

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO. G 449 of 2010**

4
5
6 **BETWEEN:**

7 **LARA CHISHOLM**

8 **Plaintiff**

9 **AND:**

10 **KRUSE SMITH**

11 **Defendant**

12
13 **Appearances:**

Mr. James Kennedy of Samson & McGrath for the Plaintiff
Mr. Stephen Symons of Bodden & Bodden for the Defendant

14
15
16 **Before:**

Hon. Justice Richard Williams

17
18 **Heard:**

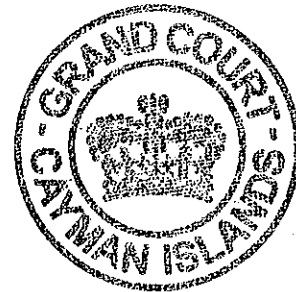
2nd July 2013

19
20 **Draft Judgment circulated:**

19th July 2013

21
22 **Date of Judgment:**

23rd July 2013



24
25 **JUDGMENT - COSTS**

26 **The Background**

27 1. I delivered my written judgment in this case on 13th May 2013 following which I
28 made an order dated 11th June 2013 in which I:

- 29 (i) dismissed the Plaintiff's claim and entered judgment for the Defendant;
30 (ii) on the Defendant's counterclaim, ordered the removal of the Caution
31 lodged by the Plaintiff against the title of the relevant property;
32 (iii) on the Defendant's Counterclaim, dismissed the Defendant's application
33 for damages in relation to the lodging of the caution;

- 1 (iv) on the Defendant's Counterclaim, dismissed the Defendant's application
2 seeking compensation with respect to cleaning of the relevant property;
- 3 (v) on the Defendant's Counterclaim, dismissed the Defendant's application
4 made in the alternative for a share in the North Side property; and
- 5 (vi) on the Defendant's Counterclaim, dismissed the Defendant's application
6 for interest.



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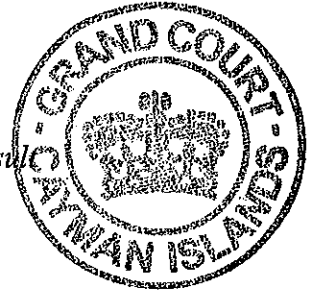
8 **The Application**

9 2. The only issues remaining are as to costs. I have considered the written and oral
10 submissions submitted by the parties in relation to the issue of costs and the
11 taxation process. Although not referred to in any detail at the hearing I have also
12 reviewed the Affidavit of Marsia Weder sworn on 25th June 2013 filed on behalf
13 of the Defendant. The facts and background of this case are set out in some detail
14 in my judgment of 13th May 2013. I do not intend to repeat them herein.

15

16 3. The Defendant seeks an order for costs, including costs of the Counterclaim, on
17 the basis of the ordinary rule that costs follow the event and that the issues raised
18 in the Counterclaim are inextricably linked to the issues in the main claim. Mr.
19 Symons when making this application reminds the Court of his duty set out in
20 Rule 15(4) of the Legal Aid Rules 1997. Rule 15(4) provides that:

21 *"It shall be the duty of an assisted person's attorney, to safeguard*
22 *the interests of the Government on any inter partes taxation*
23 *pursuant to an order for costs made in favour of the assisted*



1 *person where that person may himself have no interest in the results*
2 *of the taxation.”*

3
4 I will return to this Rule later on when I deal with the taxation process in legal aid
5 cases. However, at this stage, I note with interest that the Legislature by this Rule
6 envisages there being an *inter-partes* taxation pursuant to an order for costs made
7 in favour of an assisted person.

8
9 4. During the hearing, Mr. Symons did not continue to seek to persuade the Court
10 that costs should be made on the indemnity basis rather than on the standard basis,
11 presumably acknowledging the fact that the Defendant is legally aided.

12
13 5. The Plaintiff accepts that, in relation to her defeated main claim, costs should
14 follow the event, but contends that she and not the Defendant was the successful
15 party in regard to his Counterclaim.

16
17 6. GCR Order 62, r.4(8) provides that:

18 *“No order for costs shall be made against an assisted person.”*

19
20 Rule 15 (2) of the Legal Aid Rules 1997 provides that:

21 *“No order for costs against an assisted person in favour of an*
22 *unassisted party to any proceedings ... may be made in respect of*
23 *any sum granted by way of legal aid.”*



1 Mr. Kennedy accepts the effect of these provisions, but submits that the
2 Defendant's Legal Aid Certificate did not grant cover for the bringing of
3 the Counterclaim. He argues that the Defendant did not therefore have
4 "*the shield of costs protection afforded by legal aid*" and as a consequence
5 the costs of defending the Counterclaim are recoverable from the
6 Defendant, even for the period after the granting of the legal aid
7 certificate.

