

**IN THE COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division  
Claim No. 2021/COM/lab/00037**

**BETWEEN**

**PATRICE FERGUSON**

**Claimant**

**AND**

**COMMONWEALTH BREWERY LIMITED**

**Defendant**

Before: The Honourable Mr. Justice Leif Farquharson

Appearances: Obie Ferguson KC for the Claimant  
Audley Hanna Jr. for the Defendant

Hearing Dates: Heard on the papers

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**RULING**

1. This is an application by the Defendant brought by summons filed on 18 July 2023 for an order setting aside a certificate of taxation (the “**Certificate**”) entered by Dep. Registrar Turner and filed on 3 May 2023 on grounds of irregularity. The specific complaint is that at the time of signing and perfection of the Certificate, there was a pending application seeking a review of the underlying taxation from which it emanated. That application, the Defendant says, had been filed in full conformity with the operative rules, brought to the attention of the Deputy Registrar and counsel opposite, and had already been assigned a hearing date. The Defendant thus contends that the entry of the Certificate, which was final in nature, effectively circumvented the prescribed process for obtaining a review of the taxation. Relatedly, the Defendant seeks a stay of execution of the Certificate pending the hearing and determination of the current application, as well as costs.

2. The Defendant's application is supported by an affidavit deposed to by Toreo Taylor, an attorney with Higgs & Johnson, also filed on 18 July 2023 (the "**Taylor Affidavit**"). No affidavit evidence has been filed by the Claimant in opposition.

### **Procedural History**

3. This matter has its genesis in an employment dispute that was determined before the Industrial Tribunal. On 21 May 2021, Fitzcharles, VP (as she then was) found the Defendant liable for wrongfully dismissing the Claimant from her employment. The Defendant was ordered to pay \$20,807.50 by way of damages.
4. By Notice of Appeal filed and served on 1 July 2021, the Defendant challenged the Vice President's decision. On the very same date, the Claimant's counsel sent the Defendant's counsel an originating summons which had been filed a week earlier to commence this action, seeking leave to enforce the tribunal's award as a judgment or order of this court.<sup>1</sup> The Defendant, in turn, responded with an application seeking a stay of execution of the order of Fitzcharles, VP, and of the proceedings before this court, pending the hearing and determination of its appeal.
5. In a fully reasoned ruling dated 23 August 2021, Brathwaite J. dismissed the Defendant's application for a stay. Brathwaite J. also importantly awarded the Claimant the costs of that application. Shortly thereafter, the Court of Appeal in a judgment delivered on 25 November 2021 dismissed the Defendant's appeal in the substantive matter and affirmed the decision of Fitzcharles, VP.
6. Following the issuance of Brathwaite J.'s ruling, the Claimant sought taxation of the costs incurred in successfully defending the stay proceedings. Not unexpectedly, given the history of this matter, there appears to have been considerable divergence between the parties as to the amount of costs the Claimant was entitled to recover. Ultimately, the Deputy Registrar awarded the Claimant the sum of \$29,715.00 on taxation. This was on 15 October 2022.<sup>2</sup>
7. The Taylor Affidavit and the court's file then disclose the following sequence of events:

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<sup>1</sup> See Ruling of Brathwaite J., para.3

