

1. When one party has been ordered to pay the costs of another, taxation as between attorney and client affords little more than taxation as between party and party: see *Roos*, p 9.⁵⁶
2. The intention of Didcott J was not that the respondent's liability for the applicant's costs should be limited in accordance with the last-mentioned proposition in *Roos*: the intention of the learned judge was rather that the applicant should receive a full indemnity in respect of all costs that the applicant would have to pay to his own attorney in accordance with a taxation for payment by a client to his own attorney, that is, a taxation of type (1) of the three types referred to in *Roos*, p 9.
3. Therefore Didcott J avoided making an order for taxation of the costs as between 'attorney and client'; and the learned judge compensated for the supposed deficiencies of such an order by making an order for taxation as between 'attorney and *own* client'.
4. Nevertheless, having regard to the law as stated in *Nel*, even an order that one party is to pay the costs of another taxed as between 'attorney and *own* client' does not render the costs debtor liable for costs that must be taxed off in accordance with *Nel*. A rich man may agree to render himself liable to his own attorney for the cost of luxuries but, in terms of the decision in *Nel*, justice does not allow such a liability to be imposed upon the losing party who has become the costs debtor.

⁵⁶ For the reasons already given, I consider this to be a mistaken premise: it does not reflect the law as stated in *Nel*.

5. In other words, when an order that one party is to pay another's costs taxed as between 'attorney and *own* client' is made in preference to an order that the costs be taxed as between 'attorney and client' (for the purpose of avoiding the supposed limitation that the costs creditor will receive 'little more than a taxation as between party and party' would yield, as suggested in *Roos*), another limitation is at once encountered. It is the limitation imposed by our own law as stated in *Nel*: when one party is ordered to pay the costs of another taxed as between attorney and client, justice, as defined by the decision in *Nel*, obliges the taxing master to disallow certain of the costs that the costs creditor may be obliged to pay to his own attorney. The costs to be disallowed include, in particular, the costs of luxuries that the costs creditor may have bound himself by contract to pay to his own attorney. In terms of the decision in *Enslin v Gallo*, such costs must be taxed off even when the order is that one party should pay the costs of another taxed as between 'attorney and *own* client.' The latter formula does not enable a costs creditor to circumvent the requirement of justice to the costs debtor, as defined in *Nel*. An 'attorney and *own* client' costs order relating to a bill to be paid by one party to another, is therefore no more than a direction to tax the bill on the 'intermediate' basis recognized in *Nel*.
6. Therefore, for practical purposes, there is no difference between -
- (1) an order that one party should pay the costs of another taxed as between 'attorney and *own* client'; and
 - (2) an order that one party should pay the costs of another taxed as between 'attorney and client' in accordance with *Nel*, (being a taxation that must

ignore the inapplicable English law limitation referred to in *Roos*, to the effect that such a taxation 'gives little more than a taxation between party and party').

[101] In my respectful view, the result of *Enslin v Gallo* is undoubtedly correct even though the reasoning starts from the incorrect premise based on *Roos*. When that incorrect premise is left aside, the conclusions that must be reached are that -

1. when one party is ordered to pay the costs of another taxed as between 'attorney and client', the costs must be taxed with the generosity to the costs creditor of the 'intermediate' basis of taxation as described in *Nel*, affording him the fuller indemnity there allowed (and not restricting him to 'little more than a taxation between party and party'), whilst ensuring at the same time that costs not recoverable from the costs debtor in terms of *Nel*, such as luxurious expenses, are taxed off to avoid injustice to the costs debtor, even though the costs creditor may remain obliged to pay such irrecoverable expenses to his own attorney in terms of an agreement between them; and
2. when one party is ordered to pay the costs of another taxed as between 'attorney and *own* client', the costs must be taxed on precisely the same 'intermediate' basis described in *Nel*, with exactly the same fuller indemnity to the costs creditor and the same limitation of recoverable expenses to avoid injustice to the costs debtor.

[102] The conclusion reached in the last paragraph is, I suggest, consistent with the decision later made by van Dijkhorst J in *Ben McDonald v Rudolph* (above) in 1997. Although the reasoning in *Enslin v Gallo* was different (because of the incorrect premise

taken from *Roos*), the result arrived at was nevertheless essentially the same. The result was consistent with *Nel* in both cases.

The three types of attorney and client taxation re-stated

[103] In my view *Nel*, as applied in *Enslin v Gallo* and in *Ben McDonald v Rudolph*, establishes the position in our law to be that only the following three categories or scales of taxation as between attorney and client are known to our law. The first two are as reflected in the first edition of *Roos* (1947) at p 9. The third corrects the error made in *Roos* and is the 'intermediate' basis or scale recognized and established by *Nel*. The suggestion in the 1956 Supplement to *Roos* that *Nel* introduced a fourth category or scale of attorney and client taxation cannot be supported. The three are:

- (1) Where the costs are payable by the client to his attorney.⁵⁷ This scale, sometimes referred to as the scale of a 'pure' attorney and client taxation, is the most generous of the three to the costs creditor (who in this instance is the attorney himself). It allows an attorney to recover from his client even certain costs, such as luxuries that the client has agreed to pay for, that are not recoverable by that client from another party to litigation with him.⁵⁸ It is the *only* scale or basis of taxation that is properly

⁵⁷ According to *Roos*, this scale also applies to a case 'where the costs are payable out of a fund belonging entirely to the client.' Presumably this is another instance of the liability of the client to his own attorney. It is not apparent to me that there is any difference, in our law, between a client's liability to pay his own attorney, and his liability to pay his attorney out of a fund belonging entirely to him, the client. No doubt it is possible that English law made some distinction between the two.

