

JERSEY / JUDGMENT

Gheewala v Compendium

[2001] JRC 162 (27 July 2001)

[2001] JRC 162

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the deputy bailiff: 1. This is an appeal by the Second and Eighth Defendants ("the Defendants") against an order for taxation of costs made by the Greffier Substitute on 12th September, 2000. 2. The brief background is that, on the application of the Defendants, the Royal Court stayed the proceedings instituted by the Plaintiff on the ground of forum non conveniens . That order was made on 16th July 1998 and the Royal Court ordered the Plaintiff to pay the Defendants' costs. 3. On 17th June 1999 the Court of Appeal allowed an appeal by the Plaintiff and lifted the stay. The Court of Appeal ordered that the Defendants should pay the costs of the Plaintiff on the standard basis in relation to both the appeal and the hearing before the Royal Court. 4. In due course the Plaintiff submitted bills of costs for taxation. Following submissions by both parties, the Plaintiff's costs in relation to the appeal to the Court of Appeal were on 11th September, 2000 taxed at £54,805.55. No appeal is brought against that taxation. 5. On 12th September, 2000 the costs in relation to the hearing before the Royal Court were taxed at £75,479.00 and it is against that taxation that the Defendants now appeal. 6. In order to understand the ground relied upon by the Defendants, it is necessary to recount briefly the change in the method of taxation of costs which has been introduced recently. 7. Until 1st June 1999 an order for costs (unless stated to be on a different basis) was taken to be an order for "taxed costs". The case of *Furzer --v- Island Development Committee*

(1990) JLR 179 held that this was the same as "party and party" costs in England. The amount recoverable was based upon a fixed scale of costs published from time to time by the Greffier. The scale was fixed by reference to different types of work and was periodically updated. The most recent update was published in December 1994 and took effect on 1st January 1995. 8. The old system was the subject of criticism by the report of the Legal Practice Committee (RC 35/1993) chaired by Sir Godfray Le Quesne. The main criticism was that taxed costs resulted in the successful party recovering too small a proportion of the costs which he actually incurred. He was therefore left well out of pocket even though his claim had been upheld. The Committee recommended a change. 9. Following that report, a new system of taxation was introduced. Taxed costs were replaced by standard costs. The basis of assessing the costs recoverable on the standard basis is very different

from that used for taxed costs. As intended by the Legal Practice Committee, it has meant that a much greater proportion of the successful party's costs are now recovered upon taxation. 10. The new system of costs was introduced by a change in the Royal Court Rules. By the Royal Court (Amendment No 13) Rules 1999 a new Rule 9A/2(1) was introduced. It provides as follows:- "Subject to the provisions of this Part of these Rules, the amount of costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis." "The standard basis" is defined in Rule 9A/1 as meaning the basis of taxation of costs described in Rule 9A/4. That Rule provides as follows:- "9A/4 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 Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party." Rule 9A/14 provides for the issuing of Practice Directions as follows:- "The Greffier shall with the approval of the Bailiff issue practice directions from time to time in relation to taxation practice and scales of fixed costs for the purposes of this Part of these Rules." The amended Rules came into force on 1st June 1999. 11. As envisaged by Rule 9A/14, the amendment to the Rules was accompanied by a number of Practice Directions. The relevant one for present purposes is Practice Direction 99/2 which laid down exactly how costs on the standard basis would in fact be assessed. The memorandum accompanying the Practice Direction summarised the changes as follows:- "Practice Direction 99/2 supersedes the December, 1994, scales of fixed costs in Civil Proceedings and replaces them by a system of ascertained hourly rates which represent in general employee salaries together with overhead or non-profit costs (Factor 'A') supplemented by a percentage uplift element for care and conduct which represents the profit element ('Factor B'). The Factor 'A' average hourly expense rate for that grade of fee earner is set by the Full Court, with the advice and assistance of a Committee comprising a Jurat, the Greffier and an Accountant and it is intended that it will be revised from time to time. The total sum for Factor 'A' is determined by the Greffier on taxation, having regard to the appropriate grade of fee earner for that particular item of work. The Factor B uplift element is determined by the Greffier on taxation." 12. The relevant parts of the Practice Direction itself can be summarised as follows:- "1(1) With effect from 1st June, 1999, a new basis of taxation shall apply to all orders of costs made in Civil Proceedings by the Court and shall supersede the undermentioned scales of fixed costs currently in force, namely: Item Date (a) Royal Court, (Samedi, Héritage and Probate Division)-Taxation of costs-Revised Scale of costs (effective 1st January, 1995) December, 1994 (b) ... (c) ... 2.0 AMOUNT OF COSTS ON TAXATION: DETERMINATION OF THE TOTAL SUM FOR FACTOR 'A' AND THE FACTOR 'B' UPLIFT 2(1) The amount of costs to be allowed on taxation shall (subject to any Rule or Order of the Court fixing the costs to be allowed) be in the discretion of the Greffier. 2(2) In exercising his discretion with regard to the total sum for Factor 'A' and the Factor 'B' uplift, the Greffier shall have regard to all the relevant circumstances, and in particular to:

