[2015] JMCA Civ 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN NORMAN WASHINGTON MANLEY BOWEN APPELLANT

AND SHAHINE ROBINSON RESPONDENT

Abraham Dabdoub and Raymond Clough instructed by Knight Junor & Samuels for the appellant

Ransford Braham QC, Mrs Nesta Claire Smith-Hunter and Miss Marsha Smith instructed by Ernest Smith & Company for the respondent

23, 24 March and 6 November 2015

DUKHARAN JA

[1] This is an appeal against the judgment of Campbell J, delivered on 23 October 2013, by which he reduced the amount of costs recoverable by the appellant from $15,373,547.49 to $4,996,597.49 including general consumption tax in relation to a challenge by both the appellant and the respondent of the Supreme Court registrar's final costs certificate.

Factual background

[2] On 24 September 2007, the appellant filed an election petition against the respondent Shahine Robinson, Rupert Brown, Danville Walker and the Attorney General of Jamaica alleging amongst other things, that the respondent, who was elected on 7 August 2007 as the Member of Parliament for the constituency of North East Saint Ann, was not eligible to hold such a position as she was elected contrary to sections 39 and 40(2) of the Constitution. He asserted that she was a citizen of the United States of America and therefore not qualified to be nominated or elected to the House of Representatives. The respondent filed an amended defence on 3 June 2010, in which she asserted her Jamaican citizenship and denied being a citizen of any other country on 7 August 2007 when she was elected. The other respondents on the petition have never attended or participated in any of the court proceedings.

[3] The matter was set for hearing on 4 October 2010, however, on 15 September 2010, the respondent informed the court that based on advice she had received she would not be opposing the petition. The court was also informed that the respondent had become a naturalized citizen of the United States of America sometime in 2006.

[4] As a result, the only issue for determination was the issue of costs. Jones, J heard submissions from both sides on this issue. On 22 September 2010, he struck out the amended defence as an abuse of process and ordered the respondent to pay the appellant's costs. The appellant applied for the costs to be assessed on an indemnity basis. On 4 October 2010, Jones J heard submissions from both parties in relation to

this application. He concluded that the court had a wide discretion under the Civil Procedure Rules (the CPR), as well as section 28 of the Election Petitions Act, to determine by whom and to what extent the costs of the proceedings are to be paid. Based on this and other findings, on 8 October 2010, he made the following order as to costs:

> "… the Respondent (the unsuccessful party) shall pay all the costs (meaning on an indemnity basis) of the Claimant (the successful party) in accordance with CPR 64.6 (1) to be taxed by the Registrar of the Supreme Court in accordance with CPR 65.13 if not agreed."

[5] Pursuant to this order, the appellant filed a bill of costs on an indemnity basis for the sum of $19,085,255.15. The respondent filed points of dispute challenging, inter alia, the number of attorneys for whom fees were being claimed, the hourly rates claimed for the attorneys, the fact that the fees claimed had not been deducted from the retainer and the quantum of fees for Professor David Rowe, an attorney-at-law, who practices in Florida in the United States of America.

[6] This bill was taxed and the sum allowed by the registrar was $15,373,547.49. The registrar had reduced, inter alia, the rate for fees claimed per hour for the attorneys-at-law acting for the appellant and the length of time claimed for work done in the bill of costs.

[7] The registrar allowed hourly rates of $30,000.00 for Mr Abraham Dabdoub, $20,000.00 for Mr Raymond Clough and $8,000.00 for junior counsel, the retainer fees amounting to $5,750,000.00 and the full amount claimed for Professor Rowe's services.

The judgment of Campbell J

[8] Both parties challenged the registrar's decision and this matter went before Campbell J for hearing.

[9] The appellant appealed all the reductions made by the registrar. These included the reduction in the hourly rates for the attorneys-at-law and the time claimed for work done. The grounds of appeal filed were based on these complaints.

[10] The respondent's appeal was based on, inter alia, the hourly rates awarded to the attorneys-at-law, the retainer fees that were allowed, the time allowed for conferences and the fees allowed for Professor Rowe's services.

[11] The first issue that was determined by Campbell J was the nature of the proceedings, or the nature of the examination to be conducted by him, that is, whether it was a review or an appeal. In relation to this issue, counsel for the appellant submitted that the proceedings, whereby the decision of the registrar is challenged, ought to be heard as an appeal and he then directed Campbell J to the judgment of Sykes J, in **Phillip Stephens v The Director of Public Prosecutions** Claim No HCV 05020/2006, judgment delivered 23 January 2007, as to the principles applicable to an appeal. In dealing with this issue, Campbell J examined the provisions of section 27(2) of the Legal Profession Act (hereinafter referred to as the LPA) and rule 65.26 of the CPR.

[12] After considering section 27 of the LPA, rule 65.26 of the CPR, and the judgment of Sykes J, in **Phillip Stephens v The Director of Public Prosecutions**, Campbell J,

concluded that the subordinate legislation, the CPR, cannot supersede the express terms of the LPA. He held that based on section 27(2) of the LPA, the nature of the examination to be conducted by him was a review and not an appeal. He stated at para [13] of his judgment that "[s]ection 27(2) mandates the court to review the decision where there is, as here, dissatisfaction with the taxing officer's decision". The learned judge then proceeded to highlight the differences in the role of a court undertaking a review as opposed to an appeal.

[13] Campbell J then examined whether or not the registrar had a discretion under section 27(1) of the LPA and he concluded at para [17] that "[i]n the exercise of her functions pursuant to Section 27 of the **Legal Profession Act**, the Registrar exercises her discretion, in other words, she has a choice, and there is no beaten path that she must take". He then referred to the definition of judicial discretion by the author De Smith, in Judicial Review of Administrative Action, 4th edition which supported his conclusion.

[14] As it relates to the hourly rates allowed by the registrar, counsel for the appellant submitted that the registrar had no discretion in respect of the hourly rates of the various attorneys-at-law as these rates were based on an agreement, in writing, between the appellant and the attorneys-at-law on record for him. Further, that the appellant had not disputed the rates and the claim is a novel and unique one and the only discretion the registrar had was in relation to whether the time claimed for the particular work done was reasonable.

[15] The respondent submitted that section 21 of the LPA deals specifically with an attorney-at-law who wishes to recover fees from a client. The learned judge was of the view that the submission on behalf of the appellant was not sustainable and at para [22] he stated that he accepted that to "… bar the exercise of the discretion of the Registrar would prevent her being able to act, even where the agreement appears to have been made at less than arm's length, and is the product of collusion".

[16] He concluded that based on rule 65.17(2) of the CPR, there was a presumption that the fees were reasonably incurred or reasonable in amount, if they were expressly or impliedly consented to by the client. He was of the view that this is a rebuttable presumption, and can be displaced by evidence to the contrary. The learned judge concluded that the court, pursuant to section 27 of the LPA, had the power to vary or confirm the registrar's order.

[17] In relation to the hourly rates allowed by the registrar for the appellant's attorneys-at-law, he found that the registrar had a discretion and that it was exercised in accordance with rule 65.17 of the CPR.

[18] It was also contended by the respondent that the registrar wrongly exercised her discretion in allowing the sums of $5,750,000.00 to Knight Junor & Samuels. Also, that there was no proof that the work was actually done pursuant to the retainer agreement. He also found that although the retainer agreement was in writing, it did not conform to the requirements laid down for the protection of the client in the

American cases such as **Brian Dowling v Chicago Options Associates Inc., et al** (**DLA Piper Rudnick Gray Cary (US), LLP**) No 102578 filed 3 May 2007.

[19] It was argued, on behalf of the appellant, that where indemnity costs have been ordered the onus is on the paying party to show that the costs claimed are unreasonable. The learned judge concluded that an award of cost on an indemnity basis is not intended to be penal and that regard must be had to what in the circumstances is fair and reasonable.

[20] In relation to the claim for the retainer fees, the learned judge found that the registrar failed to take into contemplation the relevant considerations contained in rule 65.17(1) of the CPR that the sum should be reasonable and fair both to the person paying and the person receiving such costs. He further concluded that the fees in the retainer agreement were not shown before the registrar to represent any service provided by the attorneys in the conduct of this case. He went on to find that it would be unfair and unreasonable to allow the registrar's order to stand. He accordingly varied the registrar's order by disallowing the recovery of the retainer fee of $5,750,000.00.