<sup>2</sup> Taylor Affidavit, para.7

- (i) On 24 October 2022, the Defendant filed a summons pursuant to the former RSC Order 59, rule 31 (the “**Review Summons**”) seeking a review of the taxation before the Deputy Registrar. In this regard, the Defendant provided a list of objections identifying numerous items in the Claimant’s Bill of Costs which it sought to have revisited.
- (ii) On the same date (i.e., 24 October 2022), counsel for the Defendant wrote the Deputy Registrar a letter advising of its intention to seek a review of the taxation and enclosing a copy of the Review Summons. Counsel for the Defendant copied counsel for the Claimant on this letter and also delivered a copy of the same to him along with the Review Summons, both by hand and email, on 24 October 2022.
- (iii) By letter dated 2 November 2022, after conferring with counsel opposite the day before, counsel for the Defendant wrote the Deputy Registrar seeking a fixture for the Review Summons later that month.
- (iv) Significantly, and despite this sequence of events, on 30 November 2022 the learned Deputy Registrar signed the Certificate adjudging the Defendant liable to pay the full, taxed sum of \$29,715.00, inclusive of VAT. The Certificate was not stated or suggested to be interim in nature.
- (v) By email dated 3 April 2023, the court through its listing office confirmed that the Review Summons had been set down to be heard before the Deputy Registrar at 10:00 a.m. on 17 July 2023. The reason for the delay in confirmation of this fixture is not evident from the Taylor Affidavit or the court’s file.
- (vi) The Certificate (which had been signed since 30 November 2022) was subsequently filed by the Claimant’s attorneys and served upon the Defendant’s attorneys on 3 May 2023.
- (vii) As indicated, the Defendant thereafter filed the current application on 18 July 2023. Counsel for the Defendant requested a fixture in the usual way. The matter eventually came before me for the first time in March of this year.
- (viii) As it stands, therefore, there has been no adjudication of the Review Summons or any determination of the objections raised therein.

#### **The Contentions of the Parties**

8. When this matter came before me, it was agreed by both sides that the Defendant’s outstanding application could be determined on the papers. The parties’ contentions are outlined below.

*Commonwealth Brewery*

9. The Defendant's argument is straightforward. Briefly stated, it argues that having invoked its right under RSC Order 59, rule 31 to seek a review of the taxation carried out by the Deputy Registrar, the Certificate ought not to have been signed and perfected until the conclusion of that process. To compound the matter, this was done at a time when the Defendant through its counsel had written to the Deputy Registrar informing him of its Review Summons and applied for a hearing date for that application. As such, the Defendant contends that the Certificate is tainted by procedural impropriety, was issued in breach of natural justice and is wholly irregular.
10. The need for a stay of execution of the Certificate is said to be warranted to enable the Defendant to exercise its right to obtain a review without the spectre of the erroneously issued Certificate being enforced in the meantime.
11. In support of its arguments, the Defendant relies on various provisions of RSC Order 59, CPR 72.17 (which also contains a process for seeking a review of a Registrar's detailed assessment) and a series of cases addressing the jurisdiction of the court to set aside a certificate of taxation, the right to be heard and the issuance of stays to prevent injustices. It should be mentioned that the Defendant also invokes the court's inherent jurisdiction.

*Patrice Ferguson*

12. The Claimant was more economical in her response. In a nutshell, learned counsel for the Claimant argued: (i) that the Deputy Registrar's assessment of costs was reasonable and within the ambit of his discretionary powers; (ii) the Defendant was the author of much of the delay in the progress of its application by seeking to have the same determined in the first instance by the Hon. Chief Justice; and (iii) a stay was unwarranted and would unfairly deprive of the Claimant of the fruits of her judgment, or in this case, her taxation. Mr. Ferguson KC similarly relied on case law addressing the court's jurisdiction to set aside a certificate of taxation and the grant or refusal of stays. He also provided answers to the various objections to the Bill of Costs as identified in the Review Summons.
13. In the end result, the Claimant requested that the Defendant's summons be dismissed with an additional costs award of \$7,000.00.

### **Analysis and Disposition**

14. Having considered the affidavit evidence, the submissions of both sides and the other documents filed in this action, I now turn to the principal issues I have identified as arising.

