COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2011/CLE/gen/00524

B E T W E E N:

MONICA THOMPSON

First Plaintiff

AND

BETTY THOMPSON

Second Plaintiff

AND

BAHAMAS FIRST GENERAL INSURANCE COMPANY LIMITED

Defendant

Before: Assistant Registrar, Mr. Renaldo Toote

Appearances: Trevor Lightbourne for the Plaintiffs
Nadia Wright for the Defendant

Hearing Date: 23rd May, 2019

RULING

Taxation- Bill of Costs – taxation of collateral actions- cost incidental to – "costs here and below".

Toote, Assistant Registrar

1. The issue before this court is borne out of the Defendant's intention to have its Bill of Cost assessed which includes itemized cost from a collateral, yet distinct matter.

2. The Plaintiffs having been injured in a road traffic accident commenced action 2005/CLE/gen/00357 ("the first action") against the Defendant and others.

3. In the first action, which was brought by the Plaintiffs against Samuel Bethel, Annette Young and Bahamas First General Insurance, Counsel for the Defendant represented both the first defendant [Samuel Bethel] and fourth defendant [Bahamas First General Insurance Company Limited]. The fourth defendant was subsequently struck out to which an award of cost followed. Notwithstanding, the strike out the Plaintiff was successful against Samuel Bethel and Annette Young.

4. When the Defendants [Samuel Bethel and Annette Young] in the first action refused to satisfy the judgment debt, the Plaintiff commenced Supreme Court Action 2011/CLE/gen/00524 ("the second action") against the Defendant which successfully proceeded before Milton Evans, J. (as he then was).

5. Only Bahamas First General Insurance Company Ltd. appealed the aforesaid judgment. The Court of Appeal set aside the judgment, and awarded cost to the Defendant, "both here and below to be taxed if not agreed".

6. The Defendant attempted to have its costs in both actions inclusive of its appeal costs taxed before the Registrar (Acting) of the Court of Appeal who for reasons not disclosed in writing refused to tax the same.

7. By Summons filed on 19th September, 2018, the Defendant sought leave pursuant to Order 59 rule 14 for an Extension of time to begin proceedings for taxation and the leave was granted on 28th November, 2018.

8. The Plaintiff now objects to the taxing of items pertaining to the first action contained in the Defendant's Bill of Costs.

Issue

9. Whether or not the Defendant is entitled to recover its cost associated with the first action in its Bill of Costs for the second action?

The Law

10. Counsel for the Defendant submitted that by virtue of Order 59 rule 5, the Court has the power to exercise its discretion when considering taxation of costs and referred the Court to consider the case of **Société Anonyme Pêcheries Ostendaises v. Merchants Marine Insurance Co**. [1928] 1 KB 750 wherein it held:

> **"In the taxation of costs, the Taxing Master has discretion under Order [65 r. 27 sub rule 29], to decide whether costs incurred before action brought were necessary or proper for the attainment of justice, and if so, to allow them." (sic).**

11. At the Appellate Court, costs was awarded in favor of the Defendant "both here and below", to which the Defendant contend includes all costs incidental thereto inclusive of costs from the first and second action. This is the core of the matter.

12. The definition of "costs here and below" is outlined in **Halsbury Laws of England (4th Edition)** volume 10 at paragraph 19 as follows:

> **"an order for costs here and below: the effect of such an order is that the party in whose favour the costs order is made is entitled not only to his costs in respect of the proceedings in which the court makes the order but also to his costs of the proceedings in any lower court. In the case of an appeal from a Divisional Court, however, the party is not entitled to any costs incurred in any court below the Divisional Court." (Emphasis mine)**

13. It is important to note, that the learned authors of Halsbury Laws established that costs are entitled in respect of the proceeding at the instant court and [only] that of the lower court in which the appeal arose.

14. I am strongly of the view that the order of the Appellate Court does not extend to award cost to the Defendant in the first action. If indeed this was the intention, I am certain that this would have been made pellucidly clear. At paragraph 33 of the decision, Allen, P. stated **"...the decision of the learned judge is set aside in its entirety, and the appellant is awarded its costs, both here and below..."**

15. Having regard to this, the relevant rule for consideration is Order 59 rule 3(1) which states:

> **Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding except under an order of the Court. (Emphasis mine)**

16. In the capacity of the Taxing Master, I am of the view that it is not within my authority to amplify an order from a Court of supreme jurisdiction. There is no evidence submitted, to which this Court can reasonably infer that the Appellate Court considered the recovery of costs in both actions.