- (a) - (g)." (There then follow a number of matters which the Greffier must consider such as complexity, importance, specialised skill and knowledge required etc.). 13. To complete the picture I would refer also to a letter which accompanied the Practice Direction and was circulated by the Judicial Greffier to all legal practices on 9th April, 1999. The relevant part reads as follows:- "The new system will come into force on 1st June 1999. All orders for costs made before that date will continue to be taxed on the old basis but all orders for costs made on or after that date will be taxed on the new basis." 14. The Greffier Substitute considered that, as the Court of Appeal had ordered that the costs before the Royal Court should be taxed on the standard basis, he had no alternative other than to tax the bill on the basis set out in the Practice Direction. No appeal is brought against the manner in which he carried out that exercise. What is said by Mr Thompson on behalf of the Plaintiff is that the Greffier ought to have exercised his discretion so as to depart from the basis set out in the Practice Direction. 15. He accepts that, in the light of the order made by the Court of Appeal and of Rule 9A(2), the bill of costs had to be taxed on the standard basis. But, he argues, Rule 9A(4) does not prescribe that standard costs must be assessed on the basis of Factor A and Factor B as set out in the Practice Direction. It prescribes only that the taxing officer must allow a reasonable amount in respect of costs reasonably incurred. He argues that a reasonable amount in this particular case would be an amount fixed by reference to the scale of costs current at the time of the Royal Court order in July 1998. 16. He points out that the proceedings before the Royal Court were completed when the old system of taxation of costs was in force. Furthermore the order of the Royal Court awarding costs in favour of the Defendants was made at such a time. Accordingly, if the Plaintiff had not appealed, the Defendants would only have been able to recover taxed costs. As a result of the appeal, the costs are now payable by the Defendants rather than receivable by them. However the fact is that the costs relate to a hearing which was completed well before the change in the basis of taxation. It is unfair and unreasonable for the Plaintiff to recover costs on a more generous basis than would have been recovered by the Defendants under the order made by the Royal Court. According to Mr Thompson the difference is substantial. The costs claimed by the Plaintiff exceeded £100,000. That is therefore presumably the amount charged to the Plaintiff by his advocates. This amount was taxed down under the new system to approximately £75,000. Mr Thompson estimated that, applying the old basis of taxed costs, the amount would probably be taxed down to something of the order £45,000 to £50,000. We are therefore considering a difference of some £25,000 to £30,000. To penalise the Defendants and confer a corresponding benefit on the Plaintiff retrospectively in this way is unfair. 17. Miss Robinson argued that the assessment of costs was often retrospective in certain respects. Thus, even under the old system, costs were taxed at the rate prevailing at the time of the order awarding costs, despite the fact that the prevailing rate at the time the work was carried out may have been much less. In a long running case, this might result in a much higher rate being allowed than was the case at the time when the work was actually done. There was no difference in principle in relation to a change in the general scheme of taxation; costs should be assessed by reference to the rates or principles prevailing at the time when the relevant order was made. The Practice Direction was clear. All costs orders

