[2024] JMCC Comm 40

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2021CD00281

BETWEEN	**WEST INDIES PETROLEUM LIMITED**	**CLAIMANT**
AND	**SCANBOX LIMITED**	**1st DEFENDANT**
AND	**WINSTON HENRY**	**2nd DEFENDANT**
AND	**COURTNEY WILKINSON**	**3rd DEFENDANT**
AND	**JOHN LEVY**	**4th DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Ms. Keisha A. Spence instructed by Henlin Gibson Henlin Attorneys-at-Law for the Claimant

Ms. Ashley Mair instructed by Mayhew Law Attorneys-at-Law for the Defendants

Heard: 19th February and 30th October 2024

Civil Procedure –Default Cost Certificate – Whether there is a good reason to set aside the Default Cost Certificate – Civil Procedure Rules 64.6, 65.20 and 65.22

BROWN BECKFORD J

BACKGROUND

[1] The Claimant, West Indies Petroleum Limited, by application filed 9th June 2023, seeks to set aside Default Cost Certificate dated 2nd February 2023, in favour of the 3rd

and 4th Defendants, Courtney Wilkinson and John Levy, respectively. The Costs Orders at the centre of this application were made by Batts J on 18th February 2022 in respect to two interlocutory applications which were determined in favour of the Defendants. Consequently, on 18th May 2022, the 1st and 2nd Defendants filed their respective Bill of Costs, and in response the Claimant filed Points of Dispute on 20th June 2022.

[2] The 3rd and 4th Defendants filed and served their Bill of Costs and a Notice to Serve Points of Dispute on 21st December 2022. However, no Points of Dispute were filed in response by the Claimant by the 18th January 2023, the time for filing and serving Points of Dispute in relation to the Bill of Costs of the 3rd and 4th Defendants. As a result, a Default Cost Certificate was issued on 2nd February 2023 to the 3rd and 4th Defendants. The signed Default Cost Certificate was served on the Claimant on 8th June 2023.

[3] The Claimant filed a Notice of Application to Set Aside Default Cost Certificate on 9th June 2023 seeking the following Orders:

1. An order that the Default Costs Certificate dated 2nd February 2023 in favour of the 3rd and 4th Defendants is hereby set aside;

2. That the Applicant/Claimant be permitted to file its points of Dispute;

3. The 3rd and 4th Defendants' Bill of Costs filed on 21st December 2022 be taxed;

4. That there be a stay of execution of proceedings in relation to the Default Costs Certificate;

5. No Orders as to costs; and

6. Such further and other orders as the Court deems just.

[4] The Notice of Application to Set Aside Default Cost Certificate is supported by the Affidavit of Ms. Ariana Mills filed 9th June 2023 and the Supplemental Affidavit of Ms. Ariana Mills filed 19th June 2023, which exhibited the Claimant's draft Points of Dispute.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[5] Counsel on behalf of the Claimant, Ms. Keisha Spence argued that the Applicant satisfied the criteria prescribed in **Rule 65.22(1) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** to set aside the Default Cost Certificate. In support of her position she cited the case of **Canute Sadler et al v Derrick Michael Thompson et al** [2019] JMSC Civ 11.

[6] She argued that the Claimant acted promptly in making the Application to Set Aside the Default Costs Certificate, as the application was made on 9th June 2023, approximately twenty-four **(24)** hours after the Default Costs Certificate had been served. She relied on **Advantage General v Marilyn Hamilton** [2019] JMCA App 29.

[7] Counsel further submitted that in keeping with **Rule 65.22(3)**, the Claimant does have a good reason for the Court to set aside the Default Cost Certificate. She submitted that the Claimant was served with two Bill of Costs on behalf of the 3rd and 4th Defendants; one in the Court of Appeal and one in the Supreme Court. The Claimant filed Points of Dispute in relation to the Bill of Costs in the Court of Appeal on 18th January 2023. However, the Bill of Costs in relation to the Supreme Court was mistakenly placed on the incorrect file, and so, Counsel was unaware of it. This led Counsel to the belief that only one Bill of Costs was served by the Defendants.

