## DCPI 1187/2016

[2019] HKDC 717

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1187 OF 2016

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BETWEEN

WONG LAI KWAN KAY Plaintiff

and

CHINA MOBILE HONG KONG CO LTD Defendant

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Before: Master David Chan in Chambers (Open to public)

Dates of Hearing: 14 December 2017 and 8 June 2018

Date of Decision: 31 May 2019

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DECISION

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*Introduction*

1. This is an application by the defendant (“Defendant”), ie the paying party, to review my earlier taxation of the plaintiff’s bill of costs on 5September 2017.
2. As a matter of background, the plaintiff (“Plaintiff”), ie the receiving party, commenced taxation and filed her bill of costs on 7 April 2017 (the “Bill”). The Defendant filed its list of objections to the Bill on 25 April 2017 (“LOO”).
3. As the amount claimed in the Bill is below HK$200,000, the same was set down for provisional taxation by a chief judicial clerk (“CJC”) pursuant to O 62, r 21B of the Rules of the District Court (“RDC”) and paragraph 26(2) of Practice Direction (“PD”) 14.3. The provisional taxation took place on 24 May 2017, and an order *nisi* on costs after provisional taxation was issued by the CJC (“CJC’s Order *Nisi*”) on even date. On 1 June 2017, a notification was issued by the CJC to the parties (the “Notification”). As per paragraphs 4 and 5 of the Notification:-

*“4. The parties are at liberty to seek clarification within 14 days of the notification hereof. If no objection is made to the order nisi (or its clarification, as the case may be) within 14 days of the notification, the order nisi will become absolute.*

*5. If any party objects to the order nisi (or its clarification), he should apply to the Taxing Master in writing for a hearing stating his grounds of objections and giving an estimation of the hearing time. Upon receipt of an application for a hearing, the Taxing Master will set the bill down for taxation with a hearing and give further directions as he deems fit.”*

1. The directions set out in paragraphs 4 and 5 of the Notification are in effect a summary of the directions under paragraphs 35 to 37 of PD 14.3. Under paragraph 37 of PD 14.3, upon receipt of an application for a hearing, the taxing master could set the bill down wholly or partly for taxation with a hearing.
2. By a letter dated 13 June 2017, the Defendant’s solicitors, Messrs Deacons, lodged a letter requesting for a formal taxation hearing, as the Defendant was not satisfied with the CJC’s Order *Nisi*. In particular, the Defendant sought clarification in respect of the following items:-

*“Objection Item Nos. 1, 3-6, 8-10, 12, 13, 15-17, 20, 23-26, 29”*

1. A call-over hearing was fixed for 20 July 2017. The call-over hearing was heard before me. The case was then adjourned for taxation with a hearing on 5 September 2017 with 2 hours reserved.
2. In view of the above, the taxation hearing before me on 5 September 2017 was a hearing set on part of the Bill only.
3. On 5 September 2017 (“Taxation Hearing”), I had taxed the above items by amending the LOO in red, and gave the standard directions to the parties pursuant to paragraphs 38(1) to (3) of PD 14.3 (“Taxing Master’s Order”).
4. After the Taxation Hearing, the Defendant was unhappy with the Taxing Master’s Order. The Defendant applied for a review of the same on 18 September 2017 (the “Review”). The application was attached with a table setting out the Defendant’s grievances with the Taxing Master’s Order (“Defendant’s Objections”). In gist, the Defendant complained that for items on the hourly rate of fee earner, 12 and 16 of the Bill, I should not have allowed costs which were higher than those allowed in the CJC’s Order *Nisi*. The Defendant was also dissatisfied with the degree of reduction I had made to item 20.2 of the Bill.
5. The call-over hearing for the Review was fixed for 14 December 2017. Mr A. Fung (“Mr Fung”) and Mr Barry Leung (“Mr Leung”), the law costs draftsmen for the Plaintiff and the Defendant respectively, attended the same. During the call-over hearing, Mr Leung maintained the Defendant’s stance that, at the Taxation Hearing, my discretion was either to further reduce the amount of costs as requested by the Defendant, or to affirm the amount that was allowed in the CJC’s Order *Nisi*. I did not have the power to consider afresh the items in question, and award an amount which exceeded the CJC’s assessment.
6. On the other hand, Mr Fung asserted that the Taxation Hearing, which was conducted pursuant to O 62, r 21B of the RDC, was a taxation *ab initio*. As such I had the unfettered discretion to allow such costs as are necessary and proper in such a suitable amount. Alternatively, Mr Fung argued, despite that there was no application for clarification or objection from the Plaintiff to the CJC’s Order *Nisi*, it was opened for the Plaintiff to ask for a higher amount to be granted at the Taxation Hearing.
7. After hearing the initial submissions of Mr Fung and Mr Leung, I adjourned the Review to 8 June 2018 for full argument on the following questions:-
8. Whether the taxation hearing under O 62, r 21B(4) of the RDC (hereinafter referred to as “Formal Taxation”) is a hearing *ab initio*? In the premises, what are the powers of a taxing master in a Formal Taxation when dealing with the objections or application for clarifications on a provisional taxation which was conducted by a CJC (hereinafter referred to as “CJC’s Provisional Taxation”)? (“1st Issue”)
9. If the Formal Taxation is not a hearing *ab initio*, whether in the absence of an application for clarification or objection, it would be opened for a respondent to do so at the Formal Taxation? (“2nd Issue”)
10. At the end of the call-over hearing on 14 December 2017, I also directed the Plaintiff to file a reply to the Defendant’s Objections. The Plaintiff has duly complied with such direction on 28 December 2017 (“Plaintiff’s Reply”).
11. At the substantive hearing, the Plaintiff was represented by counsel Mr Jun Alric Lee (“Mr Lee”) together with Mr Fung, and the Defendant was represented by counsel Mr Leon Ho (“Mr Ho”) and Mr Leung.
12. For clarity sake, I would first set out the parties’ arguments, to be followed by my decision on the 1st and 2nd Issues, before dealing with the items under review.