⁵⁸ *Nel* (above) has established that it would be unjust for the taxing master ever to allow that attorney's client, C, to recover such costs from another party, P, to litigation with that client, C, notwithstanding the fact that the court may have ordered P to pay C's costs, to be taxed 'as between attorney and client'. The position is the same where the costs debtor has agreed to pay the costs taxed as between attorney and client. The principle that a taxation where one party is to pay the costs of another must stop short of injustice to the costs debtor does not cease to apply merely because the court
(continued...)

called 'attorney and *own* client' in our law. Generous though this scale is, it is not without limitation. The mere fact that the taxation is between attorney and own client does not of itself imply that the taxing master must ignore the tariff in Rule 70: a departure from the tariff is justified only if the client has so agreed, or in an 'extraordinary or exceptional case', within the meaning of Rule 70(5)(a).⁵⁹

- (2) Where the costs are payable to a litigant out of a general or common fund (*Brooks v Taxing Master and Another* 1960 (3) SA 225 (N)).⁶⁰
- (3) Where the costs are payable by one party to another (extending also to the rarer situations in which the costs are payable out of a fund which belongs to other parties and in which the party to be paid has no interest). This is the 'intermediate' scale or basis of taxation recognized and established as a feature of the South African law of costs by *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597, at 607 - 608. It is incorrect to state, as was stated in *Roos* in 1947, that this third scale 'gives little more than a taxation between party and party.' It

⁵⁸(...continued)

has ordered, or the parties have agreed, that the taxation should be 'as between attorney and *own* client.' Orders and agreements are not made in those terms for the purpose of facilitating the infliction of injustices on the costs debtor. They are made in order to 'compensate' for the (erroneous) perception that an order for costs taxed 'as between attorney and client' is an order that 'gives little more than a party and party taxation'. They are made for the purpose of ensuring that the costs creditor gains the benefit of the 'fuller indemnity' envisaged by the 'intermediate' basis of taxation established in terms of *Nel*. The reigning confusion can only be eliminated by recognizing the error made in *Roos*, and discarding it.

⁵⁹ *Gross v Svirsky* 1923 TPD 422, at 425; *Loots v Loots* 1974 (1) SA 431(E), at 434A-B.

⁶⁰ According to *Roos*, this scale is 'stricter' than (1) and less strict than (3). But in what way it is less generous to the costs creditor than (1) and more generous than (3) has not been set out in specific terms. As the authority relied upon in *Roos* is English, further reference to the English law of costs, as it was over half-a-century ago, is presumably necessary to ascertain the particulars. In the meantime, the English law of costs has changed fundamentally.

is also incorrect to state, as was stated in the 1956 Supplement to *Roos*, that *Nel* introduced a fourth scale or basis of taxation as between attorney and client. The fact is that *Nel* recognized that the English rule of court that had resulted in the third scale yielding little more than a party and party taxation in England, had never applied anywhere in South Africa, and that the South African law and practice of inter-party taxation as between attorney and client was different from the English law and practice. In South Africa, the objective of such a taxation was, and still remains, a substantially fuller indemnity for the costs creditor than would be achieved by a party and party taxation in the circumstances. 'As far as it can',⁶¹ such a taxation is to afford the costs creditor a complete recoupment of the costs for which he is liable to pay his own attorney on a 'pure' attorney and client taxation referred to in (1) above. However, the limitation 'as far as it can' means that certain kinds of costs allowable on a 'pure' attorney and client taxation must be taxed off in an inter-party attorney and client taxation. The costs to be taxed off in such an 'intermediate' taxation are those of the kind disapproved in *Nel* for recovery by one party from another, such as, for example, luxurious expenses that a client may have bound himself by agreement to pay to his own attorney, including special fees to counsel and fees to the attorney calculated at rates that the taxing master, after duly taking into account of the court's intention that the costs creditor should have a full

⁶¹ *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597, at 607.

indemnity short of injustice to the costs debtor, adjudges, in the exercise of his discretion, to be unreasonable.

Whether the court's discretion relating to costs empowers it to devise a new type of attorney and client costs order, not falling within one of the three types referred to above
Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574(T)

[104] In my respectful view, Swart J came to the conclusion, in *Cambridge Plan*, that the court's discretionary powers relating to costs orders are wide enough to allow the court to devise a previously unknown scale of taxation that would facilitate the taxation of a bill payable by one party to another on a new basis.

[105] The learned judge was called upon, in a review of the taxation of a bill of costs, to interpret an order that one party pay the costs of another 'taxed as between attorney and own client.'⁶² As I understand the judgment, the learned judge held, in effect, that the order was to be interpreted as having directed the taxing master to tax the bill on a new scale of taxation that would yield the costs creditor more than the 'intermediate' basis of taxation recognized in *Nel* and referred to in category (3) above, but possibly less than the amount of a 'pure' attorney and client taxation referred to in category (1) above. If I have correctly grasped and summarised the essence of this most carefully considered decision, I would, with the greatest of respect, disagree with it for the reasons that follow.

⁶² This was the same question as had faced Magid AJ in *Enslin v Gallo*, above, in 1984.

[106] In *Cambridge Plan*, Swart J reviewed the taxation of a bill of costs relating to what he described as 'admittedly a complicated trade mark matter.'⁶³ The respondents had been ordered to pay the costs of the applicants taxed 'on the scale applicable between an attorney and his own client'. The judgment on review does not seem to contain any other reference to the grounds or reasons given by the court that made the costs order ('the trial court') for having made such a special order. In the absence of any suggestion of any specific kinds of impropriety on the part of the costs debtor in the conduct of the proceedings, the likelihood seems to be that the special costs order was made on the general basis that the costs debtor had infringed the trade marks of the costs creditor in certain ways, and had then gone further and defended the infringement proceedings in a manner, that had led to great complexity in bringing the facts to light and in applying the law.