8
9 7. I have reviewed the Legal Aid Certificate dated 23rd February 2011 which refers
10 to "*land dispute proceedings*" and has a condition stating "*extended to cover the*
11 *defence of GC #449/2010.*" Mr. Kennedy contends that, as the certificate did not
12 make specific reference to the Counterclaim, there was no intention for that to be
13 covered. However, I note with interest that Mr. Kennedy wrote to the Clerk of
14 Courts seeking to challenge the granting of the Legal Aid Certificate to the
15 Defendant. In that piece of correspondence, Mr. Kennedy appeared to accept that
16 the proceedings in which legal aid had been granted included the Counterclaim. In
17 the opening paragraph of his letter dated 13th June 2012, Mr. Kennedy stated:

18 *"The [D]efendant and [P]laintiff by way of Counterclaim is*
19 *represented by Bodden & Bodden attorneys and has the benefit of*
20 *a Legal Aid Certificate."*

21
22 In the penultimate paragraph of the said letter, under the sub-heading
23 "*Legal Aid Rules*", Mr. Kennedy wrote:



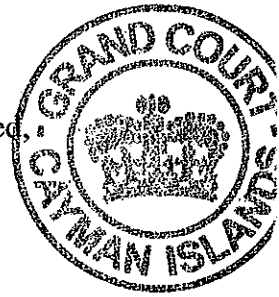
1 *"Although this is a claim for a relatively small amount our client*
2 *appears to have less means than the Defendant (who has also*
3 *issued a counterclaim) and our client faces the prospect of*
4 *succeeding but being unable to enforce an order for costs in*
5 *circumstances where we are concerned that the grant of legal aid*
6 *may have been made by the Court without full knowledge of the*
7 *means of the [D]efendant."*

8
9 Mr. Kennedy went on to say in the following paragraph:

10 *"We respectfully ask the Court to review the Statement of Means*
11 *and this letter and attachments and review the grant of legal aid to*
12 *the [D]efendant/[P]laintiff by counterclaim."*

13
14 In a letter dated 4th January 2012 from Samson & McGrath to Bodden &
15 Bodden, written to outline the Plaintiff's concerns about the granting of
16 legal aid, there was no mention at all about the Counterclaim not being
17 covered by the grant.

- 18
19 8. I have also seen a Legal Aid Certificate dated 17th July 2012, which mentions that
20 the proceedings are "*reconsideration of legal aid*" and the condition is that "*legal*
21 *aid is granted.*" Mr. Symons contends that the Opinion that was supplied in
22 support of legal aid mentioned that the certificate was to cover the Counterclaim. I
23 have reviewed the Opinion prepared by Mr. Symons dated 12th May 2011 in
24 which paragraph 25 clearly mentions the Counterclaim and paragraph 26 speaks
25 to the Defence and the Counterclaim. It is contended by Mr. Symons that the



1 certificate does not specifically exclude the Counterclaim, and that it was granted,
2 having regard to the opinion submitted.
3

4 9. Having considered Counsels' submissions and reviewed the Legal Aid file I am
5 satisfied that the Legal Aid Certificate was intended to grant cover to the
6 Defendant in relation to the Counterclaim. Therefore, if I were to conclude in
7 light of my judgment that the Defendant was the unsuccessful party in relation to
8 the Counterclaim, costs cannot be ordered against him for the period following
9 the grant of the certificate. However, even in those circumstances, I must still
10 consider the Counterclaim, when ascertaining any costs order, including any costs
11 in favour of the Defendant.
12

13 10. Mr. Kennedy also raises his concerns concerning the taxation of costs, submitting
14 that the Legal Aid Rules make no provision for a loser to be involved in that
15 process when she has been ordered to make payment to the Legal Aid Fund if the
16 assisted person is awarded costs. Mr. Kennedy's concerns were heightened
17 because he contends that the Defendant's attorneys' fee notes are excessive and
18 disproportionate to the nature of the case, especially when compared with the
19 level of his Firm's fees. Mr. Kennedy drew to the Court's attention that the
20 Defendant's attorneys' fees from 4th March 2011 to 12th May 2013 total
21 US\$62,192.08, of which \$22,065.16 has been approved at a legal aid taxation
22 without his input, of which \$27,494.42 is still pending legal aid taxation and of

1 which \$12,632.50 is for private pay.¹ Mr. Kennedy indicated that his client's
2 entire untaxed costs for the longer period between December 2010 to May 2013
3 amount to only US\$19,341, and that was on the higher private fees rate.