[8] Counsel Ms. Spence argued that these circumstances were unlike the applicant in **Advantage General v Marilyn Hamilton** *(supra)* which had repeatedly failed to comply with the Orders of the court, and which ultimately resulted in the denial of the relief sought. In this instance, prior to this administrative error, the Claimant had been compliant with the rules and Orders of the Court. Consequently, she urged the Court to accept that the explanation for the failure to file a Points of Dispute was a good reason in keeping with the dicta of the Court in **Henlin Gibson Henlin (A Firm) et al v Lilieth Turnquest** [2015] App 54.

[9] Lastly, Counsel contended that in keeping with **Kandekore v COK Sodality Co-Operative Credit Union Limited** [2018] JMCA App 2, the Claimant in its Draft Points of Dispute clearly articulated the dispute about the costs sought in the 3rd and 4th Respondents' Bill of Costs. Additionally, the Claimant has at all material times disputed the costs sought by the Defendants in the matter, both at the Supreme Court and the Court of Appeal. She concluded that the Court should find that there is a real prospect of success in disputing the 3rd and 4th Defendants' Bill of Costs, and as such, the matter ought to proceed to taxation. Counsel relied on **Swain v Hillman** [2001] 1 ALL ER 91.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[10] Counsel on behalf of the Defendants, Ms. Ashley Mair, strongly opposed the Application to Set Aside the Default Costs Certificate. She submitted that the explanation proffered for the failure to file the Points of Dispute within time does not amount to a good reason. In support of this argument, she relied on the cases of **Advantage General v Marilyn Hamilton** *(supra)*, **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37 and **Canute Sadler et al v Derrick Michael Thompson et al** *(supra)*.

[11] She further argued that the setting aside of the Default Costs Certificate would prejudice the 3rd and 4th Defendants, as they would have to endure great financial pressure in dealing with the further costs associated with a taxation hearing. Whilst the Claimant, a corporate entity with proven assets, is better able to afford the litigation process. Further, the 3rd and 4th Defendants, having received a judgment entitling them to costs in February 2022, the setting aside of the Default Costs Certificate would further delay the recovery of costs by approximately two additional years, as it is unlikely that taxation can be held before 2026. Counsel contended that in accordance with **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ **("Roshane Dixon")**, the prejudice suffered by the 3rd and 4th Defendants cannot be properly compensated by costs.

[12] It was also Counsel's submission that the Application to Set Aside the Default Costs Certificate has no real prospect of success. She argued that Counsel for the Claimant inaccurately outlined that no special cost certificate was granted for two Counsel relating to the October 1st 2021 application, however, Batts J had expressly awarded costs for two Counsel. Further, costs were only claimed for one Counsel in relation to each activity in respect of the October 5th 2021 application.

[13] Counsel, in drawing a comparison between the Bill of Costs of the 1st and 2nd Defendants and 3rd and 4th Defendants, argued that the 1st and 2nd Defendants engaged the services of Mr. Neale, an Attorney-at-Law admitted to the bar in 2015. Whilst the 3rd and 4th Defendants engaged the services of King's Counsel Mrs. Symone Mayhew, who has been at the bar for over twenty **(20)** years, and Ms. Ashley Mair, who was admitted to the bar in 2020. On this premise, she submitted that the rates claimed were reasonable and are in keeping with **Practice Direction 2 of 2018**.

[14] Additionally, it was contended that the Claimant has no prospect of success on appeal as the Court of Appeal, in **West Indies Petroleum Limited v Scanbox et al** [2022] JMCA App 28, had already considered the merits of appeal and had found that the Claimant has failed to show a prima facie case on appeal.