[107] The complications resulting from the respondents' conduct were presumably of such an order that the trial court was of the view that, when the bill of costs had been drawn and came to be taxed, the taxing master would be likely to find that the costs creditors had incurred, reasonably, an amount of costs that exceeded the costs recoverable on a party and party taxation. The order must mean that the trial court intended to make a costs order that would afford the costs creditors a full indemnity in respect of the costs that they were obliged to pay to their own attorney, 'as far as it [could]', that is, as far as the law would allow. The limitations implicit in the words 'as

⁶³ *Cambridge Plan* (above), at 576H.

far as it can',⁶⁴ are inescapable. As appears from *Nel*, that limitation is 'to prevent injustice'⁶⁵ to the costs debtor.

[108] It is, in my view, unthinkable that our law of costs could be without such a limitation. Our legal system could not accommodate a costs order that was designed to permit the costs creditor, or his attorney, or the taxing master, to draw, tax and allow a bill of costs that was designed to impose an *unjust* liability on the costs debtor. The limitation of the assessment of a liability for costs to a *just* liability is, in my view, fundamental and inescapable.

[109] Yet, as I shall try to indicate below, with great respect to the learned judge, it would appear that Swart J interpreted the costs order in *Cambridge Plan* as bearing the meaning that the protection of the costs debtor against injustice was to be removed to a certain extent: in other words, the learned judge held that a certain degree of injustice to the costs debtor had been authorized by the court's order, but not entirely without limitation.

[110] In my respectful view, the costs order cannot support such an interpretation. Even if it could, it would mean that the costs order, so interpreted, travelled beyond the framework of our law of costs and was consequently *ultra vires*.

[111] As I shall try to demonstrate, the reason why the learned judge made this decision appears to be that both the trial court that had made the order for taxation 'as between attorney and *own* client', and Swart J himself in deciding the review, had been misled by the proposition in *Roos* that taxation 'as if between attorney and client' of a bill of costs to be paid by another party 'gives little more than party and party taxation.'

⁶⁴ *Nel* (above), at 607, lines 34 - 35.

⁶⁵ *Nel* (above), at 608, line 28.

Evidently believing that an attorney and client taxation in accordance with the principles set out in *Nel* would likewise 'give little more than a party and party taxation', the trial court that made the 'attorney and own client' costs order signalled that such a limitation was not to apply, and Swart J interpreted the order accordingly.

[112] The attempt to escape from that supposed limitation inherent in the basis of taxation according to the third scale in *Roos* and, so it was apparently accepted, in the basis of taxation defined by *Nel*, confronted Swart J with what evidently appeared to the learned judge to be a new problem. If the effect of an order to tax 'as between attorney and own client' a bill that was to be paid by one party to another was to free the taxing master from the limitations in *Roos* and *Nel*, was the result that the costs creditor and his attorney were at the same time left free to exploit the situation (and to oppress the costs debtor) by agreeing between themselves upon extraordinarily high fees to counsel, and also on an exceptionally generous rate of remuneration for the attorney? If not, where was the taxing master to draw the line?

[113] Features of the taxation in *Cambridge Plan* included the following:

- (1) The applicants (whom I shall sometimes refer to as 'the costs creditors') had made an agreement with their own attorney to pay him at the rate of R250 per hour, a rate that exceeded the rate then applicable in terms of the tariff in Rule 70.⁶⁶
- (2) The fees committee of the Transvaal Law Society had written to the applicants' attorney expressing the opinion that, having regard to the circumstances placed before them, a fee as between attorney and client

⁶⁶ *Cambridge Plan* (above), at 580D-E.

of R250 per hour for the attorney's professional services was reasonable.⁶⁷

- (3) Senior counsel had provided the applicants with a memorandum setting out how the taxing master should approach her task. In the memorandum, counsel had said amongst other things that, notwithstanding the order that the bill was to be paid by the respondents to the applicants, the taxing master should tax the bill as if it was to be paid by the applicants themselves to their own attorney, that is, according to the first of the categories of attorney and client taxation mentioned in *Roos*, at p 9. The only exception that counsel is said to have mentioned was that if the agreement between the applicants and their attorney had led to costs in the nature of luxuries, the luxuries should be taxed off and disallowed for payment by the respondents as the costs debtors. Counsel said further that the taxing master would misdirect herself if she merely applied the tariff in Rule 70, and that she would be obliged to apply her mind to the agreed rate of R250 per hour in the light of all the circumstances, including the opinion of the fees committee that it was a reasonable rate in the circumstances.⁶⁸

Comment: It appears to me that counsel's advice was in substance that the order for taxation 'as between attorney and *own* client' of a bill to be paid by one party to another required taxation in accordance with *Nel*, that is, in accordance with an order for taxation of such a bill 'as between

⁶⁷ *Cambridge Plan* (above), at 579J - 580C.

⁶⁸ *Cambridge Plan* (above), at 580F - 581G.

attorney and client' *without regard to the erroneous proposition in Roos to the effect that an attorney and client taxation gives little more than taxation between party and party.* To the extent that this was indeed what counsel's advice boiled down to, it was in my view correct advice.

(4) The taxing master nevertheless held herself to be bound by the tariff in Rule 70.⁶⁹ She taxed the bill accordingly.

