11 Pages.

ROYAL COURT

9th August, 1990 1148.

Before the Judicial Greffier

BETWEEN Martyn Donald Furzer,
Wendy Joan Kirk-Bailey (née Furzer)
Heather Suzette Le Maistre (née Furzer)
wife of John Raymond Le Maistre and
the said John Raymond Le Maistre — APPELLANTS

AND The Island Development Committee
of the States of Jersey — RESPONDENT

Hearing before the Judicial Greffier in relation to the taxation of costs.

Advocate D.E. Le Cornu for the Appellants

Advocate S.C.K. Pallot for the Respondent

Mr. D.P. Huelin present to assist.

JUDGMENT

I have produced a written Judgment in this case as there are certain matters which have arisen during the course of the hearing, the determination of which may be of some assistance to the profession.

This case arose by reason of an appeal against a decision of the Island Development Committee to revoke a development permit. On 12th January, 1990 the Royal Court found in favour of the appellants and ordered that the costs of the appeal be paid by the Committee. It is clear from the Greffier's note and from the Act of Court that the Order was for taxed costs.

The Advocates for the two parties were not agreed as to the correct tests to be applied in relation to taxed costs.

Advocate Le Cornu referred me to Order 62 Rule 12 of the current Rules of the Supreme Court which reads as follows:-

12. - (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were a reasonable amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.

He also referred me to section 62/12/1 of the Supreme Court Practice 1988 Volume 1 which reads as follows:-

The test to be applied on a taxation of costs, whether on the standard or indemnity basis is that of reasonableness. In Francis -v- Francis and Dickerson [1956] p. 87; [1955] 3 ALL E.R. 836 it was held that the correct view-point to be taken by a taxing officer in considering whether any step was reasonable is that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interest of his client.

He further referred me to the above-mentioned case of Francis -v- Francis and Dickerson and to the all England Law Report 1955 volume 3 at page 840 from which, at section D, the above quotation is taken.

Advocate Pallot in answer to this produced an extract from the Supreme Court Practice 1982 volume 1 in relation to the Order 62 Rule 28 which existed as that time. He quoted the following parts of that Rule-

> (2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis 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.

(4) On a taxation on the common fund basis, being a more generous basis than that provided for by paragraph (2), there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and paragraph (2) shall not apply; and accordingly in all cases where costs are to be taxed on the common fund basis the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid.

Advocate Pallot also referred me to section 62/28/3 of the Supreme Court Practice 1982 which reads as follows -

PRINCIPLES OF PARTY AND PARTY TAXATION

It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them" (Smith -v- Buller (1875), L.R. 19, Eq., p. 475 per Malins, V-C.; and see Turnbull -v- Janson (1878), 3 C.P.D. 264; Simmons -v- Storer (1880), 14 Ch. D. 154; Warner -v- Mosses (1881), 19CH.D.72). These cases were decided prior to the S.C.R., 1883,

O.65,R.27 (29), and may have been modified by decisions such as Société Anonyme Pêcheries Ostendaises -v- Merchants Marine Insurance Co., [1928] 1 K.B.., where Atkin, L.J., at p 762, indicates that "proper" includes costs not strictly "necessary" but reasonably incurred for the purpose of the proceedings; but this decision is hard to reconcile with the wording of the present subrule 4. The Court will be reluctant to overrule the discretion of the Master as to what was necessary if he has gone into the matter fully (Oliver v. Robins (1894) 43 W.R. 137).

Advocate Pallot also referred me to the case of Jones v Jones (No. 2) Jersey Law Reports 1985 - 1986 at page 40. This Judgment was mainly in relation to the question as to when full indemnity costs should be ordered. I am quoting from a section which begins on line 32 of page 40 -

"As I said a short time ago, I have never fully understood why a successful litigant is not entitled to his or her full costs, subject to the costs in question being reasonable, having been reasonably incurred and not being excessive. I still do not understand why that is not the situation, but I have to accept that it is not the principle upon which the English Courts proceed and no doubt for that reason I have to accept also that it is not the principle upon which Jersey Courts proceed. I think that it is quite clear, first, from Preston -v- Preston (1) and secondly, from the fact that there are very few examples in Jersey where full indemnity costs have been given.

So obviously, for good reason or bad reason, we appear to have followed the English practice and I feel that I must follow that practice too.

There is a right of appeal against my decision and it may be that if an appeal is brought against the ruling I have just given, then perhaps the Court of Appeal will look into it to see whether, in fact, it is a principle which this Court ought to be following, but it does appear to me, that it is a principle which we do follow."

Advocate Pallot's argument was that as the Court in the case of Jones -v- Jones on May 23rd, 1985 considered itself bound by the English practice and as the English practice at that date was as set out in the extract from Order 62 Rule 28 quoted above, therefore, this still represented the Law of Jersey on the matter and that when a Jersey Court ordered taxed costs the Judicial Greffier in taxing the costs should apply the principles which related to party and party costs in 1985 rather than the principles which relate to the standard basis for costs in 1990.

