ROYAL COURT 96.

20th July, 1993

The Bailiff, Single Judge.

Between:	Arya Holdings, Ltd.	Plaintiff
And:	Minories Finance, Ltd.	Defendant

Appeal by the Plaintiff against so much of the Judgment of the Deputy Judicial Greffier of 11th May, 1993 (see Jersey Unreported Judgment of that date) on the Taxation of the Plaintiff's costs, arising out of the Order of the Royal Court of 31st March, 1992, as disallowed the costs of English Lawyers, incurred by the Plaintiff.

Advocate R.J. Michel for the Plaintiff.
Advocate A.J. Dessain for the Defendant.

JUDGMENT

THE BAILIFF: This is an appeal by Arya Holdings Limited from the decision of the Deputy Judicial Greffier of 11th May, 1993, in which - apart from a minor matter - he disallowed the costs of English solicitors and counsel who were, as he put it, assisting with the action.

I need not set out the detailed background to this appeal because each party accepted that the Deputy Greffier's decision arose from the judgment of the Royal Court of 31st March, 1992.

Minories Finance Limited had applied by summons to strike out the Plaintiff's Order of Justice and amended Order of Justice. Both counsel had been instructed by English Solicitors but after the original Order of Justice had been served and the Answer filed, the Defendant applied by summons to strike out the Order of Justice.

The Plaintiff filed a Reply and requested further and better particulars. At that stage it became clear to those instructing from England that the Order of Justice required considerable

amendment so as to take into account the position of the parties in English Law, and a senior Junior settled these amendments which were incorporated into the Order of Justice by consent. Difficult matters of substantive English Law were involved and in due course will fall to be decided in the main action.

On 31st March, 1992, the Royal Court declined to strike out both Orders of Justice. I was told that English solicitors and counsel on both sides were present at that hearing.

After giving the reasons for its decision, the Court, according to the Act of Court, condemned the Defendant to pay to the Plaintiff the costs of the application and of the adjournment granted on 9th October, 1991.

The decision of the Deputy Judicial Greffier, apart from one minor matter relating to incidental costs, was defended by Mr. Dessain on two main grounds. First, the Order of the Royal Court did not and could not include English lawyers' costs, and secondly, even if it did, the Deputy Judicial Greffier's decision to disallow them was right.

Both counsel accepted that the Court's Order meant taxed costs on a party and party scale. We have not here moved to the English scales of a standard and an indemnity rate, although our Courts do on occasion make orders for full indemnity costs, for example, where a divorced wife has to bring an action for maintenance.

Rule 9/7(1) of the Royal Court Rules, 1992, governs the Greffier's power to tax costs. That Rule is as follows:

"The Greffier shall have power to tax -

(a) the costs of or arising out of any cause or matter in any division of the court;

(b) any other costs the taxation of which is directed by order of the court".

The first thing I should say is that the words in paragraph (a) refer to a matter arising in any division of the court and in paragraph (b) to any other costs. Mr. Dessain has suggested that because the Royal Court on 31st March, 1992, did not specifically order that the costs of the English lawyers should be paid, such costs would come under (b); accordingly it was not open to the Greffier to tax them even if he had so wished. I cannot find myself in agreement with Mr. Dessain. It seems to me that the costs of the English solicitors properly arise out of any cause or matter in any division of the court. Whether they should be allowed and paid on taxation is a matter that I have to decide.

Powers given under the above Rule are wide and give to the Greffier an unlimited discretion. But neither the scale to be applied nor the matters the Greffier should take into account have been laid down by any statute nor indeed by the Court. (See the Official Solicitor -v- Clore [1983] J.J. 43; and [1984] J.J. 81 C.of.A.).

The question whether the Royal Court's Order should include the costs of English lawyers was not raised before the Court, but that in my opinion does not preclude Mr. Michel from raising it now.

The issue of costs was fully argued in Clore after the principal judgment as it was in the case of Rahman -v- Chase Bank [1990] J.L.R. 136. In In re Crane (1959-63) T.D. 74 the question of the costs of English lawyers was raised during argument and formed part of the *raisons* for the Court's decision. Even if the costs of English lawyers should be allowed the Court of Appeal in Egglishaw and Ors. -v- Heseltine and Ors. (1989) J.L.R. 1 C.of.A., expressed the view *obiter* that the Court should identify with some precision those matters upon which their advice and assistance is required.