[15] Counsel Ms. Mair's position was also that a greater risk of injustice lay with the 3rd and 4th Defendants as Batts J, in delivering his judgment in October 2021, ordered for the immediate taxation of the applications. She relied on the cases of **Caribbean Cement Company Limited v Freight Management Limited** [2013] JMCA App 29, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30 and **Khemlani v Khemlani** [2019] JMCA App 17.

ISSUES

[16] The issues raised in this application are reflected in the questions posed below:

i. Whether there is good reason to set aside the Default Cost Certificate? and

ii. Whether the Court should stay the taxation proceedings?

LAW AND ANALYSIS

[17] The starting point for an Application to Set Aside a Default Cost Certificate is **Rule 65.22 of the CPR**, the relevant portions of which are reproduced below:

> *65.22 (1) The paying party may apply to set aside the default costs certificate*
>
> *(2) …*
>
> *(3) The court may set aside a Default Cost Certificate for good reason.*
>
> *(4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Disputes.*

[18] The Court of Appeal has stated in several cases that an application to Set Aside a Default Costs Certificate is similar to an application for Relief from Sanctions. The considerations for an application under **Rule 26.8** have therefore been used as a benchmark in an Application to Set Aside a Default Costs Certificate.

[19] In the Court of Appeal decision of **Henlin Gibson Henlin and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54 **("Henlin Gibson")**, F. Williams JA (ag) (as he then was) opined:[1]

> *[34] The words 'good reason', (which are used in rule 65.22(3) of the CPR), have been judicially considered in several cases. One such case is Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3) [1987] 2 All ER 289. This is how the words were discussed at page 300 c, of the report:*

[1] [2015] JMCA App 54, paras 34-35

> *'The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge…'*
>
> *[35] Many of the other cases that discuss the phrase 'good reason' cite the Kleinwort Benson case. What all these cases confirm is whether good reason exists or not is a matter left to the individual judge's discretion and is dependent on the particular facts and circumstances of each case."*

[20] F. Williams JA in the later case of **Kandekore (Lijyasu) v COK Sodality Co-operative Credit Union Ltd & Anor** [2018] JMCA App 2 **("Kandekore")** relied on and applied the case of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37 **("Rodney Ramazan")**, where the court identified a non-exhaustive list of factors which may be considered in determining Applications to Set Aside Default Costs Certificates. It reads: [2]

> *Without attempting to stipulate mandatory requirements it would seem that those issues would include:*
>
> *(1) the circumstances leading to the default;*
>
> *(2) consideration of whether the application to set aside was made promptly;*
>
> *(3) consideration of whether there was a clearly articulated dispute about the costs sought;*
>
> *(4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs*

[21] This Court's approach of examining the factors individually taken in **Christopher, Yulande trading as Yulande Christopher & Associates and then Thomas and Christopher Law Partners v Duncan, Gregory and Global Designs and Builders**

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[2] [2012] JMCA App 37, para 14

Limited [2022] JMCC Comm 23, was accepted by the Court of Appeal.[3] The Court intends to take a similar approach here.

Circumstances leading to the Default

[22] It is well established that to satisfy the requirement of a good reason to set aside a Default Costs Certificate, a satisfactory explanation must be given for the delay in filing and/or serving the Points of Dispute, as the case may be. In **Kandekore**, the Points of Dispute were mistakenly filed in the Supreme Court instead of the Court of Appeal. Subsequently, the Respondents filed a Notice of Withdrawal in the Court of Appeal in relation to the taxation proceedings, on the basis that the applicants had incorrectly filed the Points of Dispute in the Supreme Court. This Notice was served on the applicant. The Court of Appeal took the view that this error would have been brought to the applicant's attention when he was served with the Notice, three months before the Default Cost Certificate had been issued. Therefore, the applicant had time to correct the error but took no steps to do so. In view of this, the Court of Appeal concluded that in the circumstances, inadvertently filing the Points of Disputes in another court was not a good explanation especially when one considered that the applicant was an attorney who ought to have been aware of the "*documents and procedures relating to taxation proceedings*."