#### *Is the Certificate irregular?*

15. At the outset, I would indicate that I accept Mr. Hanna's submission that the regularity or otherwise of the Certificate falls to be determined in accordance with the provisions of the RSC. This would seem only logical having regard to the fact that: (i) the taxation before the Deputy Registrar occurred under the RSC regime; (ii) the Defendant's Review Summons was filed when the RSC were still in force and was thus a pending application under those Rules; and (iii) the Certificate itself was signed by the Deputy Registrar when the RSC were still in force. Mr. Ferguson KC has certainly not argued otherwise.
16. For present purposes, it is useful to set out the RSC provisions addressing reviews. As indicated, these are to be found in RSC Order 59, rules 31 and 32, which provide as follows:

#### *"Review*

**31. (1) Any party to any taxation proceeding who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by him in respect of any item, may apply to him to review his decision in respect of that item.**

**(2) An application under this rule for review of the Registrar's decision may be made at any time within 14 days after that decision or such shorter period as may be fixed by the Registrar.**

*Provided that no application under this rule for review of a decision in respect of any item may be made after the signing of the Registrar's certificate dealing finally with that item.*

**(3) Every applicant for review under this rule must at the time of making his application deliver to the Registrar objections in writing specifying by a list the items or parts of item the allowance or disallowance of which or the amount allowed in respect of which, is objected to and stating concisely the nature and grounds of the objection in each case, and must deliver a copy of the objection to each other party (if any) who attended on the taxation, of those items or to whom the Registrar directs that a copy of the objection shall be delivered.**

**(4) Any party to whom a copy of the objection is delivered under this rule may, within 14 days after delivery of the copy to him or such shorter period as may be fixed by the Registrar, deliver to the Registrar answers in writing to the objections stating concisely the grounds on which he will oppose the objections, and must at the same time deliver a copy of the answers to the party applying for review and**

*to each other party (if any) to whom a copy of the objection has been delivered or to whom the Registrar directs that a copy of the answers shall be delivered.*

*(5) An application under this rule for review of the Registrar's decision in respect of any item shall not prejudice the power of the Registrar under rule 15 to issue an interim certificate in respect of items his decision as to which is not objected to.*

**32.** *(1) On reviewing any decision in respect of any item, the Registrar may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him; and any costs awarded by him to any party may be taxed by him and may be added to or deducted from any other sum payable to or by that party in respect of costs.*

*(2) On a hearing of a review under rule 31 a party to whom a copy of objections was delivered under paragraph (4) of that rule shall be entitled to be heard in respect of any item to which the objections relate notwithstanding that he did not deliver written answers to the objections under that paragraph.*

*(3) The Registrar who has reviewed a decision in respect of any item shall issue his certificate accordingly and, if requested to do so by any party to the proceedings before him, shall state in his certificate or otherwise in writing by reference to the objections to that decision the reasons for his decision on the review, and any special facts or circumstances relevant to it. A request under this paragraph must be made within 14 days after the review or such shorter period as may be fixed by the Registrar.* [Emphasis supplied]

17. The review process provided for under RSC Order 59 is well known to practitioners in this jurisdiction. It is based on a similarly worded provision appearing in the pre-CPR English rules. Its purpose is to enable a party who is dissatisfied with a registrar's decision on a taxation to reappear before him or her to review the original decision. For this reason, the Registrar will typically refrain from signing a final certificate of taxation until the period for seeking a review has passed.
18. With the foregoing in mind, I accept without hesitation that the Certificate in the present case was irregularly entered. At the time this was done, the Review Summons (which had been filed in full compliance with the Rules a mere 9 days after the taxation) was properly before the court and had been served on the other side. The Defendant through its counsel had also already requested a hearing date. The signing and perfecting of the Certificate in the circumstances therefore effectively circumvented the prescribed review process.

19. I would also take this opportunity to state that no criticism is made of the learned Deputy Registrar. The signing and perfecting of the Certificate in the instant case appear to have arisen purely as a result of an administrative error, quite likely attributable to the delay in filed documents actually being placed on the court's designated physical folder. I would anticipate that with the introduction of e-filing, such occurrences will become a thing of the past.