[21] In relation to the fees claimed for Professor Rowe, the respondent argued that the fees in the sum of $1,902,990.00 and $3,620,700.00 allowed by the registrar were unreasonable. Campbell J disallowed the sum of $3,620,700.00 that was allowed by the registrar on the basis that when the sum was compared to the fees that were charged by Professor Rowe in **Richard Edward Azan v Michael Stern & Anor** Claim

No HCV 03984/2007, judgment delivered on 30 July 2008, there was a ten-fold increase. He found that the registrar had failed to consider the relevant factor of the ten-fold increase in the research and the necessity of launching a claim in the United States. The fees totalling $3,641,400.00 were claimed by Professor Rowe for filing a claim in the Federal Court Southern Division.

[22] He also found that the registrar erred in not allowing the appellant to be cross - examined and that this would have fettered the respondent's ability to discharge the onus placed on her to prove that the costs were not reasonable.

[23] As a result of his findings the learned judge made the following orders:

> "1. The retainer fee in the sum of **Five Million Seven Hundred & Fifty Thousand Dollars** ($5,750,000.00) awarded to the Claimant/Respondent, Norman Washington Manley Bowen is disallowed as being unfair and unreasonable.
>
> 2. The fee for Professor David Rowe in the sum of **Five Million Five Hundred and Twenty-three Thousand Six Hundred and Ninety Dollars** (5,523,690.00) is disallowed as being unfair and unreasonable.
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> 3. The rates fixed by the Registrar are not disturbed.
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> 4. The Claimant's/Respondent's Appeal Notice (Costs) is denied.
>
> 5. Liberty to apply.
>
> 6. Costs to the 1st Defendant/Respondent, Shahine Robinson to be taxed if not agreed."

The appellant's grounds of appeal

[24] The appellant filed 18 grounds of appeal and they are summarized as follows:

1. the learned judge failed to appreciate that the appeals were from a taxation by the registrar of costs awarded on an indemnity basis and that the charges and fees agreed to were in writing and are subject to the provisions of section 21 of the LPA; (grounds 1-2)

2. the learned judge took an inordinately long time to render the judgment and as a result he suffered a lapse of memory that resulted in the factual and legal mistakes made by him; (grounds 3 -5)

3. the judge failed to appreciate that the matters before him were not a review of the registrar's taxation but appeals; (ground 6)

4. the learned judge erred in law in that attorneys-at-law are entitled to charge a retainer, in addition to, an hourly rate for work actually done; and so counsel Dabdoub and Clough were entitled to both a retainer as well as payment on an hourly basis for work actually done. (Grounds 7-8)

5. the learned judge failed to understand and/or appreciate that the retainer fee for Knight Junor & Samuels was not only for work to be undertaken by them but also for work done in providing the claimant with an opinion; (Ground 9)

6. the learned judge erred in disallowing the fees for Professor Rowe in that he failed to appreciate the evidence before him of proof of payment of the said fees and that Professor Rowe had done more work in the instant case than he did in **Azan v Stern.** In addition, he did not invite the parties to address him on the fees charged by Professor Rowe in **Azan v Stern** final costs certificate before relying on it; (Grounds 10 – 13 and 15)

7. the learned judge also failed to recognize, understand and/or appreciate that the work undertaken in filing a claim in Federal Court was in addition to the initial work undertaken by Professor Rowe and was absolutely necessary as a result of the first defendant's conduct; (Ground 14)

8. the learned judge erred in law in concluding that the registrar should have allowed cross-examination of the claimant since it is the paying party who has the onus of showing that the fees

claimed were unreasonable. It was the claimant's attorneys-at-law who had prepared the bill of costs and the claimant would therefore have been of no assistance given that an affidavit by the claimant was filed addressing the questions raised by the respondent's counsel; (Grounds 16 - 17)

9. the learned judge erred in law in failing to recognize and/or appreciate that the registrar's discretion ought not to be varied or interfered with on appeal unless the discretion was not judicially exercised. (Ground 18)

[25] Based on the grounds filed, the appellant sought the following orders:

(a) That the judgment of Lennox Campbell J be set aside and that:

1. The retainer fees be allowed as follows:

(i)	Retainer Fee of Knight Junor & Samuels as provided for in the letter of retainer executed by the appellant	$1,750,000.00
(ii)	Retainer fee of counsel Abraham Dabdoub	$2,400,000.00
(iii)	Retainer fee of counsel Raymond Clough	$1,600,000.00

2. The fees of Professor Rowe be restored as follows:

(i)	Professor Rowe's fee in respect to research done on Constitutional, Immigration, Citizenship and Naturalization laws of the United States of America US $22,000.00 @ $86.70	$1,907,400.00
(ii)	Professor Rowe's fees in filing a claim in Federal Court Southern District of Florida for confirmation of naturalization of Shahine Robinson	

	as a citizen of the United States of America and for provision of certified copies of the said document US $42,000 @ $86.70	$3,641,400.00

3. That the hourly charges of counsel be restored as follows:

(i)	Counsel KD Knight QC	$36,000 per hour
(ii)	Counsel Abraham Dabdoub	$36,000 per hour
(iii)	Counsel Bert Samuels	$24,000 per hour
(iv)	Counsel Raymond Clough	$ 24,000 per hour
(v)	Junior counsel's fees	$ 24,000 per hour

4. Costs of this appeal and in the court below to the appellant to be taxed or agreed;

(b) Such further order or relief as the court may deem just.

Appellant's submissions

[26] Counsel for the appellant, Mr Dabdoub, argued that the purpose of the costs being awarded on an indemnity basis is to compensate the successful party to, as full an extent as possible, for the outlay and trouble of unnecessary litigation. It was further submitted that there are a number of advantages that flow from costs being awarded on an indemnity basis. The main one being that the receiving party is more likely to obtain a higher recovery than on the standard basis. Also, that the onus is on the paying party to show that the costs claimed were unreasonably incurred or

unreasonable in amount, and any doubt as to reasonableness will be resolved in the receiving party's favour.

[27] It was also contended that the proportionality principle does not apply to this jurisdiction in relation to the assessment of costs in general and it was not enough for the paying party to simply assert that the costs are unreasonably incurred without stating or showing the reasons for saying so. It was argued that Campbell J failed to appreciate that the respondent was required to show that the costs claimed were unreasonably incurred or unreasonable in amount.

[28] It was also contended, on behalf of the appellant, that the registrar did not have a discretion to adjust the retainer fee, as the retainer agreement containing the fees claimed for the attorneys-at-law in the matter was in writing and therefore covered by the provisions of section 21 of the LPA. Further, that she had no discretion in assessing the hourly rates of the various attorneys-at-law as these rates were also set as a result of an agreement in writing that was accepted as reasonable by the client.

[29] Counsel further submitted that the registrar erred in applying the proportionality principle in many of the instances where the time was reduced for the performance of particular work done and that she failed to appreciate that it was for the respondent to show that the time spent was unreasonable or that the costs for the item charged for was unreasonably incurred. The respondent, according to counsel, had failed to advance any reasons showing why the time spent was unreasonable. In addition, it

was submitted that the matter is novel, complex and of great public importance and the rates claimed were based on the seniority of the attorneys-at-law.

[30] The appellant argued that it was the respondent's conduct that had caused him to incur considerably more expense. This, it was asserted, included the fees for Mr Dabdoub, Mr Clough and the fees for Professor David Rowe. It was argued that he was entitled to recover the entire sum claimed for Professor Rowe's fees, as it was the respondent's continued denial that she was a citizen of the United States of America that necessitated the filing of a claim in the United States to obtain information regarding her citizenship status in that country. It was further submitted that the expense incurred as a result was unavoidable, and therefore reasonably incurred. It was also pointed out to the court that Professor Rowe confirmed in a letter dated 20 November 2010, that he had been paid in full.

[31] Counsel also contended that the learned judge erred when he interfered with the registrar's decision to allow the recovery of the retainer fees and the fees claimed for work done by Professor Rowe, in that, the registrar had properly exercised her discretion and had given due consideration to the fact that the retainer was in writing. Campbell J, it was submitted, had failed to take into consideration the fact that the retainers for both Mr Dabdoub and Mr Clough were retainers agreed to by the appellant pursuant to the retainer agreement and which formed part of the remuneration for their services as counsel.