[23] In **Henlin Gibson**, the Points of Dispute was filed within time, but was served on the wrong law firm. F. Williams JA (Ag) (as he then was) found this to be a genuine error and opined at paragraph 37:

> *[37] I give special consideration to the fact that the Points of Dispute in this matter were filed on 8 July 2015 - that is, within the 28 days permitted by the CPR. I am quite aware as well that the firm on which the Points of Dispute was served was not the firm on the record. Whilst not condoning administrative inefficiency or even, possibly, carelessness, I have considered the explanation given and all the circumstances and am minded to accept the explanation given that a genuine error was made in serving the wrong firm….*

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[3] **Duncan (Gregory) and anor v Christopher (Yualande)** [2023] JMCA Civ 43

[24] In **Advantage General Insurance Company Limited (formerly United General Insurance Company Limited) v Marilyn Hamilton** [2019] JMCA App 29 **("AGICL v Hamilton")**, the applicant's reason for failing to file a Points of Dispute within time is that their bearer failed to bring the Bill of Costs to their attention. P. Williams JA accepted that while this might not have been a good explanation, it was not to be considered as fatal to the application until the other factors are considered. She opined at paras [68] – [69]:

> *[68] The bearer who works for the applicant's attorneys-at-law has accepted full blame for the circumstances leading to the default. It is endorsed on the respondent's bill of costs that she accepted service of it on 8 February 2018. She admits to failing to bring the bill of costs to the attention of the attorneys-at-law. She describes it as "a most unfortunate oversight on [her] part". Mr George is correct to have said that these circumstances are unfortunate and embarrassing. This is especially so in light of the other defaults that have been committed during the history of this matter before this court, which have led to strong comments from the court about the applicant's abysmal record of compliance. It is against that background that it is hard to imagine that the applicant would have received the bill of costs and failed to comply with the requirements for responding to them in a timely manner.*
>
> *[69] Were this the only factor for consideration, it may have proved difficult for the applicant to convince this court that it was deserving of further indulgence. Nevertheless, the entire circumstances must be borne in mind, so I feel compelled to resist the temptation to shut out the applicant solely because of its history. This explanation falls into the category of one that may not be good but is not to be viewed as fatal to the application.*

[25] The above authorities reinforce that the explanation has to be considered in light of the prevailing facts of each case, but also shows that, generally, administrative oversight will not be deemed a good explanation for the delay. Rattray J in of **Canute Sadler et al v Derrick Michael Thompson et al** [2019] JMSC Civ 11 **("Canute Sadler")** explained the position of the court as it relates to an administrative oversight, he stated:

> *The Court of Appeal has resiled from the position that oversight and heavy work schedule could be considered a good explanation. This is in keeping with the Privy Council decision of The Attorney General v Universal Projects Limited (supra), - 10 - wherein their Lordships expressed the view that administrative inefficiency was not a proper excuse for the failure to comply with the Rules or Orders of the Court. At paragraph 23 of the judgment Lord Dyson stated that: - "…To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation.* ***Oversight may be excusable***

> ***in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."*** Emphasis mine

[26] In the instant case, the Affidavit of Ms. Mills, filed in support of this application on the 9th June 2023, disclosed that the explanation for the delay in filing and serving the Points of Dispute is that the Attorneys for the Claimant received two Bills of Costs; one for a matter in the Court of Appeal and the one for which this application relates, the latter of which was incorrectly filed. The Claimant filed Points of Dispute with respect to the Court of Appeal Bill of Costs, but failed to file Points of Dispute with respect to the Supreme Court Bill of Costs, believing there to have been only one Points of Dispute filed.