4
5 11. In light of his concerns, Mr. Kennedy contends that this Court should intervene at
6 the costs hearing pursuant to GCR Order 62, r.4(7) and make orders that the
7 Plaintiff pay only a proportion of the Defendant's costs or state an amount in
8 respect of the Defendant's costs. In effect, Mr. Kennedy is inviting me to carry
9 out the role of the taxing officer.



10
11 **The Law and Conclusions in Relation to the Awarding of Costs**

12 12. GCR Order 62 was amended apparently to bring our rules more in line with the
13 modern English rules. The award of costs is in the discretion of a Trial Judge, but
14 the discretion should be exercised along well-settled lines. The basic principle set
15 out in GCR O.62, r.4 is that reasonable costs incurred in conducting proceedings
16 in an economical, expeditious and proper manner should follow the event except
17 where it appears in all the circumstances of the case that some other order should
18 be made as to the whole or any part of the costs. GCR Order 62, r.4(7) provides:

19 *"The orders which the Court may make under this rule include an*
20 *order that a party must pay –*

21 (i) *a proportion of another party's costs;*

22 (b) *a stated amount in respect of another party's costs;*

¹ Paragraph 19 of the Plaintiff's written submission on costs.



- (c) *costs from or until a certain date only;*
- (d) *costs incurred before proceedings have begun;*
- (e) *costs relating to particular steps taken in the proceedings;*
- (f) *costs relating only to a distinct part of the proceedings; and*
- (g) *interest on costs (that the prescribed rate for Cayman Island dollars) from or until a certain date, including a date before judgment."*

13. Therefore, I have a wide discretion to do justice between the parties, although this discretion must be exercised judicially, having regard to the underlying principle that the "real winner", as distinct from a nominal winner, is generally entitled to his costs. Further, I should not embark on a minute examination of all the various issues and the time taken to determine every issue, but should consider the event or outcome of the litigation and, in the light of that consideration, and any timely offers of settlement that were made, should use a broad brush in attempting to arrive at a just result.

14. The general rule governing the award of costs to a successful Defendant was laid down by Atkin LJ in *Ritter v Godfrey* [1920] 2 KB 47 at 60:

"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or



1 (3.) has done some wrongful act in the course of the transaction of
2 which the plaintiff complains.”
3

4 15. I am satisfied that the Defendant has succeeded in the claim brought against him
5 by the Plaintiff. In the circumstances of this case, there is no reason to depart from
6 the normal rule that those costs should follow the event. As I have already stated,
7 this is not a position challenged by the Plaintiff and Mr. Kennedy has not sought
8 to establish a basis for any departure from the usual rule. There is no valid reason
9 why I should deprive the successful Defendant of his costs of successfully
10 defending the claim. It might be argued that the principle applies all the more in
11 the case of a successful defendant than in that of a successful plaintiff, for the
12 former is brought to Court to answer process, whereas the latter comes to Court of
13 his own free will.

14
15 16. Accordingly, the Plaintiff should pay the costs incurred in relation to her
16 unsuccessful claim and they should be on the standard basis.

17
18 17. I have now to consider the effect of the Counterclaim in relation to costs. As I
19 have already indicated, this is a case in which I have found that the Defendant is
20 assisted not only to defend the claim also to advance his counterclaim. This means
21 that even if I were to find that he was not successful in the Counterclaim, he
22 would not be required to pay costs incurred during the time of legal aid coverage.
23

1 18. Both parties contend that they were successful in the Counterclaim. The
2 Defendant does not accept that he should be responsible for any part of the
3 Plaintiff's costs in defending the Counterclaim. The Defendant claims that the
4 issues in the Counterclaim are inextricably linked to the issues in the main claim.
5 The Defendant was successful in his Counterclaim only to the extent that the
6 caution was removed. However, that removal was an inevitable consequence of
7 him being successful in defending the claim and required little argument. The
8 Defendant was unsuccessful in arguing that damages should be awarded as a
9 consequence of the caution being lodged. The Defendant was also unsuccessful in
10 seeking damages for cleaning of the property. The Plaintiff was successful in
11 these more substantial areas of the Counterclaim which required more detailed
12 submissions, and she should be viewed as being the successful party in relation to
13 the Counterclaim.