[114] The applicants, as costs creditors, felt that the taxing master had in effect ignored the special costs order; that she had in substance taxed the bill as between party and party; and that in so doing she had only allowed them to recover a substantially smaller proportion of their costs than the costs order had entitled them to. They accordingly instituted the review of the taxation.

[115] Features of the review proceedings in *Cambridge Plan* before Swart J were:

1. The review judgment, which includes summaries of the submissions of the parties, does not disclose the nature of the conduct of the costs debtor that had caused the court to make a special costs order. So far as can be seen, the taxing master did not give, and Swart J was not asked to give, and for want of the necessary information could not give, consideration to the question of how, or to what extent, the conduct of the costs debtor had caused the costs creditor reasonably to incur additional costs that would not have been recoverable on a taxation as between party and party.

Comment: In my respectful opinion, the rationale of the intermediate basis of taxation recognized in *Nel* is precisely that a special costs order is not merely punitive: it is essentially to indemnify the costs creditor not only for

⁶⁹ *Cambridge Plan* (above), at 584B - 585G.

party and party costs, but also for such additional costs as he may reasonably have incurred as a result of the particular conduct of the costs debtor of which the court disapproved and that caused the court to make the special costs order. When such a special costs order is made, it is necessary, in my view, for the taxing master to make inquiries, and to form a view, about the degree to which the reprehensible conduct of the costs debtor caused the costs creditor reasonably to incur costs exceeding those that would have been recoverable on a taxation as between party and party. If such a comparison is not made, there is no criterion by which to measure the costs incurred by the costs creditor that exceeded the party and party costs, or to gauge the reasonableness or otherwise of those extra costs.

2. In stating her case for the purposes of the review in *Cambridge Plan*, the taxing master referred to Jacobs and Ehlers, *South African Law of Costs* and, in particular, to the apparent approval by Eksteen J, in *Loots v Loots* (above), of the three scales of attorney and client costs as set out in *Roos*, including the proposition in *Roos* that the third of such scales (an inter-party attorney and client taxation) 'gives little more than a party and party taxation.'⁷⁰

Comment: In this regard, the taxing master in *Cambridge Plan* was, for understandable reasons, misled by the erroneous proposition in *Roos*. As indicated above, although the incorrect proposition in *Roos* was quoted by

⁷⁰ *Cambridge Plan* (above), at 582F - I. The taxing master appears to have believed that Eksteen J, in his judgment in *Loots*, had approved the incorrect statement made by *Roos*. As I have endeavoured to show in dealing with *Loots* above, it is far from clear that Eksteen J did approve it. On the contrary, the learned judge applied the principles of *Nel*, with which the incorrect proposition in *Roos* cannot be reconciled. It would appear that the taxing master in *Cambridge Plan* was misled by *Roos*, and that her error in that regard was not pointed out to Swart J when he reviewed the matter and repeated, at 582H - I, the incorrect statement that an inter-party taxation as between attorney and client 'in effect gives little more than a taxation as between party and party.'

Eksteen J in *Loots*, it formed no part of the *ratio decidendi* of the case; nor could it have, because it was fundamentally at odds with the authoritative statement of our law in *Nel*.⁷¹

3. Swart J considered his first task to be to interpret the costs order for payment by one party to the other of costs taxed 'as between attorney and *own* client'.⁷²
4. The learned judge inferred that the trial court that had made the costs order had had -

'the intention ... to allow the applicant to be recouped more fully than would have been the case in an ordinary attorney and client order, the implications of which must have been well-known to the Court.'⁷³

5. Swart J did not specify the implications that he had in mind as being well-known to the trial court that had made the special costs order. Having regard to later passages in his judgment,⁷⁴ it appears that one of the assumed 'implications' to which the learned judge was probably alluding was the erroneous proposition in *Roos* to the effect that an inter-party taxation as between attorney and client 'gives little more than a taxation between party

⁷¹ It is wrong to read *Loots* as if it had approved the erroneous general proposition that an inter-party taxation as between attorney and client yields little more than a taxation between party and party. That proposition is only true where (as happened in *Loots*) the conduct of the costs debtor had *not* resulted in the costs creditor's incurring substantially more costs than he would in any event have incurred. But in cases in which the costs debtor has been ordered to pay attorney and client costs, and in which the taxing master finds that his conduct has led the costs creditor to incur substantially greater costs than would be recoverable on a taxation as between party and party, so that the case is an 'extraordinary or exceptional' one within the meaning of Rule 70(5)(a), *Nel* entitles the costs creditor to a full indemnity for his costs, limited only on the principles of justice towards the costs debtor set out in *Nel*. The costs to which the costs creditor is entitled are *not* limited on the basis of the incorrect generalization that such a taxation 'gives little more than a taxation between party and party'.

⁷² *Cambridge Plan* (above), 586G-H.

⁷³ *Cambridge Plan* (above), 589D-E.

⁷⁴ *Cambridge Plan* (above), 595G-H; 596G; 597C-D; 597D-H.

and party.' As I understand the above-quoted proposition of Swart J, its essence was that the trial court that had made the special costs order had assumed that 'an ordinary attorney and client order' had the inherent shortcoming that it would give the costs creditor 'little more than a taxation between party and party'; and that the trial court had therefore ordered taxation 'as between attorney and *own* client' in order to compensate for the assumed shortcoming of an 'ordinary attorney and client order', and to ensure that the costs creditor would recoup his expenses more fully.