*The Defendant’s Arguments*

1. As highlighted in the above, the Defendant’s main complaint is that I should not have awarded costs on items on the hourly rate of fee earner, 12 and 16 of the Bill at a rate higher than those granted in the CJC’s Order *Nisi*, especially since the Plaintiff has not lodged any objection to the same.

*1st Issue*

1. On the 1st Issue, Mr Ho agreed that O 62, r 21B of the RDC does not spell out a taxing master’s power in a Formal Taxation following a CJC’s Provisional Taxation. However, the Plaintiff’s assertion that a Formal Taxation is a “taxation *ab initio*” and that a bill of costs should be heard afresh at a Formal Taxation is equally not supported by any authority.
2. Mr Ho referred to the *Civil Justice Reform – Final Report*[[1]](#footnote-1), highlighting that provisional taxation under O 62, r 21B was introduced due to considerable demand for taxation. The purpose of a provisional taxation is to save time and costs. As such, it is wrong for the Plaintiff to suggest that a Formal Taxation should be conducted by way of a hearing *de novo*, as if the CJC’s Provisional Taxation had never happened at all. Such suggestion would defeat not only the said purpose of a provisional taxation, but also the underlying objectives of the RDC as set out in O 1A, r 1(a), (b), (c) and (f) of the RDC.[[2]](#footnote-2)
3. Mr Ho added, by paragraph 5 of the Notification, it is an express requirement that a party seeking clarification or objection should state the grounds of the same in the letter. If a taxing master in a Formal Taxation is supposed to conduct the same without regard of the objections made with reference to the decision in a CJC’s Provisional Taxation, such requirement would be rendered meaningless.

*2nd Issue*

1. As to the 2nd Issue, Mr Ho argued that by the CJC’s Order *Nisi*, this court has already granted an interim order on the taxation of the Bill. And at the Taxation Hearing, what the Defendant sought was for a variation of CJC’s Order *Nisi*.
2. Furthermore, on the basis that the Bill should not be taxed afresh, it would be an error of law for me to go beyond what is contested by the Defendant. Mr Ho referred to the case of *UDL Holdings Ltd & Anor v Leung Yuet Keung & Anor*[[3]](#footnote-3). In that case, Stone J had made a cost order *nisi* with a direction that it would become absolute unless the parties within 21 days make an application to vary the same. The plaintiffs did make such an application within time. The parties filed their written submissions on the plaintiffs’ application for variation as directed, but in the written submissions of the defendants, they also made their own belated application for variation. In refusing the defendants’ application, Stone J had this to say:-

*“36. This application is patently an ‘afterthought’ which obviously has been precipitated by the plaintiffs’ application,* ***paragraph 4 of the defendants’ submissions in opposition to those of the plaintiffs commencing this: “As the issue of costs is now re-opened and considered by the court afresh, in light of the overall conduct of the parties in this action, the defendants further submit that the costs of the action … should be on an indemnity, alternatively common fund basis …”***

*37. It seems to me that in this context two distinct issues arise for consideration: first,* ***are the defendants now entitled to belatedly raise the issue of the scale of costs at this late stage, not having done so by application within the 21 days as specified within the final paragraph (paragraph 110) of the Judgment?****; and second, and if so, what are the merits of this application?*

*……*

*42. Necessarily implicit within the defendants’ approach is that in these circumstances in which variation of the existing order nisi is sought to be raised by the plaintiffs, the defendants now are entitled as of right to mount this cross-application for variation absent any letter or summons announcing their intention in this regard. Is this correct?*

*……*

*45. As I understand the situation, notwithstanding the date of the judgment containing the order nisi, that is 22 October 2008, no move whatever was made by the successful defendants to vary this order nisi until the plaintiffs themselves sought a variation.*

*46. Whilst the matter has not been expressed thus, the defendants’ underlying assumption is that by means of the plaintiffs’ application so to vary, the plaintiffs thereby have rendered the costs’ issue at large, with the result that there is no necessity to ask for an extension of the 21 day period as prescribed for a variation application, nor indeed to proffer any explanation for the delay, and that the defendants thereby are entitled to put forward their own plea for a variation.*

*47. With respect, I consider that this approach is neither permissible nor appropriate.*

*48. It seems to me that in principle an application to vary costs’ order nisi is ‘party-specific’, by which I mean that,* ***absent any cross-application within the prescribed period by the opposing party in whatever terms may be considered appropriate, the approach of the respondent to any variation application as properly constituted is confined to resisting the application and to upholding the order nisi as originally made, and I fail to see why the fact of a variation application by one party in effect gives the opposing party carte blanche to make its own distinct and substantially different variation application out of time.***

*……*

*50. Thus I am unable to agree with the contended effect of the defendants’ reliance, as outlined in its ‘Addendum to Defendants’ Submissions’, upon the terms of Order 42, rule 5B(6), which provides that “Where a written decision is given pursuant to this rule the Court may make therein an order nisi as to costs and, unless an application has been made to vary that order, that order shall become absolute 14 days after the decision is pronounced”, and the corresponding assertion, following upon citation of that Order, that “the order nisi has not become absolute due to the plaintiffs’ application to vary and therefore can be considered by the court afresh”.*

*51.* ***The short point, it seems to me, is that the order nisi indeed can be reconsidered by the court, upon appropriate application within time, in terms of the variation proposed, but only in terms of that proposed variation****, and that if and in so far as the opposing party wishes to canvass its own variation, for the reasons adumbrated in any specific application, the court can and will consider that variation also; however, as earlier indicated, what in my view it does not do is effectively to throw the entire issue costs’ issue open to general and unrestricted debate, and thereby relieve the opposing party from responsibility for the proper formulation, within time, of its own proposed variation.”* (emphasis added)

1. Mr Ho also referred to the case of *Lee Sai Nam v Li Shu Chung & Anor*[[4]](#footnote-4), where the learned deputy judge adopted the *UDL* case. At paragraph 21, DHCJ Leung stated that:-