[32] It was also submitted, on the appellant's behalf, that the learned judge erred in looking at the taxed costs in **Azan v Stern** which were submitted to illustrate to the registrar the hourly rates previously allowed by her for attorneys-at-law. The fees charged by Professor Rowe in this matter were for the performance of two different functions, namely, research and the filing of a claim in the Southern District Court in Florida to obtain information regarding the respondent's status as an American citizen. In addition, the fees allowed for Professor Rowe in **Azan v Stern** were not raised by the respondents as a basis for their objection.

[33] The appellant also contended that since Jones J found that the circumstances of the case warranted an order for costs on the indemnity basis, the court hearing the appeal against taxation must be careful not to nullify the order for indemnity costs. In addition, there is no appeal against the order for costs to be assessed on an indemnity basis.

[34] It was also submitted, on the appellant's behalf, that the learned judge erred in law in concluding that the application for taxation from the registrar is not an appeal but a review and in doing so, he had set the stage for the grave errors he made, which now form the basis of this appeal.

[35] It was submitted that the inordinately long delay in delivering the judgment was inexcusable, particularly, in what was not a complex but a simple appeal from taxation by the registrar and this led to the learned judge's failure to give proper consideration to the appeal brought by the appellant. It was also submitted that he had forgotten the

written submissions of the appellant which no doubt contributed to the grave errors he has made.

Counter notice of appeal

[36] The respondent filed a counter notice of appeal containing 10 grounds. The grounds can be conveniently summarized thus:

(i) the learned trial judge was entitled to find that the registrar wrongly exercised her discretion, in allowing the sums claimed for retainer fees for the attorneys-at-law representing the appellant on the basis that they were "partly in writing" as the sums claimed were unfair and unreasonable, since they were unreasonably incurred and unreasonable in amount and the registrar had not judicially exercised her discretion; (ground 1)

(iii) the learned judge was entitled to reject the appellant's contention that the registrar had no discretion to determine whether the retainers were unreasonable in amount or unreasonably incurred because the retainer was in writing; (ground 2)

(i) the learned judge was entitled to take judicial notice of the final costs certificate in the matter of **Azan v Stern** which was similar to this case as it was also an election petition that dealt with similar issues; as well as the final costs certificates in **Dojap**

Investments Limited v Donald Panton & Anor 2007 HCV 03920. (ground 3)

[37] The respondent combined the arguments in relation to their counter notice of appeal with those in response to the grounds of appeal filed by the appellant, as there were no separate submissions in relation to the grounds filed in the counter notice of appeal.

[38] In addition, the grounds in the counter notice are supportive of the judge's findings and this court was referred to grounds 1.3-1.5 of the counter notice as a further response to grounds 10-15 of the appellant's grounds of appeal.

Respondent's submissions

[39] In relation to whether the learned judge should have conducted a review or an appeal of the registrar's decision, counsel for the respondent, Mr Braham QC, submitted that the learned judge used a restrictive review process which was more advantageous to the appellant. It was also submitted that it was unimportant which process the learned judge decided to undertake. Counsel for the respondent also argued that it was clear from the learned judge's judgment that he appreciated that costs had been awarded on the indemnity basis and the principle applicable to such an award. It was also argued that in analyzing the judge's decision, section 16 of the Constitution should be taken into account to ensure that the fees are fair and reasonable and do not operate as a hurdle or barrier for parties approaching the court.

[40] It was also submitted that the learned judge was entitled to reject the contention of the appellant that the registrar had no discretion to determine whether the retainers were unreasonable in amount or unreasonably incurred because they were in writing. The respondent also contended that section 21 of the LPA deals with an agreement between an attorney-at-law and his client and that section is, therefore, not relevant to the determination of the issues in this matter. It was further contended that the proviso in section 21 empowers the court to assess or determine whether the fees contained in the agreement are unfair or unreasonable.

[41] The respondent contended in relation to grounds 7, 8 and 9 that the sums claimed as retainer fees were to be treated as advance or down payments. It was argued that if it was not treated as such, the respondent would pay double for work done.

[42] It was contended further, on behalf of the respondent, that upon a proper construction of the retainer letter it does not contemplate that the retainer ought not to be set off against subsequent work. This is so because item (1), in relation to the fees payable to Knight Junor & Samuels, declared that the sum of $1,750,000.00 included the fee for the opinion.

[43] It was submitted that it was clear from the retainer letter that it was not intended that the retainer was a one-off payment against which subsequent costs would not be set off. Item (9), it was argued, reaffirms this because it clearly states that if the election petition is not filed, the fee payable to Knight Junor & Samuels for

the opinion is $375,000.00 plus General Consumption Tax. This is a clear indication, it was submitted, that the balance would be refunded, and would not be of the kind the appellant's attorney-at-law described as a one-off payment to ensure that the attorney-at-law was available to conduct the litigation.

[44] It was further submitted, on behalf of the respondent, that a retainer in the form contended by the appellant is draconian in nature and where this is the intention it should be expressly stated. It was further submitted that the agreement did not state the purpose for the fees and there was no expressed benefit conferred on the client for this alleged non-refundable fee. The court was referred to the decision in the American case of **Dowling v Piper**.

[45] The respondent argued that an attorney-at-law cannot earn fees unless he provides a benefit or service to the client. In support of this submission, the respondent cited the Supreme Court of the State of Colorado case **In Re: Larry D Sather 3P 3d 403 (W/O 2000)** No 99SA72 decided 22 May 2000.

[46] The respondent contended that the appellant was purporting to retain four senior attorneys-at-law, along with junior counsel, for work which was not complex as this claim was concluded after the judgments of the Supreme Court and the Court of Appeal had been delivered in **Abraham Dabdoub v Daryl Vaz et al** SCCA Nos 45 & 47/2008 delivered 13 March 2009. It was submitted that in the light of this, the registrar should not have allowed the fees and there is no evidence that the retainer

was paid. The learned judge, therefore, could not be faulted for setting aside this aspect of the costs given these circumstances.

[47] The respondent argued that the learned judge was entitled to find that "it would be unfair and unreasonable to allow the registrar's order to stand". It was further argued that the appellant had not set out the actual work done for the sums being claimed for retainer fees. The respondent also submitted that in **Azan v Stern**, the issues were similar and the bill of costs that was submitted in that case had set out the actual work done by the attorneys-at-law in relation to the sums claimed for retainer fees.

[48] In relation to grounds 10 - 15, which dealt with the judge's disallowance of the fees payable to Professor Rowe, the respondent submitted that the fees claimed for work done by Professor Rowe may be divided into two categories, namely, fees for obtaining evidence of the respondent's naturalization, amongst other things, and fees for general research in the United States concerning citizenship and allegiance. The respondent argued that the learned judge was correct to disallow the sum of $3,641,000.00 in fees claimed for Professor Rowe's work.

[49] It was also submitted on the respondent's behalf that the invoices submitted by Professor Rowe, which includes one dated 12 May 2010, are not detailed or clear. The invoices also contain fees for work done that based on his evidence in the **Dabdoub v Vaz** case he ought to have been fully cognizant of. The total sum of all the invoices submitted by Professor Rowe is US$107,000.00. This sum, when converted, is

equivalent to J$9,276,900.00, using a conversion rate of J$86.70 to US$1.00. The appellant only claimed US$64,000.00 in his bill of costs. The respondent contended that the unreasonableness of the fees was demonstrated by the invoices.

[50] The respondent argued that there was a disparity between the costs of Professor Rowe's fees in **Azan v Stern** and those in this matter, in that, Professor Rowe gave expert advice on similar research and his entire fee was $450,000.00. It was further argued that these factors together demonstrated that there were serious questions concerning the fees charged by Professor Rowe and the need for him to provide any service. Also, that the judge was entitled to disallow all or a portion of the fees payable to him, as the fees were unreasonable.

[51] With respect to grounds 3, 4 and 5, dealing with the delay in the delivery of the judgment, the respondent's attorneys-at-law argued that the criticisms of the judge in these grounds are unfair and unfortunate, since, as counsel, they are all aware of the atmosphere in which the judges of our courts operate. Also, that the learned judge recently presided over the longest criminal trial in Jamaica's history.