Comment: In my respectful view, Swart J may well have been correct in his belief that the court that had made the order for taxation of the costs as between 'attorney and *own* client' had done so in order to compensate for the perceived (but in reality non-existent) shortcoming of an order for costs to be taxed 'as between attorney and client', as alleged in *Roos*. For the reasons I have already given, I consider that the way to deal with that situation was to point out the error made by *Roos* (an error that was evidently acted upon by the trial court that made the 'compensating' costs order in *Cambridge Plan*); to point out further that an order for costs taxed 'as between attorney and client' was not to be interpreted in the parsimonious and self-defeating manner suggested in *Roos*, but in the appropriately generous, meaningful and just manner authoritatively laid down in *Nel* (above) as the 'intermediate' basis of taxation; that there was therefore no need for the 'compensation' apparently aimed at by the trial court that made the order for the costs to be taxed 'as between attorney and *own* client' in *Cambridge Plan*; and that the apparent objective of that court would be achieved, as far as it could be achieved within

the limits of the law, by taxing the bill according to the 'intermediate' basis recognized in *Nel*. However, this was not the solution found in *Cambridge Plan*.

6. Swart J considered the crux of the review before him to be whether the taxing master had been right or mistaken in taking the approach that -
- (a) she had remained bound by the tariff; and at the same time
 - (b) had taxed the bill on the third of the 'Roos' scales.⁷⁵

Comment:

(1) I would respectfully comment that such an approach, in terms of which (a) and (b) are satisfied simultaneously, could not ordinarily be valid in any case which is 'extraordinary or exceptional' within the meaning of Rule 70(5)(a). In terms of the law as stated in *Nel*, and as applied in *Loots*, it is only in a case like *Loots* (in which the special costs order was made by agreement, and which had no 'extraordinary or exceptional' feature that caused the costs creditor reasonably to incur extra costs not recoverable on a party and party taxation) that a taxation as between attorney and client will be the same as a taxation in accordance with the tariff. In such a case there is nothing to justify a departure from the tariff. It is therefore only in such a case, of which *Loots* is an example, that (a) and (b) above can be satisfied simultaneously.

(2) Cases like *Cambridge Plan*, in which there has been no agreement between the parties that one party should pay the costs of the other as between attorney and client, tend to be different. The court evidently imposed the special costs order without agreement between the parties. A court only

⁷⁵ *Cambridge Plan* (above), 595G-H.

does so, generally speaking, on the ground of some form of reprehensible conduct on the part of the party ordered to pay the costs; or it may do so if there is some other good reason to afford the costs creditor, at the expense of the costs debtor, a more complete indemnity for his costs than is given by taxation between party and party. In such a case, there are generally serious grounds to justify a finding by the taxing master that the matter is indeed an 'extraordinary or exceptional case' contemplated by Rule 70(5)(a). When that is his finding, the taxing master is free to depart from the tariff, and indeed must so depart if equity requires it.

(3) The special costs order is ordinarily an indication that the court or judge who made the order expects that, when the bill of costs has been drawn and comes to be taxed, the taxing master will be likely to find that the case is indeed 'extraordinary or exceptional' within the meaning of Rule 70(5)(a). The judge's expectation would be based on the view that the bill, when drawn, will probably reveal that the improper conduct of the costs debtor caused the costs creditor, acting reasonably, to incur additional costs that he would not be able to recover on a taxation between party and party. The judge makes the special costs order precisely because he intends that the costs creditor should have an indemnity in respect of such additional costs as well as the party and party costs.

(4) This can only be done in accordance with the intermediate basis of taxation recognized in *Nel*, which aims at full recoupment of the expenses of the costs creditor, short of expenses that would inflict injustice on the costs debtor. It is not within the power of the judge to order taxation on any basis

that will enable the costs creditor, or his attorney, or the taxing master, to inflict injustice on the costs debtor. Our law of costs knows no form of order that can lawfully enable one party to recover from another costs of the kind that were held in *NeI* to be irrecoverable by one party from another.

7. In *Cambridge Plan*, Swart J reached a number of conclusions. I shall refer to some that are presently relevant. First, the learned judge stated that the taxing master had -

'taxed the bill on the third of the *'Roos'* scales. As far as I can gather, this is also the 'intermediate basis of taxation' referred to in the *NeI* matter, that is something between a party and party basis and the basis applicable where an attorney seeks to recover from his own client.'⁷⁶

Comment: In my respectful opinion, a taxation on the third scale in *Roos* can only be equated correctly with one on the 'intermediate' basis in *NeI* if the error of *Roos's* observation that such a taxation will 'give little more than a taxation between party and party' is recognized at the same time. The 'intermediate' basis in *NeI* was specified by the appellate division to give a much more extensive indemnity to the costs creditor: it was to afford the costs creditor a full indemnity in respect of attorney and client costs 'as far as it can', that is, subject only to the limitation of not inflicting injustice of the kind explained in *NeI*, on the costs debtor. If *Roos's* observation is taken to be correct, his third basis or 'principle' of attorney and client taxation is obviously very different from the 'intermediate' basis laid down in *NeI*. In my respectful view, it appears that in *Cambridge Plan* the attention of Swart J was not drawn to the fact that *Roos's* observation that an inter-party attorney and client

⁷⁶ *Cambridge Plan* (above), at 595G-H.

taxation 'gives little more than a party and party taxation' was incorrect and could not be reconciled with the intermediate basis of taxation recognized and established by *Nel*. Unless I have misunderstood the position, the learned judge was misled into the the acceptance of the propositions, first, that *Roos's* third basis of attorney and client taxation was the same as the 'intermediate' basis established by *Nel* and, second, that both were qualified by *Roos's* observation that such a taxation 'gives little more than a party and party taxation'. For the reasons I have given, I consider that the second proposition is incorrect, and that if it is accepted as correct it also vitiates the first proposition. To the extent that Swart J appears to have been led to accept that both of these propositions are correct, and based his interpretation of the costs order in *Cambridge Plan* on them, I am respectfully of the opinion, that the learned judge's interpretation of that order cannot be supported.