*“21. In the present case, I consciously made a nisi order as to costs instead of leave the issue of costs at large and inviting the parties to make submissions. It would therefore be for the parties to apply for variation of the nisi order, if they desire. There was no indication whatsoever by Ken or Joseph if any intention to seek to vary the nisi costs order. That was so even in the correspondence upon this court’s consultation with them on the directions for paper disposal as envisaged by the Judgment. When they finally came to decide to seek to vary the nisi costs order, they still cared not to take out any application, let alone one for extension of time.* ***In the circumstances, what they may legitimately do is to respond to the applications by the Father, Seline and Yuen Hing and no more.****”* (emphasis added)

1. In light of these authorities, Mr Ho submitted that in the absence of any application to vary the CJC’s Order *Nisi*, the Plaintiff is debarred from doing so at the Taxation Hearing. **In addition, my discretion at the Taxation Hearing is restricted to either to affirm the CJC’s Order *Nisi* or to vary the same as per the grounds stated in the Defendant’s application**.
2. Lastly, Mr Ho made reference to O 62, r 21B(5) of the RDC. It is stated therein that the party who requested for a Formal Taxation post-provisional taxation, would have to bear costs of the Formal Taxation if the taxed costs do not materially exceed the amount allowed under the provisional taxation. It is therefore, as contended by Mr Ho, unfair to the Defendant if the Plaintiff could tack on with the Defendant’s objection without herself making an express request for Formal Taxation, thereby reaping benefits from the process whilst not being exposed to the possible adverse costs consequences.

*The Plaintiff’s Arguments*

*1st Issue*

1. In answer to the 1st Issue, Mr Lee’s submission was that a taxing master is not bound by the rulings made under the CJC’s Provisional Taxation. Once an application for Formal Taxation is made, the bill of costs would be heard afresh. As the taxing master is the primary decision maker, and he has unfettered discretion to allow such costs as are necessary and proper in such suitable amount upon a Formal Taxation, which is a taxation *ab initio*.
2. Mr Lee added that a taxing master, as compared to a CJC conducting a provisional taxation, would be in a better position to do justice, as the former would have the benefit of reading the taxation bundles, and be assisted by the parties’ submissions.
3. In support of these arguments, Mr Lee first referred to the case of *Lam & Lai Solicitors v Ho Chun Yan Albert*[[5]](#footnote-5). He cited following passage from Lam V-P’s judgment:-

*“5. … The statutory scheme in O. 62 clearly envisages that the* ***taxing master would be the primary decision maker in taxation proceedings****.*

*6. In a taxation hearing before a taxing master,* ***all the working papers of the solicitor involved would be placed before him and he would examine the papers in some detail in connection with any disputed item in a taxation. Assisted by law costs draftsmen, the taxing master can use his expertise in taxation in assessing such materials****. The process is akin to one of weighing the evidence at a trial. … Like a finding of facts by a judge, a taxing master’s reasons for decision cannot always capture all the minute nuances in his assessment process in coming to a particular finding on a disputed item.”* (emphasis added)

1. Mr Lee also referred to the case of *Wong Kam Tong v Tin Shing Court, Yuen Long (IO) (No 2)*[[6]](#footnote-6) to emphasize on the broad discretion that the court is vested with when considering what cost order to make.
2. Apart from the above, Mr Lee discussed in his submissions the former practice under O 62, r 31 of the English Rules of the Supreme Court (“RSC”), and the case of *Bromsgrove Medical Ltd v Vaughan & Co Ltd*[[7]](#footnote-7). What he wanted to illustrate from these is that provisional taxation is merely a procedural alternative, and it does not in any way fetter a taxing master’s discretion at a subsequent Formal Taxation.
3. In a nutshell, O 62, r 31 of the RSC provided for provisional taxation by a proper officer.[[8]](#footnote-8) It could be done upon the receiving party’s application or the taxing officer’s own motion. If this course is intended by the taxing officer, notice would be issued to both receiving and paying parties, and they would then have 14 days to inform the court whether they wish to be heard on the taxation. If any of the parties wishes to be heard, an appointment would be made. Conversely, where none of the parties wishes to be heard, the proper officer would proceed to tax the bill of costs provisionally. The result would be informed to the receiving party, and the latter would have 14 days to give notice that he wishes to be heard on the taxation. If such notice is given, a taxation hearing would be fixed.
4. The above procedures were also summarized by Chadwick J in the *Bromsgrove* case.
5. What Mr Lee was trying to link up to is the following passage at pp 1192-1193 of the *Bromsgrove* case, which explained what could happen at the hearing requested by the receiving party after provisional taxation:-

*“At the appointment, the receiving party will have the opportunity to make representations in support of those items in his bill which the taxing officer has, provisionally, disallowed or in support of those amounts which the taxing officer has, provisionally, taxed down. At that appointment the taxing officer will decide whether any (and, if so, which) of the items which he had, provisionally, disallowed should be restored and whether any amounts provisionally taxed down should be allowed in the sum claimed or* ***in some other sum****.”*(emphasis added)

1. By the above, Mr Lee submitted that a taxing master at a Formal Taxation is not bound by the decisions previously made under a provisional taxation.
2. In further support of this argument, Mr Lee referred to paragraphs 777-778 of the *Civil Justice Reform – Final Report*. What Mr Lee wished to highlight from these paragraphs was that the provisional taxation is a procedure alternate to a Formal Taxation. Order made under provisional taxation is on a *nisi* basis. Parties could seek a Formal Taxation after the order *nisi* is made. If a Formal Taxation was held, all questions of costs, including the effect of any sanctioned payment or offer, could be dealt with at that hearing.[[9]](#footnote-9)
3. On this point, Mr Lee cited the case of *Citi Creation Investment Limited vs The Incorporated Owners of Kwai Wan Industrial Building & Ors*.[[10]](#footnote-10) This is a case where the paying party did not file any list of objections to the receiving party’s bill of costs. Provisional taxation was conducted by taxing master and an order *nisi* was made. The paying party, pursuant to O 62, rr 21B(3) and (4) of the RDC, requested for a Formal Taxation. However, on the day of hearing, the taxing master refused to tax the bill formally, and made the order *nisi* absolute, on the ground that no list of objections was ever filed by the paying party. On appeal, HH Judge HC Wong first made clear that she would not go so far as to say the order *nisi* made after provisional taxation had been set aside by setting down of a Formal Taxation. Nevertheless, the learned judge added that the order *nisi* made under provisional taxation was an order to show cause, and the paying party had a right to show cause at the Formal Taxation. This was so despite that the paying party had failed to file and serve its list of objections within the prescribed time. Thus, a Formal Taxation should be conducted.
4. Based on the above, Mr Lee submitted that provisional taxation is introduced as a measure of efficiency, so as to save time and cost.[[11]](#footnote-11) Its introduction does not curtail a party’s right to make submissions as to disputed items and to invite the taxing master to exercise his broad discretion in light of all the circumstances and the parties’ fully argued submissions. There is therefore no basis to say this procedural alternative, which would result in an order *nisi*, is intended to limit the broad discretion of a taxing master at a Formal Taxation.
5. Taking this point further, Mr Lee made reference to the power of a taxing master at a review hearing under O 62, rr 33-34 of the RDC, in particular O 62, r 34(2). Under this rule, a taxing master may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of the item on review. Mr Lee submitted that if a taxing master’s discretion is somehow fettered by the provisional taxation, such restriction on a taxing master would be completely defeated by O 62, r 34(2), as the aggrieved party could have the taxation of the subject item heard afresh under the review process.