The issues

[52] The issues to be determined can be dealt with under the following headings:

1. the nature of the examination to be undertaken by the learned judge;

2. the principles to be applied when assessing an order for costs made on the indemnity basis;

3. whether the learned registrar had a discretion in relation to a retainer agreement in writing;

4. whether the registrar had properly exercised her discretion;

5. whether the learned judge erred in varying the costs allowed by the registrar;

6. whether the learned judge erred in finding that the registrar should have allowed the respondent to cross-examine the appellant;

7. whether the delay in the delivery of the judgment caused the judge to make factual and legal errors.

Analysis

[53] The Judicature (Supreme Court) Act provides in section 47(1) that "[i]n the absence of express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court…" Parts 64 and 65 of the CPR contain the general provisions in relation to the ordering and quantification of costs in civil proceedings in the Supreme Court and any appeal relating to any such order. In relation to the quantification and recovery of attorneys-at-law fees, the LPA, part V, makes provision for this.

[54] In addition to these provisions, the Election Petitions Act, pursuant to which the petition was brought, also makes specific provisions in section 28 to treat with the question of taxation of costs arising on an election petition. The section provides:

> "28. All costs and charges and expenses of and incidental to the presentation of a petition and to the proceedings consequent thereon, with the exception of such costs, charges and expenses, as are by this Act otherwise provided for, shall be defrayed by the parties

> to the petition in such manner and in such proportions as the Court or Judge may determine, regard being had to the disallowance of any costs, charges or expenses which may, in the opinion of the Court or Judge, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or are not on the whole successful. And the Court or Judge shall give judgment for such costs in accordance with such determination as aforesaid. Such costs shall be taxed by the proper officer of the Supreme Court according to the same principles as costs between solicitor and client are taxed in an equity suit in the Supreme Court."

[55] The equivalent provisions in the English Parliamentary Elections, 1868 Act, section 41, was considered in **John Hill v Robert Peel (the Tamworth Case); Robert Broad v Nicholos Fowler (the Penryn Case); Alfred Pegler v Russell Gurney (the Southhampton Case)** (1870) LR 5 CP 172. In that consolidated appeal, Bovill CJ stated at page 178:

> "The principle upon which the costs on election petitions are to be taxed is settled by s.41 of the Parliamentary Elections Act, 1868, which enacts that they are to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery.
>
> …
>
> The peculiarity of the case arises from the costs being payable as between party and party, and having to be

> taxed as between, attorney and client; and this is not absolutely, but only as in a suit in Chancery. The mode of taxation in such a case is stated in Mr Osborne Morgan and Mr Davey's work upon Costs in Chancery, p. 1 as follows:- '***Costs as between solicitor and client payable by one party to another will not include all costs to which the solicitor would be entitled as against his client...***'" [Emphasis added]

[56] It is, therefore, incumbent on this court, in treating with the question whether Campbell J erred in law in disallowing certain items of costs, to also recognize the applicability of section 28 of the Election Petitions Act and to have due regard to its provisions as it relates to the taxation of costs. Of necessity, the analysis of the issues raised for consideration has been conducted against the background of the applicable law, to include the statutory regime governing the award of costs in a matter such as this that is governed by a specific statutory regime.

The nature of the examination that should have been conducted by the learned judge

[57] The first issue that Campbell J had to determine was whether he was to conduct a review or an appeal of the registrar's order. The appellant submitted that the learned judge should have conducted the proceedings in the form of an appeal. Further, that his failure to do so led to many of the grave errors he made.

[58] In relation to this issue, the respondent submitted that both an appeal and review would be heard by a single judge of the Supreme Court, so it is unimportant which process he decided to undertake if his decision is correct.

[59] This issue arose because of the alleged conflict that is said to exist between rule 65.29(a) and (b) of the CPR and the LPA, section 27. Rule 65.29 states:

> "On an appeal from a registrar the judge will -
>
> (a) **re-hear** the proceedings which gave rise to the decision appealed against so far as is necessary to deal with the items specified in the appeal notice; and
>
> (b) make any order or give any directions as he or she considers appropriate." (Emphasis added)

[60] Section 27 of the LPA states:

> "(1) Upon every taxation, whether by order of the Court or otherwise, the taxing officer shall certify what is found to be due to or from the attorney in respect of the bill, including the cost of reference.
>
> (2) If either party is dissatisfied with the decision of the taxing officer as to the amount of the bill or the cost of reference, he may within twenty-one days after the date of the decision **apply to the Court to review the decision**; and the Court may thereupon make such order varying or confirming the decision as the Court considers fair and reasonable.
>
> (3) The certification of the taxing officer or, as the case may be, the order of the Court under this section shall, subject to rules of court, be final and conclusive as to the amount due." (Emphasis added)

[61] Rule 69.26 gives either party a right to appeal the decision of the registrar following the taxation of costs and rule 65.29(a) states that on appeal, the judge "will re-hear the proceedings which gave rise to the decision appealed against ...". Part V of the LPA, under which section 27 falls, deals with the recovery of fees due to an

attorney-at-law from the person to be charged (usually his client). Section 27, in particular, deals with a situation in which a reference is made to the registrar by an attorney-at-law to have the bill of his fees taxed. The section does not deal with costs ordered by the court to be taxed between party and party as in this case. Section 27 would, therefore, not have been engaged in the context of this case.

[62] In this case, rules 65.26 and 65.29 would apply and so it would have been an appeal that would have been before Campbell J, which would have properly called for a re-hearing of the proceedings appealed against in so far as it was necessary "to deal with the items specified in the appeal notice". Section 27 of the LPA was not applicable and so the conclusion of Campbell J that he was conducting a review of the registrar's decision pursuant to that provision would not have been accurate. He would have fallen into error in coming to that conclusion. Also, his discussion concerning conflicts between subsidiary legislation and a statute would have been unwarranted and unnecessary in the circumstances.

[63] However, in my view, the fact that Campbell J treated the proceedings as a review and not an appeal would not have been detrimental or prejudicial to the interest of the appellant. There is nothing to show that the case advanced by the appellant was affected in any way by this error. This ground of appeal cannot succeed.

The principles to be applied when assessing an order for costs made on the indemnity basis

[64] Jones J awarded costs to the appellant on an indemnity basis. It is important to determine what this means in relation to the assessment of costs and the determination of the amount that is recoverable. It has been said that the assessment of costs is not a precise exercise. In the United Kingdom, costs are assessed on the standard or indemnity basis. Our CPR, however, does not speak specifically to standard and indemnity costs and has not adopted the English approach to expressly differentiate between the two bases. There was no appeal from Jones J's decision and so any question as to the propriety or otherwise of this award of costs on an indemnity basis is not explored as it was never raised as an issue for the determination of this court. What is important for this court to examine is whether Campbell J had fallen into error in treating with the appeal from the registrar's assessment in the light of the fact that costs were awarded on an indemnity basis by Jones J. In treating with this aspect of the appeal, it was considered useful to examine the English position as it relates to indemnity costs and the principles applicable to the assessment of those costs in order to determine whether Campbell J erred in law.

[65] In the United Kingdom, the main differences between the indemnity basis and the standard basis concern the party bearing the burden of proof and the fact that the proportionality principle is not applicable to the assessment of costs on the indemnity basis while it is applicable to the assessment of costs on the standard basis.

[66] The differences between the two bases were discussed by Woolf CJ in **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson** [2002] EWCA Civ 879 at para 15:

> " … The differences are two-fold. First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an **indemnity order**, the onus of showing the costs are not reasonable is on the party against whom the order has been made. The other important distinction between a standard order and an indemnity order is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matter in issue, this requirement of proportionality does not exist in relation to an order which is made on the indemnity basis. This is a matter of real significance. On the one hand, it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable in consequence of litigation. On the other hand, an indemnity order means that a party who has such an order made in their favour is more likely to recover a sum which reflects the actual costs in the proceedings." (Emphasis added)

[67] In **Fourie v Le Roux** [2007] UKHL 1, it was explained in the following manner by Lord Scott:

> "… the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great. According to CPR 44.5(1), where costs are assessed on the standard basis the payee can expect to recover costs "proportionately and reasonably incurred" or "proportionate and reasonable in amount"; **and where costs are assessed on the indemnity basis the payee can expect to recover all his costs except those that were "unreasonably incurred" or were "unreasonable in amount"**. It is difficult to see much difference between the two sets of criteria, save that where

> an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion ..." (Emphasis added)

[68] It is clear from these authorities that in the United Kingdom the receiving party can only recover costs awarded on the indemnity basis that were reasonably incurred or reasonable in amount, and that the burden of proving that the costs claimed are not reasonable is on the paying party. In addition, the receiving party would only be entitled to recover costs that he or she was obliged to pay. This was the rule as stated in **Gundry v Sainsbury** (1) [1910] 1 KB 645. The appellant would, therefore, be entitled to recover from the respondent all of the costs that he is obliged to pay arising out of the matter that were reasonably incurred or that were reasonable in amount. It follows from this that although costs were awarded by the learned judge on an indemnity basis that does not preclude an enquiry by the court in order to determine whether the costs were unreasonably incurred or unreasonable in amount where they are disputed by the paying party.