It is clear to me that the terms taxed costs and costs on a party and party basis in Jersey have in the past meant one and the same thing. One example of this is the last paragraph of the Judgment of the Court of Appeal in the case of the Official Solicitor, Appellant, and Alan Evelyn Clore, respondent, which is recorded on page 101 of the volume of Jersey Judgment for 1984. The Judgment in that case referred to costs of and incidental to the application and this appeal on the ordinary party and party basis.

It is also clear that Order 62 Rule 28 as quoted by Advocate Pallot was still in force in 1985 at the time of the Jones -v- Jones Judgment, because the same Rule is quoted in the 1985 volume of the 'White Book'.

Advocate Le Cornu replied by saying that even if Advocate Pallot was right and the principles set out in Order 62 Rule 28 applied, then the section quoted above from Order 62/28/3 together with the Judgment in Francis -v- Francis and Dickerson provided a wider test than that of "necessary". He quoted from Francis -v- Francis and Dickerson All England Law Reports 1955 volume 3 page 840 commencing on the last line of section B -

"The words in R.S.C.,Ord 65, r.27(29), are "necessary or proper"; and "proper" has always been construed as "reasonably incurred" (cf. per Atkin, L.J., in Pêcheries Ostendaises (Soc. Anon) -v-. Merchants' Marine Insurance Co. (2)([1928] 1K.B. at p.762). Indeed "reasonable", "proper" and "reasonable and proper" (cf. R.S.C., Ord.65, R.27(38) and per Singleton, L.J., in Lyon -v- Lyon (3) [1952] 2 All E.R. at p. 834) are obviously interchangeable expressions in the context under consideration, and all include something beyond what is meant by "necessary" in the sense in which it appears to be used in the above observation of the registrar. When considering whether or not an item in a bill is "proper" the correct view-point to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client."

Advocate Le Cornu's argument was that the words "necessary or proper" in Order 62 Rule 28 (2) effectively meant the same as reasonably incurred for the purposes of the proceedings.

I can only comment that the position up to 1985 in England was not as clear as one might have hoped.

However, the words in Order 62 Rule 28 (4) "on a taxation on the common fund basis, being a more generous basis than that provided by paragraph (2)," must mean something and must mean more than simply that the hourly rate allowable is more generous.

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.

The result of this application is as follows:-

(a) In relation to the bill of costs of Fiott and Huelin, this is allowed in full subject to the following two deductions:-

(i) I deduct 4 hours at £35 equals £140.00 from the item totalling £630 for the period January 1983 to 1st February 1987 and this upon the basis of an overlap of work due to the change over of the legal representation; and

(ii) I am deducting the sum of £80 from the item totalling £310 for the period 2nd February, 1987 to 11th February, 1988 and this by reason of overlap of researches into questions and authorities and of work on preparation of the appellants' case due to the change in the legal representation. Accordingly I tax Fiott and Huelin's account at £1,012.75.

(b) In relation to the account of Pickersgill and Le Cornu I make the following deductions:-

(i) I take the view that 17 hours of work in relation to "preparation for trial including extensive researching authorities, redrawing pleadings etc." are beyond the test applicable to taxed costs and accordingly I reduce that element of the bill by £850 to £1,100;

(ii) In relation to the item "to assistant's time and preparation, research and attending trial and take notes and generally," I have disallowed the 20 hours spent in Court and allowed one half of the remaining time thus reducing this item by £610 from £820 to £210;

(iii) In relation to the item, to all photocopying, postage, telephone fax, and incidental disbursements, I make the following comments:-

(a) I have allowed 1,414 photocopies at 15p per copy equals £212.10 and I have allowed purchase of files £16.68 making a total of £228.78.

(b) I have disallowed fax charges postage and telephone calls, as I take the view that the allowance for these is effectively made within the hourly rate and that these should not be separately charged for the purposess of taxation.

Accordingly I have taxed the Pickersgill and Le Cornu account at £4,244.44 and taxed the two accounts together at £5,257.19.

Finally, the matter of the costs of the costs hearing arises. Although, neither party addressed me at any length upon the principle as to whether I could award costs in relation to the hearing I am of the opinion that I have such a power in the same way as I have the power to award costs in relation to other matters which come before me. In this case the appellant was asking for a greater sum than I have awarded and the respondent for a lesser sum. I am making no Order as to the costs of the taxation hearing.

AUTHORITIES

R.S.C. (1988 Ed'n): Order 62; Rule 12.
: Section 62/12/1

R.S.C. (1982 Ed'n): Order 62; Rule 28
: Section 62/28/3

Jones -v- Jones (1985-86)JLR 40

The Official Solicitor -v- Clore (1984)JJ 101

Francis -v- Francis & Dickerson (1955) 3AllER 840