*2nd Issue*

1. Mr Lee’s argument under this head also premised on the unfettered discretion of a taxing master in the Formal Taxation. He again compared the Formal Taxation with the review hearing under O 62, r 33 of the RDC. Mr Lee stressed that while the latter requires an applicant to specify the taxed items that he objected to and the grounds of objections failing which his review application could be dismissed[[12]](#footnote-12), there is no such requirement and/or consequence for a Formal Taxation. This shows that, Mr Lee argued, unlike a review, a Formal Taxation post-provisional taxation is not party-specific, and does not limit a taxing master to either uphold the order *nisi* or rule in favour of the applying party. Thus, regardless of whether a party has lodged any objection to the result of the provisional taxation, it does not fetter a taxing master’s exercise of discretion at the Formal Taxation.

*The Plaintiff’s Reply to the Defendant’s Submissions*

1. In his supplemental skeleton submissions, Mr Lee tried to distinguish the *UDL* case and *Lee Sai Nam* case from the present case. Those cases concerned O 42, r 5B(6) of the Rules of High Court (“RHC”), Cap 4A,[[13]](#footnote-13) which provides:-

*“Where a written judgment is handed down pursuant to this rule the Court may make therein an order nisi as to costs and, unless an application has been made to* ***vary that order****, that order shall become absolute 14 days after the decision is pronounced.”* (emphasis added)

1. Mr Lee further highlighted that an application under O 42, r 5B(6) of RHC is to be made by summons.[[14]](#footnote-14)
2. Based on the above, the point that Mr Lee wished to get across is that under O 62, r 21B(3) of the RDC, the application is not for variation of the order *nisi*, but specifically for a Formal Taxation. As such, the matters that a taxing master could consider at the Formal Taxation are also not confined to those set out in a summons, unlike an application under O 42, r 5B. Thus, a Formal Taxation is not party-specific, although it is so when it comes to the possible costs liable to be paid by an applying party.
3. Finally, Mr Lee referred to the case of *Chapman v Chapman*[[15]](#footnote-15). At page 605 of the judgment, Sir Robert Megarry V-C stated that *“… Order 62 is intended to be, and very nearly is, a self-contained code for the taxation of costs.”* Mr Lee relied on this to challenge the applicability of the requirements under O 42, r 5B to a Formal Taxation.

*The Defendant’s Replies*

1. In his written note of reply, Mr Ho disputed the applicability of the *Lam & Lai Solicitors* case and the *Wong Kam Tong* case to our present case. First, the said cases did not deal with the effect of an order *nisi* made by a CJC and how it would affect a Formal Taxation. Second, where the CJC had provisionally taxed a bill of costs, he should be the primary decision maker, not a taxing master who would only preside over the subsequent Formal Taxation. In support of this proposition, Mr Ho gave the example where there is no clarification sought on or objection made to the order *nisi* after provisional taxation, the same would become absolute. It follows, where there was a provisional taxation by the CJC, the CJC must be the primary decision maker.
2. The above arguments were followed by the submission that when conducting a Formal Taxation, a taxing master needs to consider the order *nisi* made after provisional taxation. Mr Ho pointed out that the repeated reference to the words “order *nisi*” in O 62, r 21B of the RDC provides sufficient indication to this effect. He compared this with O 42, r 5B(3) of the RDC, where there is equally no express requirement for the court to consider the costs order *nisi*. Yet, the court would invariably adopt the principle in the *UDL* case and consider the order *nisi* when dealing with a variation application.[[16]](#footnote-16) Mr Ho further emphasized on the importance of party making proper application, clearly setting out the reasons and the desired results for variation of an order *nisi*.[[17]](#footnote-17)
3. Mr Ho used the *Citi Creation* case cited by the Plaintiff to reject the suggestion that a Formal Taxation is a hearing *de novo* of a bill provisionally taxed. At paragraph 10 of the judgment, after HH Judge HC Wong ruled that notwithstanding the lack of list of objections filed by the paying party he should be heard at the Formal Taxation, the learned judge further commented: *“I would not go so far as to say the order nisi has been set aside by the setting down of the taxation hearing as Mr Lui has argued.”* Therefore, Mr Ho submitted, the order *nisi* made by the CJC is still in existence even if the Formal Taxation is fixed and should therefore be considered by the taxing master. The purpose of the Formal Taxation, as confirmed by the learned judge, is a venue for the applying party to show cause as to why the order *nisi* should not be made absolute.[[18]](#footnote-18)
4. As to Mr Lee’s argument which premised on the powers of a taxing master at a review hearing, Mr Ho replied that if the taxing master should at the Formal Taxation take into account the order *nisi* granted after a provisional taxation, the order *nisi* should equally by considered by the taxing master at the review hearing.
5. Finally, Mr Ho distinguished the application of O 62, r 31 of the RSC to our case, as the same did not engage making of an order *nisi*.