Whether the registrar had discretion in relation to a retainer agreement in writing

[69] The appellant hinged his appeal mainly on his contention that the registrar had no discretion in relation to the fees claimed pursuant to the retainer agreement in writing between himself and his attorneys-at-law. As a result, the issue as to whether or not the registrar had a discretion in relation to the fees contained in the retainer

agreement is important, as this affects a large portion of the sums claimed in the bill of costs.

[70] It was submitted by the appellant that the registrar had no discretion as it relates to the fees contained in the retainer agreement and is bound by the terms and conditions of that agreement based on section 21 of the LPA. The respondent, however, contended that this section only applies to a suit by an attorney-at-law for recovery of fees.

[71] Section 21 of the LPA states:

> "(1) An attorney may … in writing agree with a client as to the amount and manner of payment of fees for the whole or part of any legal business done or to be done by the attorney, either by a gross sum or percentage or otherwise; so, however, that the attorney making the agreement shall not in relation to the same matters make any further charges than those provided in the agreement:
>
> Provided that if in any suit commenced for the recovery of such fees the agreement appears to the Court to be unfair and unreasonable the Court may reduce the amount agreed to be payable under the agreement.
>
> (2) Fees payable under any such agreement shall not be subject to the following provisions of this Part relating to taxation nor to any other provision thereof."

[72] It should be noted, however, that the proviso to section 21(1) empowers the court in disputes between attorney and client to reduce the amount claimed if it finds that the fees are unfair and unreasonable. Therefore, if the fees are challenged there is

no situation or scenario where these fees are to be paid without any scope for further consideration or assessment, even in a dispute between the parties. This is understandable given the nature of the relationship between an attorney-at-law and his or her client.

[73] The learned judge rejected the submission made by the appellant and concluded that the registrar, based on her function by virtue of section 27 of the LPA, had a discretion to assess the fees claimed based on the retainer agreement. In addition, the learned judge found that she was required to assess them in accordance with the requirements of rule 65.17 of the CPR and section 27 of the LPA.

[74] The judge in my view, was correct when he said the registrar had a discretion by virtue of rule 65.17 to assess the fees. He was however wrong to say that she had the power to assess them under section 27 of the LPA which, as indicated before, is applicable in a dispute between an attorney and his or her client concerning fees. As already indicated, the registrar would have derived her discretion from rule 65.17 of the CPR.

[75] The registrar would also have derived her discretion to assess the costs from section 28 of the Election Petitions Act which, as already indicated, provides that they are to be taxed according to the same principles as costs between solicitor and client are taxed in an equity suit in the Supreme Court. In getting a clear understanding of what the statute means by costs are to be taxed in the same way as costs between

solicitor and client would be taxed in equity, it seems useful to refer to the following extract from Daniell's Chancery Practice, 8th edition p. 1078:

> "It has been stated that the Court makes a distinction, with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs; and that this distinction is marked by the terms of "costs as between party and party," and "costs as between solicitor and client"; the Court in the latter case permitting a larger proportion of actual expenditure than it allows in the former case. No precise rules can be laid down with respect to the difference between the costs allowed upon one principle of taxation and those allowed upon the other. In general, however, in taxations as between party and party only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees annexed to the general orders and regulations of the Court **while in taxations as between solicitor and client the party will be allowed as many of the charges which he would have been compelled to pay his own solicitor for costs of action as *fair justice* to the other party will permit** [Forster v Davies, 32 Beav. 624].
>
> It must not, however, be supposed that in taxations as between solicitor and client the party whose costs are to be taxed will be allowed everything which his own solicitor might claim against him upon the taxation of his bill…" (Emphasis added)

[76] Jones J's order that costs be paid on the indemnity basis did not take away the responsibility of the registrar and later, Campbell J on appeal, to ensure, in the exercise of their discretion, that the sum to be allowed to the appellant would take into account

the provisions of section 28 of the LPA which would mean that such costs should be allowed as the fair justice to the respondent will permit. In other words, in the light of the statutory provisions of the Election Petitions Act and the CPR, the jurisdiction and responsibility of the registrar to objectively scrutinize the costs that were being claimed by the appellant was not ousted by the fact that "indemnity costs" or costs to be "assessed on an indemnity basis" were awarded by Jones J.

[77] So the authorities have established that in taxations between solicitor and client in equity, the court has a discretion to say what costs are recoverable and the amount that should be allowed. Therefore, the question as to the reasonableness and fairness of the costs incurred to be paid by the respondent would have been a material one for the consideration of the registrar upon taxation. The resolution of that question warrants the exercise of her discretion.

[78] Bovill CJ in the **Tamworth, Penryn and Southampton** cases, in treating with the questions as to the costs recoverable within the context of the English Parliamentary Elections Act (equivalent to our Election Petitions Act), stated at pages 180-181:

> "The order for costs in each of these cases was general and without qualification on either of the grounds mentioned in this section of the Act of Parliament; and it therefore appears to us that the parties entitled to their costs under the orders were entitled to an indemnity for all costs **that were reasonably incurred by them in the ordinary course of matters of this nature**, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any

> particular case, or from considerations of any special importance arising from the rank, position, wealth or character of either of the parties, or any special desire on his part to insure success. We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence or mistake." (Emphasis added)

[79] His Lordship further stated:

> "We are also of the opinion that, when the election judge or Court orders payment of the costs without qualification, it was the intention of the legislature that the taxation should be liberal in favour of the successful party, and that the master should tax the costs accordingly.
>
> A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case…"

Whether or not the registrar had properly exercised her discretion

[80] In the light of the conclusion that the registrar had a discretion, the next issue to be determined is whether or not she properly exercised her discretion in making the orders she did during the taxation process in relation to this matter. Rule 65.17 lays out the test to be applied as well as the factors that the registrar should consider when conducting the taxation of a bill of costs.

Rule 65.17 of the CPR states:

> "(1) Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount -
>
> (a) that the court deems to be reasonable; and
> (b) which appears to the court to be fair both to the person paying and the person receiving such costs.
>
> (2) Where the costs to be taxed are claimed by an attorney-at-law from his or her client, these costs are to be presumed -
>
> (a) to have been reasonably incurred if they were incurred with the express or implied consent of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client; and
>
> (c) to have been unreasonably incurred if -
>
> (i) they are of an unusual nature or amount; and
> (ii) the attorney-at-law did not inform his or her client that the client might not recover them all from the other party.
>
> (3) In deciding what would be reasonable the court must take into account all the circumstances, including -
>
> (a) - (h)…

(i) in the case of costs charged by an attorney-at-law to his or her client –

(i) subject to section 21 of the Legal Profession Act, any agreement that may have been made as to the basis of charging;

(ii) any agreement about the seniority of attorney-at-law who should carry out the work;

(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter.

(4) The registrar on taxation may not allow an attorney-at-law less than the rates set out in Appendix B.

(5) In this rule the expression 'court' includes a registrar."

[81] In **Pan Caribbean Financial Services Limited v Sebol Limited and Selective Homes & Properties Limited** [2010] JMCA App 19, Harris JA aptly described the role and function of the registrar as it relates to the taxation of bills. In paragraph [13] she opined:

> "The registrar performs a discretionary role when embarking upon the taxation of a bill of costs. In the performance of such duty, the registrar is obliged to allow such costs as are reasonable and which appear to be fair to

> all parties. In so doing, she would be guided by rule 65.17 [of the CPR]."

[82] She went on further to state in paragraph [15] that:

> "… The taxation of bills of costs ranks as one of the primary duties of the registrar. She is presumed to be very conversant with the rules relating to taxation of costs. Accordingly, it would be reasonable to infer that the registrar, when quantifying the items laid for taxation, would have applied her mind to the rules and in particular, the dictates of rule 65.17 (3) and would have taken into account all relevant factors before arriving at her decision as to what is a fair and reasonable sum to be awarded with respect to counsel's fees."