[27] Counsel for the Claimant held this explanation to be an administrative oversight. It is true that Counsel should be admonished for not taking greater care in circumstances where it is known that there were matters between the parties engaging both the Court of Appeal and the Supreme Court. The Court is however led to give Counsel the benefit of the doubt of genuine oversight, in circumstances where the other Bill of Costs was properly dealt with. This type of administrative error is similar to the circumstances that occurred in the cases of **Rodney Ramazan** and **AGICL v Hamilton**. In **Rodney Ramazan**, a clerical error resulted in the Bill of Costs being misplaced following its service on the Attorneys-at-Law, and as a consequence, was not escalated to the attention of the responsible Attorney until it was located sometime later. The court found that as there hadn't been any previous delays or defaults by the applicant, the delay was excusable.

[28] In **AGICL v Hamilton**, the bearer, who worked for the applicant's Attorneys-at-Law, had accepted service of the Bill of Costs but failed to bring the bill of costs to the attention of the Attorneys-at-Law. The court in this case had described the claimant's record of compliance as abysmal, however, the application was ultimately granted. I am not unmindful that as the error was caused by the Attorney and not the litigant, the dicta of the Court in **Mendez (Jacqueline) and Anor v Patrick-Gardner (Deborah)** [2023] JMCA App 14, that the litigant should not suffer from the mistake of his Attorney is

apposite.[4] I find in all the circumstances, including that the Claimant has been generally compliant with the orders of the court, that the delay in filing and serving the Points of Dispute is not inexcusable.[5]

Promptness of the Application

[29] Whether an application is made promptly, must also be determined on a case-by-case basis. In **AGICL v Hamilton**, the Court of Appeal found that filing the application to Set Aside the Default Cost Certificate one day after it was served was prompt. This case is similarly positioned. The Default Cost Certificate, though being dated on the 2nd February 2023, was not issued out of the registry until the 25th May 2023 and was served on 8th June 2023. This application, with the affidavit in support, was filed on the 9th June 2023, one day after the Default Cost Certificate was served. It is clear that the application was made promptly.

Is there a clearly articulated dispute about the costs sought?

[30] In the case at bar, the Claimant had filed the Proposed Points of Dispute as required by **CPR 65.22(4)**. This was exhibited to the supplemental Affidavit of Ariana Mills filed on the 19th June 2023. In **Kandekore**, F. Williams considered whether there was a clearly articulated dispute against the background of (i) what is stated in the Proposed Points of Dispute and (ii) what the rules require the Points of Dispute to state. He opined that the Proposed Points of Dispute was a general contest to the Bill of Costs. **Rule 65.20(2) of the CPR** directs that the Points of Dispute must:

> *(a) identify each item in the bill of costs which is disputed;*
> *(b) state the reasons for the objection; and*
> *(c) state the amount (if any) which the party serving the Points of Dispute considers should be allowed on taxation in respect of that item.*

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[4] See paras 30-34 of [2023] JMCA App 14
[5] Ibid., para 35

[31] The Claimant has satisfied this criterion. The Proposed Points of Dispute identifies various items which it has disputed, and has given a reason for disputing each item. Further, the Proposed Points of Dispute sets out the amounts the Claimant believes should be taxed in respect of each item. The document also generally showed a contest to the 3rd and 4th Defendants' Bill of Costs. On this basis, the Court finds that there is a clearly articulated dispute in the Proposed Points of Dispute.

Is there a realistic prospect of successfully disputing the bill of costs?

[32] The analysis thus favours the Claimant for the setting aside of the Default Costs Certificate. There is however a further critical hurdle that the Claimant must cross. The Court must also determine, if on the face of it, there is a realistic prospect of success in the Claimant disputing the Bill of Costs. The meaning of the phrase *"realistic or real prospect of success"*, as defined by Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91, has been endorsed and upheld in numerous decisions by this court. Lord Woolf stated:[6]

> *The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.*

[33] If there is no reasonable prospect of success, then the Court, in keeping with the overriding objective of the **CPR** of dealing justly with a case when exercising any power under the **CPR**, should not grant the Orders sought. Doing otherwise would run afoul of the objective of saving expense, ensuring that the case is dealt with expeditiously and fairly, and that the case is allotted an appropriate share of the court's resources. The Court is reminded that it must not engage itself in a mini-trial of the issues. Its duty at this stage is to assess the circumstances of the case on the face of it, to see whether it discloses a real prospect of success in disputing the Bill of Costs.