17. The Defendant submits that the Registrar as Taxing Master has the discretion to allow them to recover costs that would have been incurred prior to the start of an extant action. I agree, however, having regard to Order 59 rule 3(1), I am of the view that the same ought to be expressed and not implied.

18. Furthermore, the general principle of *stare decisis* binds this court to the decisions of the Appellate jurisdiction. Therefore, consideration can only be made to its literal interpretation.

19. However, it is incumbent upon a Registrar as a Taxing Master to only give effect to orders made by a court. Order 59 rule 12 (c) is instructive on this principle, wherein it states:

> **The Registrar shall have power to tax —**
>
> **(a) the costs of or arising out of any cause or matter in the Supreme Court;**
> **(b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid; and**
>
> **(c) any other costs the taxation of which is directed by an order of the Court.**

20. In the absence of an express order of the Court to include the costs of the first action as ancillary costs or costs incidental thereto, the Defendant is seeking this Court to exceed its jurisdiction.

21. Inasmuch as it is relevant, the words "costs of and incidental to" are purely discretionary and derive from section 30 of the Supreme Court Act which states:

> **Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**

22. It is well-established that the phrase "and incidental to" are words of extension rather than words of restriction. See **Friston on Costs, 3rd Edition** (2018). Therefore, if the Defendants position is correct, then it invariably implies that this Court, being of a lower division, has the jurisdiction to expand an Order of a Superior Court.

23. In **Contractreal Ltd v. Davies [2001] EWCA Civ 928 at [41] Arden, LJ** considered whether the costs of other proceedings could be subordinate to or incidental to proceedings in relation to which a party was obliged to pay costs. She stated:

> **"The expression "of and incidental to" is a time-hallowed phrase in the context of costs [which] has received a limited meaning, [in particular] the words "incidental to" have been treated as denoting some subordinate costs to the costs of the action. If [counsel for the receiving party] was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings."**

24. For precisely this same reason, I do not find that the cost of the first action is incidental to that of this action. To make this assumption would be absurd and would create a floodgate. Indeed, the facts as between the two actions are collateral, however the matters are procedurally distinct in nature.

25. In the absence of any formal application to consolidate, Counsel for the Defendant seek to have her portion of the first action extracted and taxed with the second action, notwithstanding, that the Plaintiff was ultimately successful in the first action. To do so, would create extreme difficulty for this Court and would prejudice the Plaintiff. Regard must be given to the any preliminary orders which may have been granted during the course of the application in the first action, i.e. interim awards such as cost in the cause or cost which may have been thrown away.

26. The Defendant should not be allowed to throw a bill of cost at the doorstep of the Court without having regard to the procedural regularities. It appears that the Defendant's application is an attempt to enter through the proverbial "backdoor".

27. The Plaintiff submits that as it relates to the first action, the Defendant has not commenced taxation proceedings within the strict frame prescribed by the Rules of the Supreme Court.

28. Order 59 rule 19(3) provides that:

> **"(3) Subject to paragraph (4) where a party is entitled to require any costs to be taxed by virtue of —**
> **(a) a judgment, direction or order given or made in proceedings in the Supreme Court; or**
> **(b) rule 10, he must begin proceedings for the taxation of those costs within 3 months after the judgment, direction or order was entered, signed or otherwise perfected or, as the case may be, within 3 months after service of the notice given by him under Order 21, rule 2 (where he is so entitled by virtue of rule 10(1) or given to him under Order 22, rule 3 (where he is so entitled by virtue of rule 10(2) or (3)).**

29. In the Privy Council decision of **Ratnam v Cumarasamy and another [1964] 3 All ER 933 at 935, Lord Gest** held that:

> **"The rules of court must, prima facie be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time for the conduct of litigation."**

30. If indeed this is the case, the amalgamation of costs in the two matters would deny the Plaintiff an opportunity to a defense in law. These are issues which ultimately ought to be properly ventilated within its original action.

31. For the reasons hereinbefore stated, I dismiss the Defendants application to have items 1 to 37 of its Bill of Cost taxed. The cost of this application is awarded to the Plaintiff to be taxed if not agreed.

Dated this 25 day of July A.D. 2019

Renaldo Toote
Assistant Registrar
Supreme Court