*Discussions*

1. As Mr Fung and Mr Leung had said it at the end of the Review hearing, law costs draftsmen and for those who deal with taxations day-in and day-out have been waiting for a decision from the court on the 1st and 2nd Issues. The researches done by Mr Ho, Mr Lee and myself, reveal that there is no written court’s decision on these topics. Fortunately, or not, I have brought it on myself such a task by the decision I had made during the Taxation Hearing.
2. In the discussions below, I will deal with the 1st and 2nd Issues together, as they are intertwined so much that they cannot be properly considered in isolation.
3. To start with, I will briefly highlight the features of provisional taxation.

*Provisional Taxation by a Taxing Master*

1. Provisional taxation was introduced by O 62, r 21B of the Rules of High Court (“RHC”) and the RDC, after the implementation of the Civil Justice Reform (“CJR”) in 2009. It provides a taxing master with the power to conduct taxation without a hearing, regardless of the amount of costs claimed. [[19]](#footnote-19) Before the date fixed for paper taxation, taxing master would be provided with a taxation bundle prepared and lodged by the receiving party.[[20]](#footnote-20) After provisional taxation, the taxing master would make an order *nisi* as to the amount which he allows and the costs of the taxation. Parties would then have 14 days to apply to the taxing master requesting for a Formal Taxation. If no such application is made by the parties, the order *nisi* would become absolute.
2. For clarity sake, I will refer to this form of provisional taxation as “TM’s Provisional Taxation”.
3. Where an application is received, the taxing master shall set the case down for Formal Taxation. The Formal Taxation is usually presided over by the same taxing master who conducted the TM’s Provisional Taxation. As I have mentioned in the above, when a party makes such application, paragraph 36 of PD 14.3 requires him to identify his objections and their grounds.

*CJC’s Provisional Taxation*

1. Another form of provisional taxation is provided under O 62, r 13 of the RDC, namely the CJC’s Provisional Taxation. Not only is it conducted without a hearing, but also without the aid of a taxation bundle.[[21]](#footnote-21) CJC’s Provisional Taxation is an option only where the amount claimed in a bill of costs does not exceed HK$200,000. An order *nisi* would be made after the CJC’s Provisional Taxation, and the parties would have 14 days to apply for a Formal Taxation. In doing so, the applying party is also required to identify his objections. The difference is that the Formal Taxation would be conducted by a taxing master instead of the CJC who conducted the CJC’s Provisional Taxation. In addition, the taxing master at the Formal Taxation would be provided with documents concerning the items under objection.
2. That is the end of the guidance one could get from O 62 and PD 14.3 for a Formal Taxation after a TM’s Provisional Taxation and CJC’s Provisional Taxation.
3. Turning now to the arguments of the parties.

*Formal Taxation after Provisional Taxation: A Hearing ab initio?*

1. The Plaintiff’s case is that a Formal Taxation is a hearing *ab initio* of the bill of costs, so that the parties are not subject to any restriction in terms of the objection to be raised, and the taxing master could tax as if there were no CJC’s Provisional Taxation.
2. I would start off by saying that I do not think that a Formal Taxation is a hearing *ab initio* of the bill of costs, which has gone through the TM’s Provisional Taxation or CJC’s Provisional Taxation. This much has been confirmed by the learned judge in the *Citi Creation* case. The Formal Taxation is a chance for the parties to show cause as to why the order *nisi* should not be made absolute. By this, the bill of costs, in particular the provisionally-taxed items, would not be taxed afresh. The scope of a party’s objection dictates the extent of the Formal Taxation. This is comparable to an application to vary a costs order *nisi*.
3. On this point, I do not agree with Mr Lee’s submission that by the wordings of O 62, r 21B(3) of the RDC, such application is not for variation of the order *nisi*, but for a fresh Formal Taxation. I fail to see why a party would ask for a Formal Taxation following a TM’s Provisional Taxation or CJC’s Provisional Taxation except to vary the order *nisi*.
4. I also do not entirely agree with Mr Lee’s submission that a taxing master is the primary decision maker, so that he has unfettered discretion to allow such costs as are necessary and proper as if it is a fresh taxation hearing at the Formal Taxation. I think Mr Lee’s submission is premised on the misinterpretation of the *Ho Chun Yan Albert* case. Lam V-P, in the passage quoted above, was clearly not referring to a CJC’s Provisional Taxation. The CJC would neither be provided with any documents nor assistance from the law costs draftsmen in a CJC’s Provisional Taxation, something that Lam V-P had specifically mentioned in the quoted passage. As such, this submission is only right when it comes to taxation with a hearing under O 62, r 21C.[[22]](#footnote-22) In my view, for CJC’s Provisional Taxation, the primary decision maker should be the CJC. By O 62, r 13, a CJC is vested with all the powers of a taxing master to provisionally tax a bill of costs as under O 62, r 21B. An order *nisi* unchallenged by any party within 14 days would become absolute. A taxing master played no role at all in such circumstance. It is only where an application for Formal Taxation is received, a taxing master would step in and decide on the objected items. Even if this happened, the taxing master would arguably become the secondary decision maker on the objected items.
5. Mr Lee had in his submissions referred to O 62, r 31 of the RSC (together with the *Bromsgrove* case). He wanted to emphasize on the broad discretion of a taxing master. However, one can easily notice that the procedures under O 62, r 31 of the RSC are very much different from the procedures on provisional taxation currently adopted in Hong Kong.[[23]](#footnote-23) Moreover, Chadwick J in the quoted passage above, was setting out the powers of a taxing master within the confinement of an objection by an appilcant. His ruling did not go so far as to suggest that a taxing master could exercise the same powers on provisionally-taxed item not objected to by the respondent. I do not see how the principles in the *Bromsgrove* case could help the Plaintiff’s case.
6. As to the *Wong Kam Tong* case, it is a case on the broad discretion of the court when considering what cost order to make. It has nothing to do with taxation of costs.