[83] Therefore, in the light of this passage, with which I agree, for an appellate court to disturb the registrar's order it must be clear, based on the circumstances, that the registrar did not or could not have considered the factors set out in rule 65.17 in coming to her decision.

[84] I am also guided by the dictum of Bovill CJ in the **Tamworth, Penryn and Southampton** cases when he opined at page 181 that:

> "…where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment which he has formed."

The proportionality test

[85] The appellant argued that the registrar applied the proportionality test in many instances where the time was reduced for the performance of work done and that this test is not applicable to an award of costs on an indemnity basis.

[86] This proportionality principle is applied when assessing costs on the standard basis in the United Kingdom based on the UK CPR 1998. Costs that are found based on this test to be disproportionate to the benefits gained by the proceedings may be disallowed. This test is not applicable to costs awarded on the indemnity basis. The Jamaican CPR do not mention this principle as one to be applied when the court is assessing costs. Prior to the UK CPR, this test likewise did not exist in the United Kingdom. In **Home Office v Lownds** [2002] EWCA Civ 365, Lord Woolf CJ made the following statement at paragraph 7 in relation to the pre CPR era:

> "Prior to the CPR coming into force it was already possible for a court to make **an indemnity order for costs. This did no more, however, than to reverse the burden of proof in respect of disputed items of costs**. The advantages of an indemnity order over a standard order are now far more significant." (Emphasis added)

[87] The last sentence of the quotation is due to the introduction of the proportionality test under the CPR. The indemnity basis is what has been deemed to apply in this case and therefore the proportionality principle would not apply. Campbell J had alluded to that during the course of his reasoning.

[88] The appellant, however, did not demonstrate to the court any reason for asserting that the registrar had applied the proportionality principle in assessing the

time allowed for work done. The particular items complained of were not brought to the court's attention, neither the registrar's reasons for her rulings to demonstrate that she, in fact, applied the proportionality principle. I am, therefore, of the view that this contention is baseless and the registrar had properly exercised her discretion as it relates to the time allowed for work done.

Hourly rates

[89] In relation to the hourly rates claimed for the attorneys-at-law in the bill of costs, the registrar reduced the amount claimed for each attorney-at-law. The learned judge, in his judgment, concluded that the registrar had properly exercised her discretion in allowing hourly rates in the sum of $30,000.00 for Mr Dabdoub, $20,000.00 for Mr Clough and $8,000.00 for junior counsel.

[90] The appellant contended that the registrar had no discretion in relation to the hourly rates claimed for the attorneys-at-law as the agreement was in writing pursuant to section 21 of the LPA, and the registrar only had a discretion pursuant to rule 65.17 of the CPR, in relation to whether the time claimed for the particular work is reasonable. They also submitted that it was a novel and complex matter so the fees claimed were reasonable. In his notice of appeal, the appellant had asked that the hourly fees charged by the attorneys-at-law be restored to the sum claimed in the bill of costs.

[91] The retainer agreement was in writing and the appellant indicated in his affidavit that he signed a copy of the said letter in acknowledgement of his acceptance to pay

the fees as stipulated in the letter. Rule 65.17(1), as already indicated, provides that the amount of costs to be allowed to a party on taxation of costs is the amount that the court deems to be reasonable and fair to both the paying and receiving party.

[92] According to rule 65.17(2)(a) and (b), where an attorney-at-law is claiming costs from his client, if the costs were incurred with the consent of the client then it is to be presumed that the costs were reasonably incurred and if the amount of the costs was approved by the client, it would be presumed that the costs claimed were reasonable in amount. This presumption would, therefore, have been raised if the appellant's attorneys-at-law were to claim their fees from him. This would be so because the appellant is saying that he had agreed to the fees contained in the letter.

[93] Rule 65.17(2)(c), however, provides, that where the costs to be taxed are claimed by an attorney-at-law from his or her client, these costs are to be presumed to have been unreasonably incurred if they are of an unusual nature or amount and the attorney-at-law did not inform his or her client that the client might not recover them all from the other party.

[94] In the light of these provisions, coupled with the provisions of section 28 of the Election Petitions Act, I would agree with Campbell J, that despite the written agreement between the appellant and his attorneys-at-law, it was still open to the respondent to displace the presumption that the fees were reasonably incurred or were reasonable in amount. The respondent was entitled to show that the rates and number

of hours agreed were unreasonable and that the registrar was entitled to find them unreasonable.

[95] Since I have already concluded that the registrar has a discretion, the issue to be determined here is whether the registrar had properly exercised her discretion in reducing the hourly rates claimed for the attorneys-at-law representing the appellant.

[96] Campbell J adopted and applied the views of Harris JA in **Pan Caribbean Financial Services Limited** and concluded that "unless it can be shown that the registrar failed to consider something she ought to have considered, or took into her determination irrelevant considerations" it is to be presumed that she properly exercised her discretion.

[97] I conclude that the registrar had a discretion not only in relation to the length of time claimed but also as it relates to the hourly charges claimed. The registrar would have considered what was presented to her by both sides before making a decision, therefore, unless it is shown that the registrar made an error in relation to the factors that she considered her order should not be disturbed.

[98] I am of the view that the learned judge was correct in not disturbing the registrar's decision as it relates to the hourly fees as it had not been shown that she considered irrelevant factors or failed to consider relevant factors in making her decision.

[99] The appellant requested that the rate of $36,000.00 per hour be allowed for Mr KD Knight QC. In the retainer letter this is included in item six on page two. No hourly

fees were however claimed for Mr Knight QC in the bill of costs that was taxed by the registrar. Also, the registrar did not make any ruling in relation to hourly fees for Mr Knight and it was not included in the final costs certificate issued by her. In the light of the fact that there was no claim for hourly fees in relation to Mr Knight in the bill of costs that was taxed by the registrar, this cannot be introduced on appeal.

Whether the learned judge erred in varying the learned registrar's orders

[100] The learned judge varied the registrar's order by disallowing the sums claimed in the bill of costs for retainer fees for all the attorneys-at-law representing the appellant and a portion of the fees claimed for Professor Rowe's services. I will deal with these variations in turn.

Retainer fees

[101] The registrar had allowed the recovery of the sums claimed for retainer fees amounting to $5,750,000.00 on the basis that the agreement was in writing. There was no dispute that the letter from Knight Junor & Samuels dated 12 September 2007 contained the retainer agreement between the appellant and his attorneys.

[102] Campbell J concluded at paragraph 39 that, "[t]here was a failure to take into the Registrar's contemplation, those relevant considerations pursuant to Section [sic] 65.17(1) of the Civil Procedure Rules that the sum was reasonable and was fair both to the person paying and the person receiving such costs. That the fees in the Retainer Agreement were not shown before the registrar, to represent, any service provided by the attorneys in the conduct of this case. I find that it would be unfair and

unreasonable to allow the Registrar's Order to stand". On that basis the learned judge varied the order of the registrar and disallowed the recovery of the retainer fees amounting to $5,750,000.00 for Knight Junor & Samuels, Mr Dabdoub and Mr Clough.

[103] The appellant contended that the judge erred when he interfered with the registrar's decision to allow the retainers for the various attorneys-at-law appearing for the appellant, and that the registrar had properly exercised her discretion and gave due consideration to the fact that the retainer was in writing and that Campbell J, failed to take this into consideration.

[104] The respondent submitted that the retainer fees claimed in the bill of costs for the various attorneys-at-law were unfair and unreasonable. The appellant had not set out the work done for these sums and there was no provision for it to be set off against subsequent work. It was contended that this led to the respondent being billed twice for the same work. In addition, the respondent argued that in **Azan v Stern**, the actual work done for the retainers were set out in the bill of costs. The respondent submitted also that the contention by the appellant that it was a retainer to secure the availability of counsel does not stand up to scrutiny as the said document provides that if the petition were not filed, the sum of $375,000.00 plus General Consumption Tax (GCT) would be charged for the opinion that had been provided.

[105] In dealing with this issue it is important to determine the type of retainer agreement that existed between the appellant and his attorney-at-law. In doing this, one has to examine the terms of the agreement.