14
15 19. I find that this is a case where the Defendant has won, and been awarded costs on
16 defending the claim, but the Plaintiff would ordinarily be awarded costs on some
17 of the other issues raised by successfully defending the majority of the
18 Counterclaim. However, some of these costs are common to both issues. The
19 Plaintiff is entitled, on the standard basis, to the costs of the Counterclaim
20 incurred prior to the period when the Defendant was legally aided. With this in
21 mind, I prefer the approach adopted by the House of Lords in *Medway Oil and*
22 *Storage Company Ltd v Continental Contractors Ltd and Others* [1929] A.C.

1 88. That case involved a claim for damages for the wrongful repudiation of a
2 contract to purchase a large quantity of kerosene oil. The defendant purchasers
3 counterclaimed for the difference between the contract and the market price of the
4 oil on the ground that the plaintiff vendor's had themselves repudiated the
5 contract by failing to deliver the first instalment of the oil on time. The defence to
6 the counterclaim was that the defendants' tanks were not ready to receive the oil
7 and that the defendants had conspired with the plaintiff's own suppliers to defeat
8 the plaintiff's attempts to obtain the oil. MacKinnon J, the Trial Judge, dismissed
9 both the claim and the counterclaim with costs on the grounds that the plaintiff
10 had not established a repudiation by the defendants and (in relation to the
11 counterclaim) that the defendants had suffered no loss. The House of Lords
12 accepted that the costs attributable to work done, which was common to both the
13 claim and the counterclaim, could not be apportioned and the plaintiff was only
14 entitled to recover the extra costs solely attributable to the counterclaim. The
15 House of Lords, reversing the decision of the Court of Appeal, recognised that
16 some costs consist of a composite fee covering separately identifiable work
17 carried out on the different issues in the case, to which the costs order relates. The
18 approach of the House of Lords means that a taxing officer must seek to identify
19 work that would not have had to be done but for the counterclaim.



1 20. I see merit in repeating the following significant part of Viscount Haldane's
2 review herein, as he helpfully sets out the approach of the House of Lords, when
3 he stated at page 92:

4 *"The view of the Court of Appeal is that where the plaintiff fails*
5 *with costs in his claim and the defendant with costs in his*
6 *counterclaim, the proper mode of taxation is not, as MacKinnon J*
7 *thought, to give the defendant all costs incurred in resisting the*
8 *claim, depriving him only of any costs which he has incurred*
9 *exclusively in supporting his defeated counterclaim. In that view*
10 *no question of what is called apportionment can arise. The Court*
11 *of Appeal has on the contrary, held that where evidence is given of*
12 *facts which are put forward in connection with the claim and the*
13 *counterclaim in common, there is no reason why the plaintiff*
14 *should not be allowed the costs incurred in relation to them when*
15 *resisting the counterclaim on which he has got judgment, and the*
16 *duty of the taxing master is to apportion the amounts when taxing*
17 *the entire costs...."*

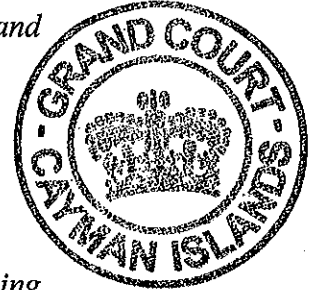


18
19 21. Viscount Haldane continued at page 101:

20 *"My Lords, the principle applied in Wilson v Walters² may have*
21 *consequences in individual cases which would be harsh if the*
22 *taxing master did not supervise the costs of claim and*
23 *counterclaim closely, and split up the cost of items which are*
24 *required by both. In such instances, he takes an item, a single fee*
25 *on the plaintiff's brief for example, and split it into two notional*
26 *fees, the one attributable to the claim, and the other to the*
27 *counterclaim. This is not an apportioning, in which the payment is*

² [1926] 1 K.B. 511.