In my view it is not necessary for the Court awarding costs to distinguish between particular sorts of costs. That is a matter for the Judicial Greffier. (I should add that the Bailiff alone has power to award costs under Article 13/1 of the Royal Court (Jersey) Law 1948), but the Act of Court refers to the award by the Court itself). If, therefore, I am right and the Royal Court Order of 31st March, 1992, can include English lawyers' costs, was the Deputy Judicial Greffier right to exclude them in this case?

Mr. Dessain pointed out, quite properly, that the issue before the Court in March, 1992, was that of striking out, and that the passage in the judgment dealing with the principles which should apply was short and referred only to Jersey cases.

Mr. Michel submitted that, taken as a whole, the judgment contains a fair proportion of English cases and it is clear to me, from reading the list of authorities cited before the Court, that there is reference to a large number of English authorities as well as, of course, a quantity of Jersey cases and authors.

It is fair to add nevertheless that once English principles of law have been incorporated into the Law of Jersey, whether by statute or decisions of this Court, they become part of our Law just as fully as our customary law. But those English principles themselves undergo changes in England and such changes may have to be examined and discussed in subsequent actions in Jersey, and therefore the assistance of English solicitors and counsel may in appropriate cases be proper.

In this case the Jersey proceedings followed litigation in England after the insolvency of Johnson Mathey Bankers and, without being facetious, our proceedings may be said to be the Jersey branch of that litigation. Hence it was quite natural for English lawyers to be concerned from the beginning. I should add that the position would have been the same if the principal litigation had been in France or Spain, or any other foreign court's jurisdiction which for the present purposes includes the English Courts notwithstanding that for the purposes of certain English statutes the Royal Court is, as indeed we have always claimed to be, a British Court.

I find that the matters before the Royal Court on the striking out application were such that it cannot be asserted with confidence that it was not proper for counsel to be assisted by English solicitors or English counsel both in the preparation of the principal case and in the arguments to be advanced. They were needed, not just for managing the action but to advise on specific points of English Law when they were applicable.

The Jersey cases of Crane, Clore and Rahman show that whilst the principle in the Crane case, namely that the costs of English lawyers will not be allowed in what may be loosely called matters of pure Jersey Law, matters of English Law, or of any foreign law, which have to be considered even in the context of a Jersey case, may let in the costs of English lawyers.

In <u>Rahman -v- Chase Bank</u> (1990) J.L.R. 136 the Court considered the Crane and Clore cases and said this at p.142:

> ***"Notwithstanding the fact that the Court of Appeal did not express a final view..."*** (that was in Clore) ***"on the question whether, in some cases, it would be entirely appropriate to distinguish the Crane case and to allow the costs of non-Jersey lawyers where questions of private international law and of foreign law are principal matters in dispute, the court has no hesitation in doing so in this particular case. The development of this Island in the sphere of its finance industry and the provision of services has made it inevitable that the Court should look at and consider other systems of law. This was an international matter. Matters of Lebanese law were raised. They were raised as matters of fact in Jersey but to prove or disprove those facts the plaintiff was obliged to obtain the appropriate Lebanese advice".*** (I interpolate here, that is exactly the argument Mr. Michel advanced in the course of yesterday's hearing in relation to English Law) ***"Difficult questions of conflict arose and in the view of the Court it was entirely appropriate that the plaintiff should have sought advice from leading English solicitors and counsel as well as from the Lebanese and Moslem lawyers that, having succeeded, she should be entitled***

to recover those costs as well as the costs incurred by her in Jersey".

It seems clear also that the Judicial Greffier has been inclined to apply the Crane principle somewhat more flexibly, for example in A.C. Mauger & Son -v- Victor Hugo Management (21st October, 1991) Jersey Unreported. He has decided and set out the principles, correctly in my opinion, which he follows in taxation in the case of Furzer -v- Island Development Committee [1990] J.L.R. 179. The headnote to that case is as follows:

"The appellants applied for the taxation of costs awarded following a successful appeal to the Royal Court.