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[6] [2001] 1 All ER 91

[34] **Practice Direction No.2 of 2018 (PD No. 2**) posits that for an assessment to be fair and reasonable regard should be had to previous assessments carried out in a case. I am also reminded that the receiving party bears the burden of satisfying the assessor of the reasonableness of the Bill of Costs.

[35] The Proposed Points of Dispute challenge the charges for two Counsel, the rates charged for each Counsel, the time spent and administrative charges.

[36] Firstly, it was contended that there was no certificate sought for two Attorneys on the applications. In **Harold Brady v The General Legal Council** [2012] JMCA App 40, Brooks JA observed that charging for multiple Attorneys reviewing the same document might result in duplicated charges. He determined that such practices must only be done with the court's authorization.

[37] Counsel Ms. Mair pointed out that the Orders of Batts J specifically gave a certificate for two Counsel in the October 1st 2021 application, and this was the only application that costs were sought for two Counsel.

[38] Having perused the Bill of Costs, Ms. Mair is correct. The charges for two Counsel were only made in relation to one application, that is the October 1st 2021 application for which Batts J had in fact granted a certificate for two Attorneys. Therefore, a challenge to the Bill of Costs on the basis of duplication has no real prospect of success.

[39] The next challenge was to the hourly rate claimed for Counsel for the 3rd and 4th Defendants. The 3rd and 4th Defendants' response is essentially that the hourly rate claimed is within the range suggested in **PD No. 2** for each Attorney, considering their years of practice, expertise and Mrs. Mayhew's status as a King's Counsel.

[40] In keeping with **PD No. 2**, the rates of $48,000.00 and $12,000.00 charged for Mrs. Mayhew K.C and her junior, respectively, are within the suggested range for Attorneys at their respective levels. The relevant portion of the Practice Direction is exhibited below.

Band A	Attorneys-at-Law under 5 years call	$10,000.00-$15,000.00
Band B	Attorneys-at-Law over 5 years but under 10 years call	$16,000.00-$25,000.00
Band C	Attorneys-at-Law over 10 years but under 20 years call	$26,000.00-$35,000.00
Band D	Attorneys-at-Law 20 years call	$36,000.00-$45,000.00
Band E	Queen's Counsel	$46,000.00-$55,000.00

[41] The Court notes from the affidavit of Ms. Lesley Ann Stewart, sworn on the 9th February 2024, that higher rates were granted for King's Counsel in the Court of Appeal for the related matter than were proposed in the Claimant's Points of Dispute. The Affidavit of O'Neil Corinaldie, sworn on the 16th February 2024, states that costs were awarded at the rate of $47,000.000 for King's Counsel. On the face of it, the hourly rates claimed for Counsel are not unreasonable.

[42] The Claimant has also challenged various administrative costs in the Bill of Costs such as the printing costs and attendance to file documents. Again, Ms. Stewart in her affidavit points to similar charges being allowed in the Court of Appeal taxation. Therefore, a challenge to the Bill of Costs on this basis is also likely to fail.

[43] The time spent doing each task was also challenged on the basis that having regard to the nature of the matter and the work done, the time spent was excessive. **PD No 2** acknowledges the nigh impossibility of having a formula to determine the reasonableness of time spent on a particular task. It states:[7]

> *Since it is virtually impossible to give guidance as to whether the time claimed by attorneys at law has been reasonably spent, it is for the court in*

[7] PD No 2, para 18

> *each case to consider the work properly undertaken to arrive at a figure which is in all the circumstances reasonable.*