*Procedures to adopt if a party wishes to raise objections*

1. Having decided that Formal Taxation after a TM’s Provisional Taxation or CJC’s Provisional Taxation is not a hearing *ab initio*, I agree with the submission of Mr Ho that it is not opened for a party to object to an order *nisi* at the Formal Taxation unless he or she has complied with paragraphs 4 and 5 of the Notification. These paragraphs specifically required a party objecting or seeking clarification on the CJC’s Order *Nisi* should send a letter setting out the grounds of objection and the estimated time required for the Formal Taxation. As I have mentioned in the above, these requirements found their roots in paragraphs 35 to 37 of PD 14.3. Despite that they are not entrenched by the rules like what we have seen in O 42, r 5B(6) and O 62, r 33, they are there for good reasons. Again, the purpose of provisional taxation is to save time and costs of not only the parties but also the court. By setting out the grounds of objection in the letter, it entails the applicant having to specify which and how many items provisionally-taxed need to be revisited at the Formal Taxation. The grounds of objection would also enable all parties and the court to know the likely arguments involved, and their degree of complexity. Without the same, it would be impossible for the applicant (and the court) to realistically estimate the time required for the Formal Taxation. If a whole day was set aside for the Formal Taxation but the applicant was only objecting to a few items that could be completed within an hour or two, both costs and time of the court and the parties would be wasted.
2. In addition, trial by ambush has no place in our civil justice system. This is exactly what would happen if the respondent is allowed to raise a cross-objection to the order *nisi* at the Formal Taxation without giving the applicant prior notice and the grounds of such cross-objection.
3. Furthermore, I agree with Mr Ho’s submission that it would be unfair to allow a respondent to tack on with an applicant’s application without being liable to the possible adverse costs consequences imposed against an applicant by O 62, r 21B(5). The respondent should not have the best of both worlds.
4. For these reasons, despite that the court in the *UDL* case was dealing with a costs order *nisi* under O 42, r 5B(6), I would respectfully adopt the same principles set out by Stone J in terms of the procedures and rules to an application for variation of an order *nisi* after TM’s Provisional Taxation or CJC’s Provisional Taxation. The Formal Taxation is party-specific. If the Plaintiff in our case wished to vary the CJC’s Order *Nisi*, she should have lodged her application setting out her objections and the grounds of the same. She had failed to do so. In the circumstances, what the Plaintiff could do at the Taxation Hearing was to respond to the applications by the Defendant and no more. She could not ask for costs which were higher than that assessed by the CJC.

*Power of a Taxing Master at the Formal Taxation after CJC’s Provisional Taxation*

1. In the above, I have dealt with the general nature of a Formal Taxation after TM’s Provisional Taxation or CJC’s Provisional Taxation, and the procedures that a party should follow if he or she wished to object to an order *nisi* following the same. But that is not the end of the matter. For a Formal Taxation after a CJC’s Provisional Taxation, where the respondent has not lodged any cross-objection (like in our case), does that mean a taxing master is left with the options of either accepting the applicant’s objection or affirming the CJC’s assessment, as suggested by Mr Ho? I disagree.
2. It is a distinct feature of a CJC’s Provisional Taxation that no taxation bundle would be lodged by the receiving party. I would not go so far as to say that a CJC would be making his or her assessment blindly, as one could always refer to certain relevant documents kept in the court’s file, but they are usually limited to pleadings, court orders, witness statements, list of documents, affidavits, summons and perhaps correspondences between parties and the court. If the cost items required consideration of the working papers and documents beyond those contained in the court’s file, the CJC could only rely on his or her own knowledge and experiences acquired via past taxation exercises to make the assessment. His or her assessments in the latter situation could prove to be incorrect in light of the documents and working papers disclosed to a taxing master at the Formal Taxation.
3. For example, in a case where the CJC allowed 2 hours to be spent on drafting of a statement of claim by a receiving party. The paying party in the objection argued that the time allowed was excessive, and should be further reduced to 30 minutes. In such a scenario, a taxing master, after perusal of the relevant documents, might disagree to reduce the time to 30 minutes. However, he or she was not then bound to affirm the CJC’s assessment of 2 hours. The taxing master could instead allow 1 hour for drafting of the statement of claim, after seeing the working papers in connection to this item. In such a case, the taxing master was neither accepting the applicant’s case nor affirming the CJC’s original assessment. But one could not say that the taxing master was wrong in adopting such course.
4. Using another example, in the bill of costs, the receiving party claimed that a partner of the firm spent 2 hours for a conference with the lay client on a certain day. The paying party, in his list of objections, stated that the time claimed was excessive and suggested 30 minutes, and that the conference could be conducted by a junior solicitor. The CJC, not being provided with the attendance notes of the conference in question, allowed the costs at the hourly rate of the partner for 45 minutes. The receiving party objected to such assessment, seeking for the time as claimed in the bill of costs. The paying party did not lodge any objection to the CJC’s original assessment. At the Formal Taxation, the attendance notes revealed that the conference was actually conducted by a junior solicitor rather than the partner of the firm. In such situation, despite that there was no cross-objection from the paying party, it was clearly unjust and wrong in principle for the taxing master to affirm the original assessment of the CJC, even if he rejected the receiving party’s objection. The rate of the junior solicitor should be adopted.
5. I have also considered Mr Lee’s submission on the power of a taxing master at a review hearing. I think there is some force in his argument. I do not see why a taxing master should be subject to some form of constraint in the Formal Taxation which could only be liberated at a subsequent review hearing. This would, again, be a waste of the time and costs of the parties and the court. However, I must emphasize that this argument does not change my view above that the Formal Taxation is party-specific. A review hearing, equally, is party-specific.
6. For the above reasons, I would say that when an application for variation of the order *nisi* is rejected, whether the CJC’s original assessment would be affirmed by the taxing master depends on the circumstances of the case. If the original assessment was wrong in principle and/or was subsequently proved to be so unreasonable in light of the documents and working papers disclosed that it should not be affirmed, the taxing master could and should depart from it. But there must be good reasons to do so, and it must not be done liberally or arbitrarily. In my view, the fact that a taxing master would have assessed an item more generously or tightfistedly is not a good reason. Otherwise the underlying objective of a CJC’s Provisional Taxation would be defeated.

*The Review*

1. With the above principles in mind, I will deal with the Defendant’s Objections below.
2. I will start with items on the hourly rate of fee earner, 12 and 16 of the Bill, items that I have allowed costs which were higher than that assessed by the CJC.