[106] The appellant, in his affidavit, stated that he understood, before signing the agreement, that the retainer fees were non-refundable and that any work done by the attorneys-at-law would have been charged for separately at the hourly rates. These are important terms, that should have been in writing and therefore included in the letter given the nature of the retainer that the appellant is asserting was entered into.

[107] In relation to this issue, a number of American authorities were cited and referred to by the respondent. I would like to point out that these authorities are persuasive only and will be relied upon to the extent that the principles cited proved useful in our deliberations. In **Dowling v Piper**, the Supreme Court of the State of Illinois held that the guiding principle in determining the type of retainer that should be entered into should be for the protection of the clients' interest. The court also referred to three types of retainers, namely, the classic or general retainer, the security retainer and the advance payment retainer.

[108] The court described these retainers as follows:

> "The first is variously referred to as the "**true**," "**general**," **or** "**classic**" **retainer**. Such a retainer is paid by a client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client … The second type of retainer is referred to as a "**security retainer**." Under this arrangement, the funds paid to the lawyer are not present payment for future services; rather, the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned

> funds are refunded to the client. The purpose of a security retainer is to secure payment of fees for future services that the lawyer is expected to perform.
>
> …
>
> There is yet a third type of retainer, called the "**advance payment retainer**." This type of retainer consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment." (Emphasis added)

[109] **In Re: Larry D Sather** the court stated that "… in order to earn fees an attorney must confer a benefit on the client". In relation to the general retainer, sometimes called an engagement retainer, it is said that these retainers typically compensate an attorney for agreeing to take a case, which requires the attorney to commit his time to the client and to forego other potential employment opportunities. The court also stated that "… the client may pay an engagement retainer merely to prevent the attorney from being available to represent an opposing party". So the court accepted that these types of retainers are capable of benefitting the client.

[110] In relation to the types of retainers such as the classic or general retainer where the sums that are paid over become the attorney's property, there are certain requirements that need to be satisfied before a court will uphold them. These same requirements were said to apply to non-refundable fees and others of a similar nature. The court was also of the view that it is not enough to label the fee as non-refundable.

[111] **In Re: Larry D Sather**, the court made the following statement in the last paragraph of part c headed "non-refundable" fees:

> "In the limited circumstances in which an attorney earns fees before performing any legal services (i.e., engagement retainers) or where an attorney and client agree that the attorney can treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. In either of these situations, however, an attorney's fees are always subject to refund if excessive or unearned, and an attorney cannot communicate otherwise to a client."

[112] **In Re Larry D Sather**, it was said that "an engagement retainer allows a client to advance funds often referred to as 'advance fees', flat fees etc". The court also stated that if the fee agreement does not expressly state that a fee is an engagement retainer and explain how the fee is earned upon receipt, the court will presume that any advance fee in those circumstances is a deposit from which an attorney-at-law will be paid for specified legal services.

[113] This accords with the general rule as to the interpretation of contracts between attorneys-at-law and clients, in that, it will be interpreted in the client's best interests if there is any doubt. Fees described as non-refundable are treated in the same manner.

[114] The assertions by both the appellant and his attorneys-at-law indicate that the retainer agreement specifies a form of advance payment retainer. Based on the description of the agreement by the attorneys-at-law it would be an "engagement" or

"general" retainer, and based on the description by the appellant it would be a non-refundable fee retainer.

[115] The retainer agreement would need to comply with the requirements stated above. The agreement between the appellant and his attorneys-at-law does not contain the requirements stipulated in **Dowling v Piper**. Although it is in writing, it does not expressly state the type of retainer agreement that they intended to enter into and how the fees would be earned upon receipt.

[116] In the instant case, there are two conditions or provisions contained in the retainer letter that would assist in determining the type of retainer agreement. They are as follows:

> "Knight Junor Samuels will be paid a retainer of $1.75 million which sum will include the Opinion given herein.
>
> …
>
> In the event that you decide not to file an Election Petition our fee will be $375,000.00 plus General Consumption Tax which sum will be incorporated in our retainer in the event you decide to file an Election Petition."

[117] In the light of the fact that the retainer agreement was not expressly stated to be an engagement retainer and based on the two conditions of the agreement above where it clearly provides for the costs of a specified legal service to be included in the retainer fee and to be deducted if they did not file the petition, it seems fair to conclude

that the intention of the parties was that the costs of legal services would be off set against the amount claimed for retainer fees.

[118] The submission made by counsel for the appellant in relation to the type of retainer and the appellant's statements in relation to the type of retainer are at odds with what is contained in the letter. Having examined the letter, in my view, it would be quite a strain to construe it as being what is called an engagement retainer or to conclude that the sums for retainer fees contained in it were non-refundable, especially since these terms are not included in the letter.

[119] The general rule of interpretation as it relates to agreements between attorneys-at-law and their clients is that once there is any doubt the retainer agreement should be construed in the manner that is more favourable to the client. I am of the view based on the contents of the letter, that the type of retainer that existed between the appellant and his attorneys was a security retainer as described in **Dowling v Piper**. This is the retainer agreement that is most advantageous to the client, in that, the retainer sums still belong to the client and must be placed in a trust account and when fees are earned they are deducted.

[120] In the light of this finding it is not reasonable for the retainer sums plus the fees charged on an hourly basis to be recoverable. This would lead to the respondent paying twice for the legal fees as she has contended. This would also rebut the presumption raised by rule 65.17(2) of the CPR. For this reason, I would uphold the order by Campbell J that the sum of $5,750,000.00 claimed for retainer fees for the

attorneys-at-law is disallowed, and find that the registrar had not properly exercised her discretion in allowing it.

Bills of costs

[121] The appellant pointed out that when costs are awarded on an indemnity basis the onus is on the paying party to prove that the costs claimed are unreasonable in amount or unreasonably incurred. However, rule 65.18(3) of the CPR states inter alia:

> "A bill of costs need not be in any particular form but **must contain a general description of the work done in relation to which the costs are claimed** and must –
>
> (a) **contain sufficient detail and information to justify the amount being claimed by the receiving party**; …." (Emphasis added.)

[122] The appellant would therefore have been required, based on this rule, to justify the costs claimed in his bill of costs by giving a general description of the work done and sufficient detail and information to justify the amount being claimed by him. So, even though the order for costs was made on an indemnity basis and the burden is on the respondent to prove that the fees are unreasonable in amount or unreasonably incurred, the appellant is required to provide certain basic information to justify the claim for the fees in the bill of costs.

[123] In the light of this rule, the appellant must indicate in his bill of costs what the sums claimed were for. Campbell J was therefore correct in holding that the registrar erred in allowing the retainer fees, since it had not been shown that they represented

any service provided by the attorneys-at-law in the conduct of this case. He was, therefore, in those circumstances, correct to disallow their recovery.

Professor Rowe's fees

[124] The appellant claimed $1,902,990.00 and $3,620,700.00 for services provided by Professor Rowe. Campbell J disallowed the portion for $3,620,700.00, which the appellant asserted was the costs for filing a claim in the United States of America to obtain information regarding the respondent's citizenship status in that country. The appellant complained that the learned judge erred in this regard. He asserted that the claim was necessitated by the respondent's failure to provide this information despite steps that were taken by the appellant to have her do so.

[125] Another complaint by the appellant in relation to this issue was that the learned judge should not have compared the fees charged by Professor Rowe in **Azan v Stern** with the fees being claimed in the instant matter for his services, as the costs certificate had been submitted simply to indicate to the registrar the fees that she had allowed before for attorneys-at-law.

[126] The respondent argued that there is no proof that this action in the United States of America was necessary or that it was possible to obtain any information relating to the respondent's status by filing a court order. Also, she contended, there was no proof of anything being achieved by the filing of the claim. In addition, when compared with the final costs certificate in relation to **Azan v Stern**, the fees being claimed are unreasonable and that case shared a number of similarities with the instant

case and the amount charged in that case in the previous year was $450,000.00. The respondent also asserted that the matter was neither novel nor complex as both the Supreme Court and the Court of Appeal had delivered judgments on the issues to be decided in this matter.

[127] It was also contended by the respondent that there was no proper explanation given and that the invoices submitted by Professor Rowe were not clear enough. The research on the issues of citizenship and renunciation of citizenship were the same areas he had researched in the **Azan v Stern** matter.

