

ROYAL COURT21st October, 1991

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Before the Judicial Greffier

BETWEEN	A.C. Mauger & Son (Sunwin) Limited	PLAINTIFF
AND	Victor Hugo Management Limited	DEFENDANT
AND	Julian Anthony Clyde-Smith and Others exercising the profession of advocates under the name and style of Ogier & Le Cornu	FIRST PARTY CITED
AND	Cater Allen Bank (Jersey) Limited	SECOND PARTY CITED

Taxation Hearing in relation to an Order for Taxed Costs following an interlocutory hearing in the Royal Court.

Advocate G. Le V. Fiott for the Plaintiff

Advocate J.G. White for the Defendant

JUDGMENT**JUDICIAL GREFFIER:**

On 26th and 27th November, 1990 the Royal Court sat in order to consider the Defendant's application for injunctions contained in the Order of Justice (and subsequently varied by Order of the Court) to be discharged and for the Order of Justice to be struck out. The application was refused and the Defendant ordered to pay taxed costs of the application.

A number of interesting points of principle arise in this case as follows:-

- (a) whether the costs of English solicitors who were assisting with the case should be allowed on taxation;
- (b) whether the costs of two advocates in preparing for the hearing and also in attending in Court, one appearing as an advocate and the other as if an ecrivain, should be allowed on taxation;

- (c) what were the appropriate rates to be allowed upon taxation;
and
- (d) to what extent were the fees of a quantity surveyor who is employed by the Plaintiff allowable on taxation.

The test to be applied in relation to taxed costs is discussed at some length in the taxation hearing in *Furzer -v- I.D.C.* 9th August, 1990 Unreported. In the final paragraph on page 8 of that Judgment I wrote:-

"Accordingly, I find that the correct test for me to apply in relation to taxed costs is that of taxation on the party and party basis as set out in Order 62, Rule 28(2). That is to say "there shall be allowed all such costs as were necessary or proper for the attainment of Justice or for enforcing or defending the rights of the party whose costs are being taxed". I take the words "necessary or proper" to mean more than simply necessary but less than the test of taxation on the common fund basis of "there shall be allowed a reasonable amount in respect of all costs reasonably incurred". Although the authorities lead me to this conclusion they do not give clear guidance as to precisely where the line is between those two positions. I can only apply the test of necessary or proper as seems right".

Included in the costs before me was an account of Masons an English firm of solicitors who were assisting with related arbitration proceedings and also with the conduct of this action. The authorities of the Crane case (1960) 1 PD 186, the Clore case (1983) JJ 83/43 and the Rahman case 2nd July, 1990 Unreported were placed before me. Advocate Fiott argued that if the costs of an English solicitor were not to be allowed then there would be an anomaly because if the same solicitor were to be working for a firm of Jersey advocates then his time would be allowed. He also invited me to find that there was a sufficient connection between the present action and the arbitration which was being effectively conducted from the UK to take the action out of the category of an essentially domestic Jersey matter. However, he conceded that this was not a case in which the English solicitors were doing specific research in relation to points of English Law and where the Law of Jersey followed the English Law or where English Law was generally persuasive. He accepted that the work

being performed by Masons was essentially advisory and by way of co-ordinating the Jersey action with the arbitration proceedings. I also noted that the original building contract in this case was governed by Jersey Law and that the building work was to be performed in Jersey.

In my view, the imposition of Mareva injunctions and the Law on striking out are both very well settled parts of Jersey Law. In both cases we borrow very heavily from English Law but there is a sufficient body of Jersey Law available. Furthermore, as admitted by Advocate Fiott, the work being performed by Masons was not by way of specific research.

Without in any way attempting an exhaustive definition of the Law following the Crane, Clore and Rahman cases, it appears to me from those cases that there is a clear distinction between the type of situation in this case where the English solicitors are acting as co-ordinators and general assistants as opposed to the type of situation where specific legal advice on applicable points of Law is being sought. I therefore found that in this case I should disallow the whole of the sum of £612 being sought.

I found no merit in Advocate Fiott's line of argument in relation to the position of English solicitors working for Jersey lawyers. Such people would be working under the authority of the Jersey lawyers who would ultimately be responsible. They would not essentially be in any different position in Jersey to that of a senior clerk. The position on that is well established and it is customary to allow a percentage of the taxed rates which would be applicable for the work of a qualified lawyer.

However, there was a further point which followed on from this. Advocate White argued that if the costs of the English solicitors should not be allowed then similarly, the costs of all correspondence with the English solicitors should not be allowed. I do not agree with him on this point. In my view, it is one

thing to disallow the costs of the English solicitors and another thing to say that it was not necessary or proper for the Jersey advocates to consult with them. In my view, this was completely proper due to the need to co-ordinate the two types of proceedings and I have therefore allowed the costs of the Jersey lawyers in relation to this where it related to this particular application.