8. A further conclusion reached by Swart J⁷⁷ on the basis of the erroneous equation between *Roos's* third principle of attorney and client taxation and the 'intermediate' basis in *Nel*, on the footing of *Roos's* incorrect observation about the effect of the taxation, may be summarised as follows:

(1) The learned judge said that (as had been recognized in *Nel*, at 607):

'... there is a difference (which may be vast) between what a successful litigant can recover from the loser and what his own expenses are.'⁷⁸

(2) Further -

⁷⁷ *Cambridge Plan* (above), at 595 I - 596 J.

⁷⁸ *Cambridge Plan* (above), at 596 B.

'... this discrepancy is due to the protection offered to the unsuccessful litigant because of considerations of fairness and equity by the institution and the law of taxation'.⁷⁹

- (3) The learned judge went on to hold that 'reprehensible conduct on the part of one of the parties' may 'make it unfair or inequitable that a litigant should be afforded the normal protection', so that 'a litigant by his conduct has placed himself substantially outside the ambit of fair play', and 'the Court voices its displeasure by *pro tanto* lifting the shield of protection, allowing the successful party to recover more of his expenses resulting from claiming his rights.'⁸⁰
- (4) The idea of removing the law's protection of the costs debtor against injustice (a protection entrenched by the appellate division in *Nel*⁸¹) led the learned judge to a further conclusion expressed as follows:

'The present order was obviously motivated by such an approach. Indeed, the form of the order proclaims it. Not only were party and party costs not awarded, but attorney and client costs were not awarded. The Court must be taken to have been aware of the limitations on recoverability in an attorney and client award and obviously intended, insofar as it could be achieved, that those limitations should not apply and that the applicant should be entitled to recover its expenses. At the same time I have no doubt that the order also comprises important, albeit unexpressed, qualifications:

- (i) ...;
 - (ii) ...;
 - (iii) that lifting the shield of protection does not mean discarding it.
- Only to the extent of the order must the respondents be

⁷⁹ *Cambridge Plan* (above), at 596C.

⁸⁰ *Cambridge Plan* (above), at 596D-F.

⁸¹ *Nel* (above), at 608, line 28.

mulcted. They are still entitled to be treated fairly and equitably within the ambit of the wider costs order.'

Comment: In my respectful view, the idea of lifting the shield of protection against injustice so as to allow a certain measure of injustice against the costs debtor, but no more injustice than is fair and equitable, is difficult to grasp in principle, and impractical to apply. Save where discretionary powers are concerned, our system of law does not generally invest the courts with the power to temper law with what a particular court may take to be equitable in the peculiar circumstances of a particular case. The dichotomy between law and equity that was once a feature of the English legal system has never been a feature of our own. I would respectfully suggest that this aspect of the decision in *Cambridge Plan* is not a correct reflection of our law of costs.

9. Swart J also raised the question whether the 'Roos' analysis was wide enough to cover an order for costs to be paid by one party to another, taxed as between attorney and own client; and the further question whether the taxing master, by taxing the bill in accordance with the third *Roos* scale, had implemented that order.⁸² At this point the learned judge stated, in respect of the third attorney and client scale in *Roos*:

'the third scale, which admittedly provides (and did in this case provide) little more than a taxation between party and party.'⁸³

This statement reveals beyond doubt that the learned judge was indeed misled by the fallacious proposition in *Roos*.

10. The learned judge considered that the costs claimed did -

⁸² *Cambridge Plan* (above), at 597B.

⁸³ *Cambridge Plan* (above), at 597C-D.

'... technically, fall under the third scale, but simply to leave it at that loses sight of the fact that:

- (i) the Court expressly awarded costs ... on the first of *Roos'* scales, that is between an attorney and his own client;
- (ii) that *Roos'* scales do not provide for the order made in this case.⁸⁴

11. The learned judge went on to hold -

- (a) that if, as appeared to him to be the position, the taxing master had interpreted the order as directing a taxation on the third of the *Roos* scales, she had misdirected herself;⁸⁵ and
- (b) that the taxing master had also erred in considering herself bound by the tariff.⁸⁶

12. In the light of these findings, Swart J came to the conclusion that (without laying down any rules that would necessarily be applicable to *all* such orders) any order that a bill of costs to be paid by one party to another is to be taxed as between attorney and *own* client, should be interpreted in the light of the particular circumstances of the case together with certain general propositions set out by the learned judge in paragraphs (g)(i), (ii) and (iii).⁸⁷ I deal with them in sequence:

⁸⁴ *Cambridge Plan* (above), at 597D-E.

⁸⁵ *Cambridge Plan* (above), at 597J - 598C.

⁸⁶ *Cambridge Plan* (above), at 598C - 599E.

⁸⁷ *Cambridge Plan* (above), at 599F - 602J.

- (1) Paragraph (g)(i): inter-party taxation on the first scale: In the words of Swart J:⁸⁸

'... the ostensible purpose of the order ... is to recompense the successful litigant as far as it can be done. To that end, subject to such qualifications as may follow, taxation should take place on the first of the 'Roos' scales. If it be accepted that, as the practice now stands, an attorney and client order between parties is not intended to provide full recompense, and if the *Roos* classification is valid, the Court order can only be implemented by taxing this bill on the first of the aforesaid scales.'