[128] The learned judge in relation to this issue stated at paragraph [43] in his judgment that, "[a]n assessment on an indemnity basis cannot mean that the receiving party is to be reimbursed, for all costs including those that were unreasonably incurred". The learned judge found that the registrar had "failed to consider the relevant factor of the tenfold increase in the research and the necessity of launching a claim in the United States of America".

[129] I cannot agree with the submission made on behalf of the appellant that the fees charged by Professor Rowe in the **Azan v Stern** matter should not have been relied on by the learned judge. The documents were presented to the registrar and the issues were similar in many ways. Professor Rowe had done the work in both matters. This was the information before the registrar and which had formed part of the record of the court, so the learned judge could consider any relevant information contained in it.

[130] Campbell J's decision and finding on this point cannot be faulted and he was correct to disallow this amount. In all the circumstances, the total being claimed was unreasonable. Given the registrar's obligations under rule 65.17 of the CPR and section 28 of the Election Petitions Act, she would have failed to properly exercise her discretion when she allowed the recovery of all the sums claimed for Professor Rowe's services.

[131] I wish to address an issue regarding the order made by Campbell J, in relation to the fees for Professor Rowe. There is a signed order in the bundle indicating that the total sum claimed for Professor Rowe's fees was disallowed. I would like to point out that based on the orders in the judgment of Campbell J, only the claim for the sum of $3,620,700.00 was disallowed. The appellant was allowed to recover the sum of $1,902,990.00.

Whether the learned judge erred in finding that the registrar should have allowed the respondent to cross-examine the appellant

[132] In relation to whether or not the registrar should have exercised her discretion and allowed the respondent's counsel to cross-examine the appellant, it was asserted in ground 17 that the bill of costs was not prepared by him and that cross-examining him would have been of no assistance.

[133] The respondent submitted that the onus was on her to prove that the costs are unreasonable in amount or unreasonably incurred and the fact that her counsel was not allowed to cross-examine the appellant restricted her efforts to prove that the costs claimed were either unreasonable in amount or unreasonably incurred.

[134] The learned judge had concluded that based on the fact that the onus was on the respondent, he found that the registrar had erred, and that due to "… the absence of cross-examination could have lost an opportunity, to determine what was 'just and reasonable', in keeping with the overriding objective of the Civil Procedure Rules" (paragraph 46).

[135] Campbell J also said at paragraph [47] that "[a]part from a right to establish that the costs were not reasonably incurred or unreasonable in amount, there is an unqualified right to cross-examine an applicant pursuant to [rule 30.1(3) of the] CPR …"

[136] Rule 30.1 (3) states:

> "Whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross-examined."

[137] In his affidavit the appellant's evidence went beyond the issue of the signature, and in addition he was a party to the agreement, so the respondent should have been given the opportunity to challenge his evidence based on the content of the affidavit and rule 30.1(3). The appellant is the best person to provide this information as the attorneys-at-law are creatures of instructions and would therefore have acted on his instructions even if the instructions are based on their advice. In fact, the appellant, having referred to some of these issues in his affidavit, the respondent should have been given a chance to cross-examine and challenge his evidence.

[138] The learned judge was, in my view, correct in his conclusion that the registrar should have allowed the appellant to be cross-examined based on rule 30.1(3) in light of the circumstances of this case and the burden placed on the respondent.

Whether the delay in delivering the judgment caused the judge to make factual and legal errors

[139] The matter was heard by Campbell J on 1 November 2011 and the learned judge delivered an oral judgment on 22 October 2013; almost two years later. The fact that no explanation or reason was given for the delay only served to exacerbate an already unfortunate state of affairs.

[140] In relation to this ground, the attorneys-at-law for the appellant based their submissions on the length of the delay, communication between themselves and the learned judge's secretary and a letter written by the learned judge to the Honourable Chief Justice which was copied to all the attorneys-at-law in the matter. The appellant's attorneys-at-law had written to the Chief Justice complaining about the delay in receiving the judgment in this matter from Campbell J. In the grounds filed they also argued that based on a letter from the learned judge they became concerned as the reference to the case did not cite the reference for the costs appeal but the substantive matter.

[141] They also indicated that they had serious concerns since the learned judge's secretary had called to enquire about the matter, in particular, whether or not they had

completed their submissions. According to them, at that stage the matter had already been heard in full by the learned judge and the parties were awaiting his judgment.

[142] It was also argued on behalf of the appellant that the inordinately long delay in delivering the judgment was inexcusable and resulted in the learned judge's failure to give proper consideration to the appeal brought by the appellant. They contended further that he had forgotten the written submissions of the appellant which, no doubt, contributed to the grave errors that he made.

[143] In responding to this issue, the respondent submitted that the criticism contained in this ground is unfair and unfortunate and that there is no evidence that the "delay has resulted in the judge suffering a lapse of memory". Also, according to them, the learned judge had, in the interim, presided over the longest criminal trial in the history of Jamaica.

[144] In **Cobham v Frett** [2001] 1 WLR 1775, the Privy Council gave the following guidance as to how an appellate court should assess this ground and the issues to be considered when it is argued as a basis of appeal. At pages 1783 and 1784, paragraphs E and H, their Lordships held, inter alia, that:

> " … It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It will be important to consider the quality of the judge's notes, not only of the evidence but also of the advocates' submissions …
>
> In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that

> description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

[145] Having read and assessed the written judgment of Campbell J, I am of the view that it is a carefully considered judgment where all the issues that were raised before him were duly considered and addressed.

[146] In his judgment, he dealt with the issues identified by the parties as arising, as well as those that he highlighted, and he dealt with them in turn by applying the relevant legal principles. It is clear that the learned judge appreciated the issues involved in the case and gave them due consideration in arriving at his decision.

[147] There is nothing in the judgment that could lead this court to find that the learned judge did not appreciate or recall the issues involved in this matter and nothing has been pointed out to the court that could reasonably lead to such a conclusion. In addition, the learned judge also made reference throughout his judgment to the submissions by both parties and his views or conclusion based on the law in indicating whether or not he accepted the submissions made and the reasons for his decision.

[148] More importantly, the complaint by the appellant refers to matters unrelated to the content of the judgment itself, therefore the issues complained of would not be a sufficient basis "to cast doubt on the reliability of the judge's assessment of the evidence or invalidate his findings" (to use a phrase cited in **Cobham**). In addition, the

submissions were in writing, so the learned judge would have had access to all the material. So, it was quite inappropriate for the appellant to argue that the learned judge had forgotten the written submissions.

[149] Also, their Lordships in **Cobham** had cited with approval a number of cases, which in their opinion had taken the correct approach in dealing with the issue of delay. This included the case of the **Times Newspapers Ltd v Singh Choudry** (unreported) 17 December 1999, in which Lord Justice Peter Gibson handed down the judgment of the Court of Appeal and made the following statement:

> "More pertinently, in the absence of any sign whatsoever that the judge has misremembered any evidence it is, in our judgment, impossible to see how the appeal could succeed on this ground."

[150] In the light of the foregoing, I cannot agree with the submissions on behalf of the appellant that the delay in delivering the judgment has led the learned judge to fall into error, by failing to give due consideration to the issues and the written submissions by counsel for the appellant.

[151] For the foregoing reasons, I would dismiss the appeal with costs to the respondent on the appeal to be taxed, if not agreed.

[152] The respondent filed a counter-notice of appeal in which she asked that the appeal should be dismissed and that Campbell J's judgment should be upheld. The counter-notice was, however, not in compliance with rule 2.3(3) of the Court of Appeal Rules in that it asked this court to say that the learned judged was correct in the

approach that he used. It did not go on to identify any additional grounds on which Campbell J's decision could be affirmed. Rule 2.3(3) states:

> "A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds."

In the circumstances the respondent would not be entitled to have a ruling on the counter-notice of appeal or to costs in respect thereof.

BROOKS JA

[153] I have read, in draft, the judgment of my learned brother Dukharan JA. I agree with his reasoning and conclusion and have nothing further to add.

McDONALD-BISHOP JA (AG)

[154] I too have read, in draft, the judgment of my learned brother Dukharan JA and agree with his reasoning and conclusion. I have nothing further that I can usefully add.

DUKHARAN JA

ORDER

The appeal is dismissed. The judgment of Campbell J delivered on 23 October 2013 is affirmed. Costs to the respondent on the appeal to be taxed, if not agreed. No order as to costs in respect of the counter-notice of appeal.