*Hourly rate of fee earner*

1. For this item, it concerns the hourly rate of Mr Bilan Mak Yiu Wah (“Mr Mak”). Mr Mak was admitted in 1988 and charged an hourly rate of HK$2,600 in the Bill. The CJC allowed the rate of HK$2,400 per hour, and I increased the same to HK$2,500 at the Taxation Hearing. Mr Leung for the Defendant submitted that the hourly rate of Mr Mak should be reduced to HK$2,300, as this is a straight forward and simply personal injury case, without complexity of law or facts involved. In addition, liability was admitted at an early stage of these proceedings. Furthermore, Mr Leung argued that Mr Mak could have delegated simple and routine tasks to junior solicitor or staff.
2. All these arguments were made by Mr Leung at the Taxation Hearing and I had considered them. Arguments to the same effect were also stated in the LOO. After perusing the Bill, the court’s file and in particular the pleadings of the Plaintiff, I was and am still not persuaded that the hourly rate of Mr Mak should be reduced to HK$2,300 as suggested by Mr Leung. However, considering the principles I have set out in the above, I also do not see any reason to depart from the CJC’s original assessment on this item. I would therefore allow the review and reduce the hourly rate of Mr Mak from HK$2,500 to HK$2,400.

*Item 12 of the Bill*

1. Under this item, Mr Mak claimed to have used 10 minutes to consider the Notice of Increase of Sanctioned Payment filed on 5 August 2016. The CJC reduced it by 4 minutes. At the Taxation Hearing, I had reduced the item by 2 minutes. The Defendant at the Review asked me to reconsider this item by either affirming the CJC’s Order *Nisi* or to reduce it by more than 4 minutes.
2. I would not reduce the time claimed under item 12 by more than 4 minutes. When considering the Notice of Increase of Sanctioned Payment, one would not simply be looking at the document itself. Mr Mak would have to consider whether the total amount paid into court by the Defendant was reasonable in view of the Plaintiff’s case and what advice should be given to his lay client. Of course, with Mr Mak’s experiences in this field, it would not take long for him to reach his conclusion. Having said that, I do not think the CJC’s original assessment is unreasonable or wrong in principle, notwithstanding my view that he could be more generous and allow slightly more time on this item. That is not a reason to depart from the CJC’s initial assessment. As such, I would allow the review and affirm his initial assessment. Item 12 of the Bill would be reduced by 4 minutes.

*Item 16 of the Bill*

1. This item is for the time Mr Mak used to consider the Notice of 2nd Increase of Sanctioned Payment filed on 19 September 2016. HK$100,000 was further paid into court by the Defendant. Mr Mak again claimed 10 minutes for this item, and the CJC reduced it by 4 minutes. At the Taxation Hearing, I allowed the item in full. The Defendant at the Review asked me to reconsider this item by either affirming the CJC’s Order *Nisi* or to reduce it by more than 4 minutes.
2. I had allowed 10 minutes on this item at the Taxation Hearing mainly due to the substantial increase in the amount paid into court by the Defendant as compared to the previous payments. It might warrant Mr Mak spending more time to consider the same. However, I would repeat my reasons above and allow the review by affirming the CJC’s initial assessment. Item 16 of the Bill would be reduced by 4 minutes.

*Item 20.2 of the Bill*

1. This item concerns a conference which took place on 29 June 2016 between Mr Mak, the Plaintiff, and the legal executive of the firm. The Plaintiff claimed 2 hours spent by Mr Mak, and 45 minutes spent by the legal executive. The CJC reduced Mr Mak’s time by 1 hour, and the time claimed by the legal executive by 25 minutes. At the Taxation Hearing, I affirmed the CJC’s assessment on the time allowed for Mr Mak. As to the legal executive, I had taxed-off this part of the item entirely. I did not see why the conference with the Plaintiff had to be attended by 2 fee earners.
2. The Defendant sought further reduction on this item at the Review. Mr Leung, in his reasons for objections, stated that this conference was for Mr Mak to explain to the Plaintiff the sanctioned payment of HK$50,000.00 made by the Defendant on 28 June 2016 (“1st Sanctioned Payment”). But before the 1st Sanctioned Payment, the Defendant’s insurer had on 26 May 2016 already offered a sum of HK$50,000.00 on top of the payment of HK$13,425.25 for the employee’s compensation claim, as full and final settlement of the Plaintiff’s common law claim (the “Offer”). Mr Leung argued that during the telephone conversations as claimed under items 5.1 and/or 20.1 of the Bill, Mr Mak must have already discussed the Offer with the Plaintiff, so that there was no need to spend another 1 hour on 29 June 2016 explaining the 1st Sanctioned Payment and the costs consequences to the Plaintiff. For these reasons, Mr Leung suggested that 30 minutes should be sufficient for this conference.
3. According to the bundle of documents prepared by the Plaintiff for the Taxation Hearing, under item 5.1 of the Bill, there were 6 telephone conferences between the Plaintiff, Mr Mak and the legal executive. The dates of these telephone conferences were 28 October 2014, 28 October 2014, 18 September 2015, 17 May 2016, 27 May 2016 and 7 June 2016. The Offer came before only the last two conferences. From the attendance notes provided, the telephone conferences were between Mr Mak and the Plaintiff, but there was neither any mentioning of the Offer being discussed, nor was there any advice rendered on the costs consequences of a sanctioned payment.
4. As to item 20.1, it was a telephone conference between the Plaintiff and Mr Mak on 15 June 2016. No attendance notes for the same was provided by the Plaintiff.
5. Notwithstanding the absence of any record showing it, I believe that there would have been discussions between the Plaintiff and Mr Mak regarding the Offer during 1 of the latter 3 conferences. There was no reason for Mr Mak to hide the Offer from the Plaintiff. At the Review, Mr Fung had tendered to the court a letter dated 31 May 2016, under which the Plaintiff had written to the Defendant, rejecting the Offer and requested for over HK$300,000 as the settlement sum. As such, and fairly conceded by Mr Fung, the quantum itself should have been considered there and then,and there was no need to repeat the same consideration during the conference on 29 June 2016.
6. However, I do not agree with Mr Leung’s submission that the effect and the costs consequences of a sanctioned payment would also have been advised during the said telephone conferences. The Offer is not a sanctioned payment. The 1st Sanctioned Payment came only on 28 June 2016. One could not say with certainty that Mr Mak must have advised the Plaintiff on the effect and costs consequences of a sanctioned payment before the 1st Sanctioned Payment was made. In fact, it would be most singular if he did.
7. As to the conference on 29 June 2016, I also do not see that spending 1 hour to explain the effect and costs consequences of a sanctioned payment to the Plaintiff, a lay person, is unreasonable.
8. For the said reasons, I would dismiss the review of this item.