*Should the Certificate be set aside?*

20. Non-compliance with procedural rules (whether under the RSC regime or the CPR regime) will of course not invariably have a vitiating effect. Unless the consequence of failure to comply is specified, the court will still frequently have to consider whether the error warrants invalidating the step taken in breach of the rule, practice direction or order, as the case may be.<sup>3</sup>
21. In support of its argument in favour of setting aside the Certificate, the Defendant placed significant reliance on the authority of *Thorne v. Thorne*<sup>4</sup>. A brief reference to the facts of that case is helpful. On a taxation following divorce proceedings, the taxing officer assessed costs in the wife's favour in the amount of £10,027. The husband's position was that costs should have been no more than £7,000. The solicitor with carriage of the file on behalf of the husband subsequently left his firm without filing an application for review of the taxation within the 14-day period prescribed by RSC O.62, r.33 of the former English rules. The certificate of taxation was duly entered by the taxing officer after expiry of the 14-day period, adjudging the husband liable to pay £10,027. Immediately afterwards, the solicitor who assumed carriage of the file discovered that the objections to taxation had not been lodged in time and took out a summons seeking an extension for doing so. The registrar dismissed the summons on the ground that he had no jurisdiction to grant the relief sought based on the wording of RSC O.62, r.33, which provided that no application under the rule for review of a decision in respect of any item may be made after the signing of the certificate of taxation dealing finally with that item. The husband appealed.
22. In allowing the appeal and setting aside the certificate, the court explained that a certificate of taxation may be set aside in certain circumstances, including fraud, mistake, breach of

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<sup>3</sup> See RSC O.2, r.1, CPR 26.9

<sup>4</sup> [1979] 3 All ER 164

natural justice or errors resulting in a short delay that is satisfactorily explained. The court also held that despite the language in O.62, r.33, it nonetheless had power to extend the period of time for seeking a review, even after a certificate had been issued. Comyn J. instructively explained (at pages 168-169):

*“....First, that the court has got the power to set aside a certificate of taxation in proper circumstances. Secondly, that consequent on that, and, as I believe, under RSC Ord 3, and under its inherent powers as well, the court has power to extend the time for objections. In elaboration of these reasons I think it is an unhappy fact that this vitally important part of the rule has hitherto stood on cases very briefly reported. That is no criticism of those who reported them; it is simply stating a fact. But I think the three cases relied on have the effect of giving the court power in a proper case to set aside a taxation certificate in spite of the apparently mandatory tone of RSC Ord 62. In my judgment, it is manifest that the court would have power to do so in many circumstances, which do not, of course, arise here; for example, if there were a situation where the certificate was obtained by fraud, or if the certificate were granted at the registry by mistake. By ‘mistake’, I mean a mistake in procedure; a mistake in any of the essential ingredients; a mistake as to date; a mistake as to amount; a mistake as to any of the vital details. It would further be a case for revoking a certificate if it had been granted in breach of the rules, or if it had been granted without jurisdiction, or if it had been granted in circumstances which were contrary to natural justice, which is the attractive way counsel for the wife has sought to get round *Brown v Youde*, in effect saying that it is an exceptional decision on its own very special facts and there would have been a breach of natural justice had the certificate stood.”* [Emphasis supplied]

23. It is worth noting that **Thorne** was followed locally in **Fidelity Bank (Bahamas) Ltd. v. Forbes**<sup>5</sup>, and relied on in setting aside a certificate of taxation in circumstances where it was determined that a default judgment had been improperly entered, resulting in (among other things) costs being awarded for items which were not properly recoverable.
24. In conclusion, I am satisfied that the Certificate in the present case should be set aside. For the reasons already discussed, this was issued in clear breach of the provisions of RSC Order 59, rule 31. This would appear to have been done mistakenly. I also accept Mr. Hanna’s submission that the breach of the process provided for in rules 31 and 32 raises natural justice considerations. Finally, the Defendant appears to assert several substantive objections with respect to the award of costs for various items within the Claimant’s Bill. In my view, it would be unfair to prevent it from ventilating these.

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<sup>5</sup> [2022] BHS J. No.181

25. I therefore order that the Certificate be set aside. In light of my decision, a stay of execution of the Certificate is unnecessary. I will adjourn to issue directions with a view to the expedited resolution of the Review Summons, so that this long-outstanding costs dispute may be brought to an end. I will also hear the parties further on the costs of the current application.

*L. Farquharson*

FARQUHARSON, J.

29 September 2025