Advocate Fiott argued that as it was a well established principle in Jersey that an ecrivain would instruct an advocate to appear in the Royal Court, an advocate ought to be able to play the role of ecrivain and in turn instruct another advocate to appear in Court. He argued that the value of the assets in dispute in this claim and the complexity of the case were such as to justify this course of action. He produced a section from the first supplement to the 1991 White Book in relation to paragraph 62/28/8 which begins on page 27 of the supplement under the heading "Leading counsel and the two counsel Rule."

I quote now from part of the second paragraph of that section as follows -

"Evans J. first listed the most likely factors affecting the decision whether or not to instruct a leader; they include:

- (a) the nature of the case, including in accident cases:
 - (i) the nature and severity of the Plaintiff's injury;
 - (ii) the likely duration of the trial;
 - (iii) difficult questions regarding the quantum of damages, including evidence and questions of law;
- (b) its importance for the client;
- (c) the amount of damages likely to be recovered;
- (d) the general importance of the case, e.g. as affecting other cases;
- (e) any particular requirements of the case, e.g. the need for legal advice, or for special expertise e.g. examining or cross examining witnesses; and
- (f) other reasons why an experienced and senior advocate may be required.

The learned Judge felt that the fact that the other party has instructed leading counsel or intends to do so cannot

and should not be disregarded as a factor to be taken into account when deciding the question whether or not it is reasonable to have instructed leading counsel. It was treated as relevant though not conclusive in *British Metal Corp. Limited -v- Ludlow Brothers (1913) Limited* [1938] Ch. 987.

With regard to the question of whether or not a junior should be instructed in addition to leading counsel, it must be answered by reference to the test of reasonableness."

It must be borne in mind that in the English cases what was being considered was whether it was reasonable for there to be a solicitor and also senior counsel and that the reference in the final paragraph quoted to junior counsel would lead to three lawyers. In this case I was considering if it was reasonable that there be two lawyers. Advocate Fiott indicated that the volume of work on the case and the pressures relating to his belonging to a relatively small firm, were such that it was in his view necessary for him to instruct Advocate Michel in order to assist. The sum of money in dispute in the arbitration proceedings and therefore also involved in these proceedings was of the order of two million pounds. Clearly this action was of the utmost importance to the Plaintiffs. If the injunctions had been lifted or if the striking out had succeeded then in either event the whole case would have failed and there would have been a loss of control over the distribution of the Defendant's assets. In my view, it was proper and reasonable for a second lawyer to be instructed in this case. However, I have taken into account to a certain degree the fact that there will inevitably have been a certain degree of duplication of effort due to the fact that Advocate Michel was instructed fairly late on in relation to this matter and had to read himself into the whole file in order to consider and advise upon a wider range of matters than that dealt with under the summons.

The hourly rates which are currently permitted on taxation on a taxed costs basis are set out in scales which are issued from time to time by the Judicial Greffier. The most recent scale dated November, 1990 applies to all Orders for Costs made on or

after November 5th, 1990. The effect of this is that costs are taxed on that scale whenever they were incurred provided that the Order for Costs is made on or after that date.

One heading is that of "All work done in connection with discovery, interrogatories, striking out, and other procedural matters (per hour) £60". A second scale is "Attending on witnesses, taking proofs of evidence, obtaining reports from experts, inspection of any property or place material to the proceedings, and making researches through other entries and public records, appraisals of pleadings, letters etc., (per hour) £70". In my view, all the work by way of preparation for this case comes under the £60 rate except for time actually spent with witnesses who were going to swear relevant affidavits which are allowable at £70. Clearly striking out and an application for the lifting of injunctions are procedural matters. On the other hand, the rate in relation to appearing in Court is that set out in paragraph (f) which is "For hearing of action, including interlocutory matters (per hour) £90". Accordingly all Court time in this case is allowed at £90 per hour.

Advocate Flott quoted to me the case of Pajama Limited, trading as Martin L. Dodd and Partners -v- Ferpet Investments Limited JJ 1982 page 137. I quote now from a section beginning about two thirds of the way down on page 138 of that Judgment -