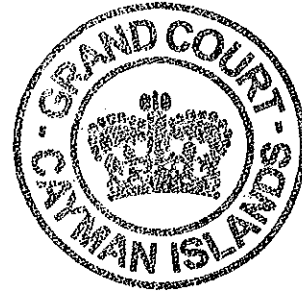
1 *treated as a single item, and the question is to what it is*
2 *attributable. It is in reality a notional division of what on the face*
3 *only of it is one item. If the principle is not kept in mind confusion*
4 *will follow, as was pointed out by, and out by Lindley M.R. and*
5 *other judges....”*
6



7 22. At page 102 Viscount Haldane continued:

8 *“The order of the Court of Appeal went on to direct the taxing*
9 *master to allow the respondents (the plaintiffs) all costs properly in*
10 *fact incurred by them in defending the counterclaim, and to allow*
11 *the appellate (defendants) all costs properly in fact incurred by*
12 *them in defending the action, and directed that all common items*
13 *be apportioned in the discretion of the Taxing Master accordingly.*
14 *The direction given by MacKinnon J. was in effect that when, as*
15 *here, the defendant has succeeded in his defence but failed in his*
16 *counterclaim he is entitled to the costs which he has actually*
17 *properly incurred in defeating the claim (including in this case, the*
18 *costs of the issues mentioned), but is not entitled to any costs which*
19 *he would not have incurred had he not counterclaimed. The*
20 *plaintiffs are only entitled to such costs as they would not have*
21 *incurred had they not been compelled to meet the counterclaim.*
22

23 *The view taken in the Court of Appeal was very different. ‘In*
24 *considering,’ said Bankes LJ, ‘what the real contest between the*
25 *parties under each of these heads’ (the issues) ‘was, I do not think*
26 *that justice can be done except by treating the costs of the*
27 *litigation under each head as costs which must be apportioned if*
28 *the order as to costs is to be complied with.’ Atkin LJ says that ‘It*
29 *appears to me wrong both in law and fact to say that when a man*



1 *sues for 62,000l. and is sued in counterclaim for 46,000l., and the*
2 *event is to be determined by consideration of the same evidence, he*
3 *incurs all the costs of evidence because of the claim. He seems to*
4 *me obviously to incur the cost because of both; in other words the*
5 *costs are occasioned by both. And it is quite irrelevant as to such*
6 *costs to consider what he would have incurred if there were no*
7 *counterclaim, that is with no other cause operating. The result of*
8 *the rule now laid down is that where there is a substantial*
9 *counterclaim involving common evidence, the Master will*
10 *apportion. But apportion does not necessarily mean divide into*
11 *equal moieties. He will decide how much in fact should be*
12 *attributed to the claim; how much to the counterclaim.' He thought*
13 *that the statement of Fry J. in Saner v Bilton that the plaintiff was*
14 *to be represented as letting loose the waters of litigation, and*
15 *therefore if unsuccessful should be in a worse position than an*
16 *unsuccessful counterclaimant, unsatisfactory.*

17 *Lawrence L.J. concurred, being of opinion that the authorities*
18 *disclosed no consensus of view. He followed what was laid down in*
19 *Christie v Platt.*

20 *My Lords, the judgments in the Court of Appeal appear to me to go*
21 *back in spirit as well as in letter on the series of decisions by Fry*
22 *J., Jessel MR, Lindley M.R., and other eminent judges whose*
23 *opinions I have already examined. The purpose of these opinions*
24 *was to find a principle which might extricate the law relating to*
25 *taxation in cases like the present from the hopeless confusion in*
26 *which Fry J. found it. The successive decisions, down to Christie v*
27 *Platt, established a principle which in individual cases may seem a*
28 *hard one. But it is a clear one, and in most cases will operate*
29 *justly, as was pointed out by Fry J., while in others the Taxing*

1 *Master can correct the effect of applying it in isolation as an*
2 *abstract rule, by dividing items as distinguished from apportioning*
3 *general costs. Such as it is, the rule was one necessary to lay down*
4 *in some form, and I think that the form in which it has been laid*
5 *down here and in Ireland was adopted by the learned judges, who*
6 *did so because practice and authority alike pointed to it as the*
7 *proper one.*

8 *I am therefore of opinion that we must reverse the judgment of the*
9 *Court of Appeal and restore that of MacKinnon J.”*



11 23. Therefore, in a case such as this where the Claim and Counterclaim both fail the
12 Clerk of the Courts should not apportion the costs, but should:

- 13 (i) treat the claim and counterclaim as two different actions;
14 (ii) ascertain what items relate to each action; and
15 (iii) divide into two any items incurred partly for one action, and partly for
16 the other.