The appellants submitted that (a) since the principles of current English Rules of the Supreme Court may legitimately be applied in Jersey, it followed that they should be awarded all those costs they had "reasonably incurred" in the litigation, that being the principle of taxation specified under O.62, r.12; and (b) even if the superseded 1985 Rules were applicable and the award of taxed costs meant the award of costs on a party and party basis which, under O.62, r.28 of the 1985 Rules, covered those costs "necessary or proper for the attainment of justice," it followed that they should nonetheless be awarded those costs "reasonably incurred," since the word "necessary" should be construed as widely as possible.

The respondent submitted in reply that (a) since the Jersey Courts were bound by the English 1985 practice, it followed that taxed costs meant costs awarded on a party and party basis; and (b) since under O.62, r.28, costs awarded on that basis were specifically less generous than "reasonably incurred" costs to be awarded on the common fund basis, it followed that the word "necessary" should be construed narrowly and that the respondent should be ordered to pay only those costs which were strictly necessary to the appellant's conduct of the litigation.

Held, ruling on the basis of the taxation:
Since Jersey law had adopted the English principle of taxation which existed in 1985, it followed that the test to be applied in taxing costs was the party and party basis, i.e. the costs "necessary or proper for the attainment of justice". The word "proper" added something to the word "necessary" and should be determined in an individual case by adopting the view point of a sensible solicitor considering in the light of his then knowledge what was reasonable in the interests of his client. Although the significance of the test was not altogether clear, it seemed likely to yield a lower figure than taxation on the current English test of the

common fund basis of "a reasonable amount in respect of all costs reasonably incurred".

In my view the attainment of justice in the dispute between the parties in this case does not preclude the obtaining of advice from English solicitors and counsel. Although it is true that the words used by the Judicial Greffier in the Mauger case are limited to specific legal advice, nevertheless given the range of the matters here, it is difficult to see that that advice was not properly obtained.

Whether it was necessary for those solicitors and counsel to be present all the time if at all at the striking out hearing will of course be a matter for the Judicial Greffier to decide.

In the course of yesterday's hearing, however, Mr. Dessain, quite rightly, put before me the practical results of finding as I have now done. He asked what scale the Greffier would apply if he taxed the English lawyers' costs and where he would turn for assistance. Would he apply, for example, the present English scale, or would he apply the same scale that we use as it was in 1985? That, it seems to me, is a matter for the Greffier, he should be able to obtain help from the appropriate Master in England on this matter and I do not think it is necessary for me to go into it at this time.

Accordingly, I allow the appeal.

Authorities

Royal Court (Jersey) Law 1948: Article 13.

Civil Proceedings (Jersey) Law 1956: Article 2.

The Royal Court Rules, 1992, Rule 9/7.

In re Crane [1960] 1 P.D. 186.

In re Crane [1959-63] T.D. 74.

Naval Production -v- Jetcat [1985-86] J.L.R. 66.

Milner -v- Pyper (7th September, 1992) Jersey Unreported.

A.C. Mauger & Son -v- Victor Hugo Management (21st October, 1991) Jersey Unreported.

Jersey Precision Engineering -v- Jersey Tufting Company (6th February, 1974) Jersey Unreported.

Official Solicitor -v- Clore [1983] J.J. 43.

Official Solicitor -v- Clore [1984] J.J. 81 C.of.A.

In re Gibsons Settlement Trust [1981] 1 All E.R. 233.

Rahman -v- Chase Bank [1990] J.L.R. 136.

R.S.C. (1985 Ed'n) 62/28/3.

Furzer -v- I.D.C. [1990] J.L.R. 179.

Michael Stevens & Ors. -v- R.A. Rossborough (Insurance Brokers) Ltd. (29th June, 1993) Jersey Unreported.

Egglishaw & Ors. -v- Heseltine & Ors. [1989] J.L.R. 1 C.of.A.

R. -v- Cripps, *ex parte* Muldoon & Ors. [1984] 1 Q.B. 68.