Comment:

- (a) I respectfully agree with the first proposition (that the purpose of an order for taxation of an inter-party bill of costs 'as between attorney and *own* client', is to recompense the successful litigant as far as can be done; that is, as far as is lawful within the limits set by *NeI*).. However, with due respect to the learned judge, I would point out that the proposition that an inter-party taxation should take place on the attorney and client scale that is applicable when an attorney is to be paid by his own client (the first scale) cannot be reconciled with *NeI* precisely because it tends to lead to injustice against the costs debtor in the ways referred to in *NeI*. The most obvious injustice flows from the fact that the costs debtor may in this way be saddled with the burden of paying extravagant special fees agreed upon between the attorney and his client in terms of an agreement to which the costs debtor was never a party.

⁸⁸ *Cambridge Plan* (above), at 599H-I.

(b) *Nel* accepted that our law and practice relating to costs derived from the English law, in which the three scales of taxation of attorney and client costs were recognized. However, *Nel* also recognized a crucial difference between the English law and our own law of costs that *Roos* overlooked. There was an English rule of court that -

‘... went too far in the extent to which it required the Taxing Master to disallow items of an attorney and client bill of costs where such costs were payable not by the client himself to his attorney but by the other party.’⁸⁹

No equivalent rule has ever been adopted anywhere in South Africa. That unsatisfactory English rule of court gave rise to the comment in an English text book,⁹⁰ relied on by *Roos*, that the third attorney and client scale of taxation (applicable to a bill payable by one party to another) -

‘... gives little more than a taxation as between party and party, except that any necessary letters to and attendance on the client are allowed.’

It was the absence, in South Africa, of any such unsatisfactory rule of court that left the appellate division free to determine, as they did determine in *Nel*, that taxation of a bill of costs on the attorney and client scale for payment by one party to another (the third attorney and client scale referred to by *Roos*) permits of a full indemnity to the costs creditor, limited only by the danger of injustices to the

⁸⁹ *Nel*, above, at 608.

⁹⁰ *Porter and Wortham, Guide to Costs*, 13th ed, 915.

costs debtor of the kinds referred to in *Nel*. In South Africa, such a taxation is not restricted in the way that it was in England at the time; and the comment that it 'gives little more than a taxation as between party and party', even if once true in England, has never, or at least not since *Nel*, been true in South Africa.

- (c) On the analysis of Swart J, if two propositions are correct, effect can only be given to an order for payment by one party to another of costs taxed as between attorney and *own* client, by taxing the bill as if it were an attorney's bill to be paid by his own client (the first basis of attorney and client taxation). The two propositions are -
- (i) that, 'as the practice now stands, an attorney and client order between parties is not intended to provide full recompense'; and
 - (ii) 'if the *Roos* classification is valid'.
- (d) For the reasons I have already given, I am respectfully of the view that the correct analysis of the position shows, in respect of (c)(ii) above, that there is nothing invalid about the classification of attorney and client taxations into three categories. They are, (in abbreviated form):
- (i) where an attorney claims payment from his own client;⁹¹
 - (ii) where the payment is to be made from a common fund;⁹²

⁹¹ Of the three, this basis of taxation is the most generous to the costs creditor (the attorney), subject to the client's not being over-reached by his attorney.

⁹² The taxation is less generous to the costs creditor than (i) above. Compare *Brooks v Taxing Master and Another* 1960 (3) SA 225 (N), at 230 B-E, dealt with more fully above.

(iii) where the payment is to be made by one party to another.⁹³

What is wrong is the idea spread by *Roos* that taxation in terms of the third category 'gives little more than a taxation as between party and party.' This mistaken idea has given rise to unnecessary attempts to 'compensate' for the perceived (but non-existent) shortcomings in an inter-party attorney and client costs order, by stipulating for contractual undertakings to pay another party's costs 'taxed as between attorney and own client', and by praying for orders in similar terms. When *NeI* is properly understood and applied, it is seen that the latter type of agreement or order cannot possibly yield any more costs than the former type. In terms of *NeI*, the former type of order gives the costs creditor as full an indemnity as is legally possible, stopping short of injustice to the costs debtor. No room remains for the latter type of order to yield anything more to the costs creditor.

(e) For the same reasons, the proposition in (c)(i) above can, with due respect to the learned judge, not be supported. It is *not* the current

⁹³ Although this basis of taxation is the strictest of the three, and the least generous to the costs creditor, the objective is nevertheless as set out in *NeI*. It is to provide the costs creditor with a full indemnity for all the costs he has had to incur, including not only those that would have been recoverable on a taxation as between party and party, but also the additional costs that would not be recoverable on such a taxation and that he has reasonably incurred in consequence of the conduct of the costs debtor that has met with the disapproval of the court. This basis of taxation is subject to the limitation that there should be no injustice to the costs debtor of the kinds envisaged in *NeI*. This is the basis of taxation referred to in *NeI* as 'intermediate'. It is indeed intermediate between (i) above (taxation of a bill to be paid to an attorney by his own client) and a party and party taxation. The court makes a special order for one party to pay another's costs taxed as between attorney and client in the expectation that, when the taxing master looks into the details of the bill of costs, he will find that the costs creditor reasonably incurred costs additional to those recoverable on a party and party taxation; and that the reprehensible conduct of the costs debtor made the case 'extraordinary or exceptional' within the meaning of Rule 70(5)(a). The intention of the court making the order is, in accordance with *NeI*, that the costs creditor should recover *all* of his costs reasonably incurred, short of inflicting injustice on the costs debtor.

practice that an order that one party should pay the costs of another taxed as between attorney and client 'is not intended to provide full recompense'. Correct current practice is not founded on *Roos's* erroneous proposition. It is founded on *Nel*. The intention behind such an order is therefore that the taxation should afford the costs creditor a full indemnity for all his costs, including costs not ordinarily recoverable on a taxation between party and party, limited only by considerations of justice towards the costs debtor as indicated in *Nel*.