[44] The Court notes that the Bill of Costs of the 1st and 2nd Defendants in the Notice of Application filed October 1st 2021 was taxed in the sum of Seven Hundred and Seventy-Three Thousand Eight Hundred and Seventy-Four Dollars and Eight Cents **($773,874.08)**. The hourly rate for Counsel in those proceedings was in the suggested band of $16,000.00 to $25,000.00. According to the suggested band for King's Counsel, the rate for Mrs. Mayhew would be approximately double, and the rate for junior Counsel, approximately two-thirds. Therefore, an equivalent bill for the 3rd and 4th Defendants would be approximately Two Million Fifty-Eight Thousand Five Hundred and Four Dollars (**$2,058,504.00)**. The 3rd and 4th Defendants' Bill of Costs in respect of this application was for Three Million One Hundred and Thirty-Three Thousand and Forty Dollars **($3,133,040.00)**. The difference is more than one million dollars. It appears that the Bill of Costs for the 3rd and 4th Defendants could bear closer scrutiny.

[45] The Court is of the view that it could have been better assisted to determine if the sums set out in the Bill of Costs of the 3rd and 4th Defendants were reasonable if the taxed Bill of Costs for the 1st and 2nd Defendants were presented to it.

Prejudice

[46] Finally, the Court must consider the issue of prejudice. Like the court in **Canute Saddler**, the Court has to employ a balanced approach in determining who is likely to be more prejudiced in the circumstances. The Claimant would be prejudiced if the Default Cost Certificate is not set aside, on the basis that it would be required to pay unchallenged costs in circumstances where the default was not of its own making. Whilst, the 3rd and 4th Defendants will face a delay in the payment of costs to them and further costs to be incurred in the taxation proceedings.

[47] It is not lost on the Court that litigation can be expensive. It was recognised by Batts J that the Claimant, as a corporate entity, was likely to have more resources available to fund the costs of litigation. By the same token, the Claimant would be

prejudiced by paying costs not reasonably incurred. Consequently, both sides will be equally prejudiced regardless of the outcome of this application. In light of this, prejudice would not be a determining factor in the exercise of the Court's discretion.

[48] It seems in all the circumstances the Claimant has a realistic prospect of successfully disputing the 3rd and 4th Defendants' Bill of Costs at Taxation. I am therefore minded to exercise my discretion to set aside the Default Cost Certificate granted in favour of the 3rd and 4th Defendants.

WHETHER THE COURT SHOULD STAY THE TAXATION PROCEEDINGS?

[49] The Court notes that the appeal against the Order of Batts J was in relation to the Notice of Application filed on October 5th 2021, in which the 3rd and 4th Defendants were awarded half of the costs. The initial appeal against the Order of Batts J was unsuccessful. The Claimant applied for and was granted a rehearing. On that occasion, Counsel for the 3rd and 4th Defendants conceded and accepted that certain conditions of the Orders of Batts J were incorrectly made. It is not suggested however that the appeal would be successful in its entirety. There does not seem to have been any challenge in relation to the application of October 1st 2021.

[50] Set against the decision of Batts J for an Order for immediate taxation on the basis that the Claimant as a company would be better positioned to weather the storms of expensive litigation, as against the Defendants who were individual persons, the Court is of the view that the grant of a stay in the taxation proceedings would defeat the purpose of the Order of Batts J, which in all the circumstances would not be warranted. The Court therefore declines to exercise its discretion to stay the taxation as sought by the Claimant.

ORDERS

[51] The Court therefore Orders:

1. The Default Cost Certificate dated 2nd February 2023 in favour of the 3rd and 4th Defendants is hereby set aside.

2. Costs of the application to be the 3rd and 4th Defendants.

3. The 3rd and 4th Defendants are permitted to file an amended Bill of Costs to include the costs of this application.

4. The Claimant is permitted to file its Points of Dispute within 14 days of service of the Amended Bill of Costs.

5. The 3rd and 4th Defendants' Amended Bill of Costs is to be taxed immediately.

6. Claimant's Attorney-at-Law to prepare, file and serve this Order.

_____

Judge