"Now the plaintiff is an incorporated body and whether it is an incorporated body with one partner or two partners or more, the fact remains that in Law it is an incorporated body, and that being so, we have had regard to the section in the White Book (62/28/11), where the paragraph says that there is an established practice of disallowing any sums claimed in respect of time spent by share-holders personally in the course of instructing the company's solicitors but it goes on to say that the corporation may charge for employing its own specialist staff where outside experts would otherwise be employed. The amount to be allowed must be restricted to a reasonable sum for the actual and direct cost of the work. Now, that sub-paragraph requires two matters to be considered; was Martin Dodd a specialist, employed by his own company in effect, and if he was, then should he, or the company, be entitled to some remuneration

for his time? However, that part of the White Book's paragraph is qualified and the amount allowed has to be restricted to a "reasonable sum". We are satisfied, first of all, that Martin Dodd can be considered to be in the category of specialist staff because his knowledge, even if he was not qualified by diploma (although for the purpose of practising as an architect it could justifiably be inferred from the fact that he had been in practice for some time, and therefore has a practical knowledge) could properly be classed to be that of an expert. If he was not used then someone else would have had to have been used outside the company staff and that in fact of course happened in the case of Mr. Dyson. Therefore, as far as the Greffier's allowance in principle of some payment in respect of Mr. Dodd's time and his assistant (we think his assistant is covered as well as Mr. Dodd in principle) that allowance was correct. Nevertheless it was wrong, we think, to assess the amounts on the basis of profit costs, and therefore so far as the taxing of the Martin Dodd and Co. and Mr. Plunkett-Cole's costs are concerned we are going to refer them back to the Greffier to assess the actual costs and not the profit costs which have been included in the bill."

I was provided with information by Advocate Fiott by a letter subsequent to the initial taxation hearing to the effect that the appropriate hourly rate in order to cover Mr. Booth's time was £50 per hour. Unfortunately, I have not been provided with any adequate calculation of the basis upon which that figure has been assessed. The Judgment in the Pajama Limited case refers in the penultimate line of the quotation above to actual costs. In the absence of detailed information I have made my own calculations. I have also received an inadequate breakdown of the time spent by Mr. Booth in his professional capacity. I excluded immediately the time spent in Court. As to the remainder of his time, I have allowed 10 hours at £30 being £300.00 altogether.

I have read through the relevant letters and files of Advocates Fiott and Michel and have taxed Advocate Fiott's costs as £3,114.25 and Advocate Michel's costs at £3,559.70 and in addition have allowed the sum of £300 in relation to Mr. Booth. This produces a total figure on taxation of £6,973.95.

I do not propose to deal with these item by item in this Judgment because of their complexity. However, there are certain comments which I would wish to make.

I did not allow anything in relation to work done in relation to the application under Rule 6/7(5) of the Royal Court Rules for Judgment in default of an answer. I similarly did not allow any amount for work done in relation to proposed amendments to the Order of Justice as the idea behind that was primarily to extend the existing injunctions. In a number of places I have sought to apportion time spent in order to confine the taxed costs solely to this particular application. This is not an easy thing to do as a number of matters were being considered simultaneously. I have also made some allowance from time to time for a degree of overlap between the work done by Advocate Fiott and the work done by Advocate Michel. Finally, Advocate Fiott had claimed for ten and a quarter hours by way of preparation between the 27th September to the 17th October, 1990 and had claimed a further five and five-sixths hours of time on November 20th, 1990. I have reduced those periods to seven hours and three hours respectively. Advocate Michel claimed for thirteen hours of time which he dated as at 15th November, 1990 and this I have reduced also to ten hours. Advocate Michel also claimed for work of an assistant at 19.8 hours and I have reduced this to fifteen hours. I have done this upon the basis that the time for research and preparation is only necessary or proper up to a total, under these categories, of twenty hours for the two advocates and fifteen hours for the assistant. I have not allowed the telephone or facsimile charges claimed in accordance with the principles set out in the Furzer -v- I.D.C. case. I will need to be addressed in relation to the costs of the taxation hearing.

AUTHORITIES.

Millbrook Executor & Trustee Company, Ltd & Anor -v- Crane (1960) 1 PD 186.

Clore (1984) JJ 81 C. of. A.

Preston -v- Preston (1982) 1 All ER 41.

Jones -v- Jones (No 2) (1985/86) J.L.R. 40.

12 & 13 Britannia Place Ltd -v- J.& G. Property Ltd & Ors (8th February, 1989) Jersey Unreported.

Rahman -v- Chase Bank (CI) Trust Company Limited (2nd July 1990) Jersey Unreported.

Pajama Limited, trading as Martin L. Dodd and Partners -v- Ferpet Investments Limited (1982) JJ. 137.

R v Dudley Magistrates' Court QB Divisional Court (16th March, 1990) NLJ.

Francis -v- Francis and Dickerson (1955) 3 All ER 836.

British Metal Corporation Limited -v- Ludlow Brothers (1913) Limited (1938) 1 Ch. 787.

R.S.C. (1991 Ed'n): 62/A2/4, 5, 6; 59/13/3; 62/27 & 28; 42/1/12.

Re Nossen's Patent (1969) 1 All ER 775.