(f) I am therefore respectfully of the view that when a bill to be paid by one party to another has been ordered to be taxed as between attorney and *own* client, the first approach proposed in *Cambridge Plan* to such a taxation (paragraph (g)(i)) is not correct: the taxing master is *not* required to tax the bill on the first of the *Roos* scales ie as if he were taxing the bill for payment to an attorney by that attorney's own client.

(2) Paragraph (g)(ii): the measure of the liability of the costs creditor to his own attorney:⁹⁴ The second step proposed by Swart J in the approach to an inter-party taxation as between attorney and *own* client was to ascertain what the attorney of the costs creditor would be able to recover from the costs creditor, in order to determine what the costs debtor should pay to the costs creditor. The learned judge went on to discuss *expenses* and *fees* separately.

⁹⁴ *Cambridge Plan* (above), at 599J - 600G.

Comment:

- (a) In my respectful view, this approach cannot be reconciled with the decision in *Nel*. It appears to me to overlook the following important passage in *Nel*:⁹⁵

'... the court in a particular case considers it just ... to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. ... a party may have incurred expense which is reasonably necessary but is not chargeable in the party an party bill. ... Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say "as far as it can" because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party.'

- (b) As is apparent from the remainder of the judgment in *Nel*, the limits beyond which the court's powers do not reach (implied by the words 'as far as it can') are limits imposed by considerations of justice towards the costs debtor. The court has no power to order a taxation on a basis that may, in terms of *Nel*, inflict injustice on the costs debtor. Therefore an order for an inter-party taxation 'as between attorney and *own* client' does not, as a matter of law, authorize the taxing master to go any further than an order for an inter-party taxation 'as between attorney and client' as explained in *Nel*. Accordingly, the proposition in *Cambridge Plan*, paragraph

⁹⁵ *Nel* (above), at 607, line 24.

(g)(ii), that the taxing master should first ascertain what the attorney of the costs creditor can recover from his own client in order to determine what the costs creditor can recover from the costs debtor, appears to me to be partly inconsistent with *NeI*.

- (c) Generally, the bill presented by the costs creditor in an inter-party taxation will include all fees and disbursements that the costs creditor is obliged to pay to his own attorney. Indeed, it may include more. Items that may be taxed off on the basis that the costs creditor is not obliged to pay them to his own attorney are obviously not recoverable by the costs creditor from the costs debtor. But when that exercise has been completed, the bill has *not* been taxed in accordance with the limits established and recognized in *NeI*. In an inter-party taxation (even if the order is for taxation as between attorney and *own* client), the question confronting the taxing master is not, as suggested in *Cambridge Plan*, paragraph (g)(ii), 'How much must the costs creditor pay his own attorney?' It is, 'How much is the costs debtor obliged to pay the costs creditor to afford the latter the full indemnity envisaged by *NeI*, whilst bearing in mind the just limits recognized in *NeI*?'
- (3) Paragraph (g)(iii): the role of an agreement between the costs creditor and his own attorney.⁹⁶ In this passage, Swart J has set out guidelines as to how far the taxing master, for purposes of an inter-party taxation as between attorney and *own* client, should have regard to any agreement

⁹⁶ *Cambridge Plan* (above), at 600G - 602J.

on fees and disbursements that may have been arrived at between the costs creditor and his own attorney.

Comment:

- (a) To the extent that this passage is consistent with *NeI*, I respectfully adopt it. I find nothing in *NeI* that is inconsistent with the following words of Swart J:

'... I am of the opinion that the agreement cannot be treated as if it does not exist. ... as far as the agreement is concerned, there must be this qualification, namely that ... it cannot be enforced against the [costs debtor] insofar as, objectively speaking, it is unreasonable. An agreement would be unreasonable if, for instance, it authorized unprofessional fees or work or expenses which were unreasonable or unnecessary in the sense I have indicated above. As far as expenses are concerned, they would, for instance, be unreasonable if they were not in broad accordance with, say, counsel's professional fees or the normal fees of investigators and so forth, and were incurred with the approval of the client to simply load the dice against his opponent.'

For the reasons I have already given, I consider that there is no difference between an inter-party taxation 'as between attorney and client' and 'as between attorney and *own* client.' Therefore, it seems to me that the above-quoted passage is equally applicable in both situations.

- (b) *NeI* recognized that in an inter-party taxation as between attorney and client, the taxing master is not necessarily confined to the tariff.

Tindall JA said (with emphasis added by me):⁹⁷

'Theoretically, a party and party bill *taxed in accordance with the tariff* will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill.'

The implication that the more complete recoupment envisaged by *NeI* contemplated departures from the tariff, is plain.

- (c) The costs incurred by the costs creditor are always based on some form of agreement between him and his attorney, and in some instances also on agreements with third persons, such as expert witnesses. Agreements for fees exceeding the tariff are by no means unusual. It appears to be inevitable that the taxing master, when assessing the more complete indemnity envisaged by *NeI* for a costs creditor, will from time to time have to apply his mind to the question whether such an agreement was within the fair and just limits permitted by *NeI*, or whether the agreement, in some respects at least, went beyond those limits and provided for 'luxuries' of a kind disapproved in *NeI*. Obviously, not every departure from the tariff amounts to such an irrecoverable 'luxury'. As accepted in *NeI*, the circumstances may render departures from the tariff 'reasonably necessary' (and therefore recoverable by one party from another on

⁹⁷ *NeI* (above), at 607, line 29.