made after 1st June 1999 were to be taxed on the new basis. The order of the Court of Appeal (including that which reversed the order for costs before the Royal Court) was made after 1st June 1999 and should therefore be taxed on the new basis. Indeed this was envisaged by the Court of Appeal which referred specifically to taxation on the standard basis. The Greffier ought not to depart from the Practice Direction. The taxing of costs was not a penalty or a bonus as suggested by Mr Thompson. It was simply the Court's assessment of the level of costs incurred by a successful party which ought to be recovered from the unsuccessful party. That was a procedural matter and the Court should not depart from what it now considered to be the fair and reasonable basis for assessing those costs. 18. I have come to the conclusion that this is a case where the Greffier ought to have taxed by reference to the December 1994 fixed scale of costs. My reasons are essentially those put forward by Mr Thompson but I would summarise them as follows:- (i) I agree that the Greffier Substitute had no alternative but to tax costs on the standard basis. That was the order of the Court of Appeal and it must be followed. (ii) The question is what flexibility does the Greffier have when assessing standard costs? The only guidance given in the Rules themselves is that contained in Rule 9A(4). That states merely that the costs must be in a reasonable amount in respect of costs reasonably incurred. In this case we are concerned with the former rather than the latter because no criticism has been made of the Greffier's assessment of the latter. No further guidance is given in the Rules as to how to assess what is a reasonable amount. (iii) It is the Practice Direction which elaborates how this is to be calculated. It provides that the costs are to be assessed by reference to Factor A and to Factor B and it goes on to state that this will apply to all orders for costs made after 1st June 1999. However a Practice Direction, although of enormous persuasive value, may be departed from in exceptional circumstances. It is not binding upon the Court in the same way that Rules of Court are. In my judgment there is a discretion in the Greffier to assess standard costs on a basis other than that set out in the Practice Direction if satisfied that there are exceptional grounds for so doing. For the avoidance of doubt I emphasise that the discretion referred to here is not the discretion referred to in paragraph 2(1) of Practice Direction 99/2. That is a discretion which relates to the sums to be allowed for Factor A and Factor B respectively. The discretion to which I am referring is a discretion to depart altogether from the basis set out in the Practice Direction. (iv) In my judgment fairness and equity dictate that the discretion should be exercised by departing from the Practice Direction and assessing the costs by reference to the December 1994 scale of costs. (a) The hearing before the Royal Court was complete and the order for costs made in July 1998, almost a year before the change in the system of taxation. The situation is therefore not the same as that where a case is continuing at the time of a change in the taxation system. The method of taxation in relation to the proceedings before the Royal Court crystallised at the date of the order. (b) It is not just that the work was done before the change; what is significant is that the order for costs was also made before the change in taxation procedure. Thus, if there had been no appeal by the Plaintiff, the Defendants would have received only taxed costs from the Plaintiff. It seems unfair that, just because the order has been reversed, the costs should now be assessed on a completely different basis. (c) Indeed it goes further. Let us assume that, contrary to what in

fact happened, the Defendants had been unsuccessful before the Royal Court. They would therefore have been ordered to pay taxed costs. Let us assume further that the Defendants then appealed unsuccessfully to the Court of Appeal and that the appeal was heard in June 1999 after the new system was introduced. Absent special circumstances, the Court of Appeal would have left the costs order before the Royal Court undisturbed and would simply have ordered the Defendants to pay the costs of the unsuccessful appeal on the new standard basis. In those circumstances the Defendants would therefore have paid the Plaintiff's costs before the Royal Court on the taxed costs basis. It follows that, as a result of the Greffier Substitute's order, the Defendants are worse off by being successful before the Royal Court and losing before the Court of Appeal than they would have been had they lost before both the Royal Court and the Court of Appeal. There is no logic or fairness in such an outcome. (d) Although changes in the basis or rates of taxation of costs often have retrospective effect, I consider that the retrospective effect in this case operates in a particularly marked and unfair way and should be avoided if possible. 19. For these reasons I conclude that justice requires that the reasonableness of the costs in respect of the hearing before the Royal Court should be assessed in the same way as it would have been assessed upon taxation of the original order of the Royal Court dated 16th July 1998. That order would have been taxed by reference to the December 1994 scale of costs (which were current until 1st June 1999). Accordingly I allow the appeal and order that the Greffier Substitute should tax the Plaintiff's costs in relation to the hearing before the Royal Court by reference to the December 1994 fixed scale of costs. 20. I would emphasise that this is not to go against the order of the Court of Appeal. The Court of Appeal ordered costs on the standard basis and the Rules state simply that the standard basis shall allow a reasonable amount in respect of costs. The question is what is reasonable in the unusual circumstances of this case and my decision is that, what is reasonable is an amount fixed by reference to the scale of taxation which would have applied upon taxation of the original order of the Royal Court. 21. I would add that this decision is not to be taken as conferring a wide discretion upon the Greffier to depart from the basis and rates laid down in the Practice Direction. I cannot be definitive as I have only considered the facts of the case before me but I cannot at present envisage any situation in which it would be right for the Greffier to depart from the scheme of taxation set out in the Practice Direction other than one on all fours with the facts of this case; i.e. where an order for costs was made by the Royal Court before 1st June 1999 and that order has been reversed by the Court of Appeal after 1st June 1999. Authorities. *Furzer --v- Island Development Committee*

(1990) JLR 179 . Royal Court (Amendment No 13) Rules 1999. Page Last Updated: 16 May 2017
BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2001/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/gheewala-v-compendium-2001-jrc-162-27-july-2001>

Prepared on 23 October 2026 · Esheria