*Conclusion*

1. To recap, the Defendant is successful in reviewing Mr Mak’s hourly rate (from HK$2,500 to HK$2,400), items 12 (from a reduction of 2 minutes to a reduction of 4 minutes) and 16 (from no reduction to a reduction of 4 minutes) of the Bill. The Defendant’s review of item 20.2 of the Bill is dismissed.
2. Having succeeded in most of the arguments set out in the Defendant’s Objections, I would make an order that the Defendant be entitled to 85% of the costs of the Review, with certificate to counsel. Taking this into account, and having read the Statement of Costs filed by the Defendant, I summarily assessed the costs at HK$51,630.28[[24]](#footnote-24) to be paid by the Plaintiff to the Defendant. Such costs order *nisi* will be made absolute after 14 days from the date hereof.
3. Pausing here, I had awarded costs to the Plaintiff at the end of the Taxation Hearing. Mr Leung proposed and Mr Fung agreed that no variation of such order would be required.
4. Lastly, I must thank Mr Lee, Mr Fung, Mr Ho and Mr Leung for their assistance.

( David Chan )

Master

Mr Jun Alric Lee (Counsel) and Mr A. Fung (Law Cost Draftsman) instructed by B Mak & Co, for the plaintiff (the receiving party)

Mr Leon Ho (Counsel) and Mr Barry Leung (Law Cost Draftsman) instructed by Deacons, for the defendant (the paying party)

1. See pp 414-417, para 776 [↑](#footnote-ref-1)
2. The underlying objectives cited are: (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court; (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable; (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings; and (f) to ensure that the resources of the Court are distributed fairly. [↑](#footnote-ref-2)
3. (unreported, HCA 4409/2002, Stone J, 19 January 2009) [↑](#footnote-ref-3)
4. (unreported, HCA 1711/2009, DHCJ Leung, 14 March 2016) [↑](#footnote-ref-4)
5. [2018] 2 HKLRD 127 [↑](#footnote-ref-5)
6. [2012] 2 HKLRD 1128 [↑](#footnote-ref-6)
7. [1997] 1 WLR 1188 [↑](#footnote-ref-7)
8. See O 62, r 29(8) of the RSC. “Proper Officer” means an officer of the appropriate office within the meaning of paragraph 6(b) of the rule [↑](#footnote-ref-8)
9. See paragraph 778(4) at p 417 [↑](#footnote-ref-9)
10. (unreported, LDBM 180/2009, HH Judge HC Wong, 22 March 2010) [↑](#footnote-ref-10)
11. See such confirmation at paragraph 8 of the *Citi* *Creation* case and paragraph 1 of *Chiang Chin Tsai v Shum Kin Wong & Anor* (unreported, DCPI 900/2007, Temporary Registrar C Lee, 23 November 2010) [↑](#footnote-ref-11)
12. See O 62, rr 33(3) and (3A) of RDC. See also *Hong Kong Civil Procedure 2019*, Vol 1, at paragraph 62/33/3 [↑](#footnote-ref-12)
13. Its equivalent under the RDC is O 42, r 5B(3) [↑](#footnote-ref-13)
14. See *Hong Kong Civil Procedure 2019*, Vol 1, at paragraph 42/5B/1 [↑](#footnote-ref-14)
15. [1985] 1 WLR 599 [↑](#footnote-ref-15)
16. Mr Ho cited the case of *Bothlink Limited v King Claire Limited & Anor* (unreported, HCA 1978/2013, DHCJ Yvonne Cheng SC, 23 March 2015), which is another case which adopted the principles on variation of costs order *nisi* set out in the *UDL* case [↑](#footnote-ref-16)
17. See the case of *Lam Po Yee & Anor v Dr Chan Yee Shing also known as Dr Chan Yee Shing Alvin* [2018] HKCFI 870, at para 83 [↑](#footnote-ref-17)
18. Mr Ho also referred to the case of *Dah Sing Bank v Daylight Industrial Co Ltd* [1987] 3 HKC 25, which is a case on charging order nisi [↑](#footnote-ref-18)
19. Before CJR, taxation without a hearing is prescribed by O 62, r 21(4) of the RHC and RDC, under which a taxing master could give notice to the parties the proposed amount of costs that he intended to allow for a bill of costs with the amount not exceeding HK$100,000. It would then be up to the parties to decide whether to accept the proposed amount. Where any of the parties was not satisfied with the same, an application could be made to the taxing master for an appointment to tax: see the 8.7.2005 version of the RDC. [↑](#footnote-ref-19)
20. See paragraph 28 of PD 14.3. The pre-CJR version of PD 14.3 did not set out such requirement [↑](#footnote-ref-20)
21. See paragraph 30 of PD 14.3 [↑](#footnote-ref-21)
22. A taxing master is also the primary decision maker of the TM’s Provisional Taxation and the Formal Taxation which follows. However, at the Formal Taxation, the bill of costs would not be heard afresh. Again, the extent of the Formal Taxation would be dictated by the parties’ objections to the order nisi. [↑](#footnote-ref-22)
23. See footnote no. 8 above. The procedures under O 62, r 31 of the RSC were to a degree similar to those in Hong Kong before the CJR [↑](#footnote-ref-23)
24. Solicitors’ costs at HK$25,790.28; law cost draftsman’s fee at HK$8,840; counsel’s fee at HK$17,000. [↑](#footnote-ref-24)