18 24. Following the costs hearing, leave having been given, Mr. Symons has filed
19 particularly helpful written submissions concerning the issue raised by Mr.
20 Kennedy as to whether the rules enable an *inter-partes* hearing of taxation of legal
21 costs. Having reviewed his submissions and the legislation I endorse his
22 interpretation.

24 25. Mr. Symons indicates that the procedure is that after the Court makes an *inter-*
25 *partes* order as to costs, the attorney of an assisted person then prepares a legal aid

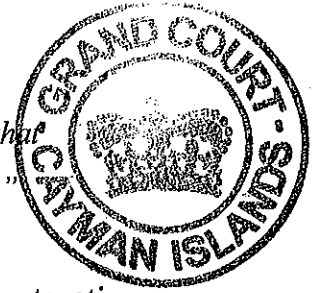
1 bill of costs and presents it for legal aid taxation to the Clerk of Court, pursuant to
2 Rule 17(1) Legal Aid Rules 1997. The Clerk of Court then reviews the bill and
3 taxes it. Pursuant to Rule 17(4), having taxed it, the Clerk of Court shall issue
4 certificate of legal aid taxation.



5
6 26. If the assisted party's attorney is satisfied with the amount allowed to him
7 taxation, then it is at this juncture that the attorney for the successful party
8 prepares the Bill of Costs in Form 314. If he is dissatisfied then the Form 314 will
9 be prepared by him after the application of his hearing for re-taxation before a
10 judge. The Form 314 will outline the amounts and items of hours which have
11 been allowed to taxation by legal aid. The Form will then be served on the paying
12 party pursuant to Order 62 r.27. Upon receipt of the Form, the paying party will
13 be able to review the same and state to what degree he agrees with and accepts
14 liability to pay the amounts claimed as provided for in Order 62, r.27. If he
15 disagrees with the level of taxed costs, he will serve a written Statement of
16 Objections. This will then mean that the taxation proceedings pursuant to Order
17 62, r.28 will commence.

18
19 27. As already mentioned herein, Rule 15(3) of the Legal Aid Rules provides that it
20 is:

21 *"the duty of an assisted person's attorney to safeguard the interests*
22 *of the Government on any inter-partes taxation pursuant to an*



1 *order for costs made in favour of the assisted person where that*
2 *person may himself have no interest in the result of the taxation."*

3
4 The Rules therefore envisage the paying party being involved in the taxation
5 process. This involvement would come about when the Clerk of Courts reviews
6 the paying party's written statement of objections prepared pursuant to order 62, r.
7 27(4) when carrying out the required inquisitorial taxation. If the Clerk of Courts
8 feels that she cannot properly carry out his taxation function without receiving
9 oral submissions, she must send a notice of appointment not only to the successful
10 assisted party, but also to any paying party who has completed column 4 of Form
11 314.

12
13 28. Having regard to this procedure, if the assisted person is awarded costs, two
14 taxations are necessary. One taxation is to determine how much the loser must
15 pay to the Legal Aid Fund and the other is to determine how much will be paid
16 out of the Legal Aid Fund to the assisted person's attorney. This means that Mr.
17 Kennedy's concerns would be addressed even if the Clerk of Courts has chosen to
18 carry out an interim legal aid taxation and allowed payment of an amount to the
19 Defendant's attorney that the paying party feels to be excessively high.

20
21 29. Of course, the fees raised by the Defendant's attorney at a time when he was not
22 covered by the Legal Aid Certificate will be dealt with separately on taxation and
23 that taxation will follow the normal course.

1 30. Having regard to my view about the adequacy of the taxation procedure and the
2 circumstances of this case, I do not feel it appropriate for me to take on the role of
3 the taxing officer. The Clerk of Courts is better placed to do that. Therefore, I do
4 not feel it appropriate to make the orders commended by Mr. Kennedy pursuant to
5 Order 62, r.(7)(a) and (b).

6
7 31. The Clerk of Courts should understand that, when carrying out the legal aid
8 taxation, if, an assisted party is successful and the other party is required to pay
9 costs, there will be an additional taxation. This should concentrate the Clerk of
10 Courts' mind, especially when carrying out interim taxations before a case has
11 come to its conclusion.

12
13
14 Dated this 23rd day of July 2013.

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17
18
19 

20 **The Honourable Mr. Justice Richard Williams**
21 **JUDGE OF THE GRAND COURT**
22

