his favour. I think that Master Matthews must have had this in mind when he directed the trial of the preliminary issues.

67 Once the nature of the issue is understood, in my judgment it points to the burden of proof on the question of authority being one that falls on Mr Ahmed. The solicitors who issue process in the name of a company warrant that they are authorised to do so, and the court proceeds on that basis unless the contrary is shown to be the case.

...

71 ...In my judgment, the present case is one in which the court is entitled to assume that proceedings in the name of Zoya are properly authorised unless Mr Ahmed establishes that they are not, and to that extent the burden of proof is on him. How easy it is for Mr Ahmed to discharge that burden will depend on all the circumstances of the case." [Emphasis added]

23. Mrs. Rolle, KC and Mr. Moree appeared in both the court below and in the Court of Appeal on behalf of the intended respondents. Costs orders were made in favour of the intended respondents.
24. The Certificates of Taxation which issues at the end of the taxation proceedings impose an obligation on the intended appellant to pay the taxed sums to the intended respondents, not to Mrs. Rolle, KC or Mr. Moree. This is so because the obligation to pay costs and the entitlement to receive costs is that of the parties to the litigation.
25. If the position is as Mr. Smith submitted, that would be an issue for the intended respondents and Mrs. Rolle, KC and Mr. Moree, not for me as Taxing Master. At this stage of the proceedings, my sole duty was to tax the Bill of Costs presented by the intended respondents / receiving parties, pursuant to the costs orders.

26. Indeed, not having raised the issue before the Supreme Court or the Court of Appeal and receiving the considered view of the Court, taxation proceedings are not the appropriate forum for Mr. Smith to ventilate his submission with respect to the lack of authority of Mrs. Rolle, KC and Mr. Moree. Suffice it to say, the Court has not determined that Mrs. Rolle, KC or Mr. Moree lack the authority to appear on behalf of the intended respondents.
27. In my judgment, taxation proceedings are not the appropriate forum for Mr. Smith to attempt to litigate the issue of Mrs. Rolle or Mr. Moree's authority, or lack thereof, as Mrs. Rolle, KC and Mr. Moree appeared in the Court of Appeal on behalf of the intended respondents and no objection was taken to their appearances. Further, no application was made to stay the proceedings pending a determination of Mrs. Rolle, KC or Mr. Moree's authority to act on behalf of their clients.
28. In these circumstances, I was entitled to rely on and proceed on the basis that by commencing the taxation proceedings on behalf of the intended respondents, Mrs. Rolle, KC and Mr. Moree warranted that they had the requisite authority to commence these taxation proceedings, unless and until the contrary had been shown.
29. It was for these reasons that I dismissed Mr. Smith's preliminary point and proceeded to tax the four Bills of Costs.

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**Kristina Wallace Whitfield, Registrar**