

JERSEY / JUDGMENT

Luce v Manning [2004]

JRC 014 (23 January 2004)

[2004] JRC 014

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judgment

the DEPUTY bailiff: 1. This is an appeal by the plaintiff against the decision of the Master on 18th September 2003 to confine his costs in relation to the proceedings to a maximum sum of £750 and to refuse him an order for costs in relation to the summons before the Master that day. Factual background 2. The defendant, a solicitor, is the executor of the estate of Brian William Le Feuvre. He wished to obtain valuations of various immovable properties for the purposes of registering the will in the Public Registry. . He instructed the plaintiff in early November 2001. Nothing was said about fees at the time. The plaintiff prepared written valuations of the various properties on 26th November 2001. At the same time he submitted a fee note in the sum of £8,687.50, which was a scale fee of 0.25% based upon the scale of professional charges recommended by the Jersey Estate Agents Association. He sent reminders for his fee on 27th December 2001 and 14th January 2002. 3. On 6th February 2002 the defendant responded by letter to the effect that the fee was excessive. He stated that, in his experience, estate agents usually charged a fee of between £100 and £250 for valuations for the purposes of registration of a will. He accepted that this case was somewhat more involved than normal and would therefore command a higher fee but said that he had not expected a scale fee of 0.25%. He suggested a discussion on the telephone as to how the matter might be resolved. The plaintiff replied by letter on 8th February stating that the scale fee was not up for negotiation and refusing to discuss the matter on the telephone. He said that he would be instructing Sinels unless the fee note was paid in full by 18th February. 4. The defendant wrote again to the plaintiff on 27th February following a chance meeting in the street. The letter essentially repeated his previous assertion as to the fee which estate agents usually charged in such circumstances and went on to state that he would defend any action to pursue full payment whilst remaining willing to discuss matters. 5. On 8th March 2002 the plaintiff issued a summons. It was placed on the pending list. Particulars of claim were filed on 17th April and an Answer was filed on 14th June. In the Answer the defendant asserted that it was an implied term of the contract that the plaintiff would be entitled to a reasonable fee and went on to state that the defendant was prepared to pay a reasonable fee. He denied that a fee of £8,687.50 was reasonable. 6. On 25th July 2002 the plaintiff issued a summons for directions. Unfortunately this did not come on until 4th December at which time the Master issued various directions. Amongst these were orders for discovery and provision for expert witnesses as to the custom and

practice of estate agents in relation to charging in such circumstances. Discovery duly took place and a trial date was fixed for 24th April 2003. 7. On 28th March 2003 the defendant made a payment into Court in the sum of £4,000 in satisfaction of the claim. On 15th April the plaintiff accepted the payment into Court. Subsequently there was a dispute as to whether the plaintiff was entitled to his costs up to the date of the payment in. A summons was issued to resolve this and it eventually came before the Master on 18th September. The plaintiff alleged that he should have his costs up to the date of the payment in together with his costs in relation to the summons, whereas the defendant argued that each party should bear his own costs. The Master's decision 8. The Act records the Master as having ordered that the sum paid into Court should be paid forthwith to the plaintiff, that the defendant should pay to the plaintiff the costs of the action up to the date of the payment into Court up to a maximum of £750 and that there should be no order as to the costs of the application before him. 9. The Master subsequently gave his reasons. Having set out the history of the matter he recorded that he had been informed that the total time costs recorded on the computer of the plaintiff's advocates, Messrs Sinels, amounted to some £13,000. He reminded himself of Article 2 of the Civil Proceedings (Jersey) Law 1956 (which states that costs are in the discretion of the Court which has full power to determine by whom and to what extent they are to be paid) and Rule 6/26 of the Royal Court Rules 1992 which deals with payments into Court. He referred in particular to Rule 6/26(6) which provides as follows:- "The Court when awarding costs may take into consideration the fact that payment into Court has been made: provided that nothing in these Rules shall derogate from the complete discretion of the Court to make such order as to costs as it deems right and just." He then correctly reminded himself of the principles concerning the award of costs as described by Commissioner Page in *Watkins -v- Egglshaw*

(2002) JLR 1 . Importantly he also referred to the dicta of the Court of Appeal in *Re Esteem* (27th July 2000) Jersey Unreported; [2000] JLR N.41) where the Court said:- "From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of costs, and within a reasonably short time." 10. The nub of his reasoning is to be found in the following three paragraphs of his decision:- "9. In the course of the hearing before me on 18 th September 2003 I drew the attention of the parties expressly to the provision which I have just quoted [that from *Re Esteem*]. I indicated to the parties my own view that this was a case which did little credit to the parties or those having conduct of the litigation. In my opinion, this was a matter which could and should have been resolved without troubling the Royal Court by means of mediation or other alternative dispute resolution procedures. I also considered it an absurdity that a claim originally for a sum of £8,687.50 and which was to be resolved by the payment of £4,000 should cause one party to incur costs calculated at some £13,000. If the costs of the defendant were then added then it is quite conceivable that the total costs would amount to two or three times the value of the claim. For myself, I consider that to be unacceptable and to be totally at odds with the objectives of the Royal Court and the Court of Appeal in seeking to achieve efficient and effective management of litigation at a

reasonable cost. 10. Taking those matters into account I ordered that the sum of £4,000 which had been paid into Court be paid to the plaintiff forthwith. I then considered the various principles which I have outlined and which I was bound to apply in making a costs order. In so doing, I considered that the time had come and this was an appropriate case for the Court to indicate its disapproval of the conduct of litigation of this nature. In so doing I had clearly in mind the overriding objective and principle to which I must have regard namely to do justice between the parties. I considered that this was best achieved by putting a limit on the amount of costs which the plaintiff could properly recover from the defendant. I therefore ordered that the defendant pay the costs of the plaintiff up to the date of payment into Court of the sum of £4,000 but subject to the limit of a maximum of £750. 11. To reinforce my views and to indicate the expression of disapproval which I had made abundantly clear to the parties I also decided that in relation to the summons heard before me it was appropriate that there should be no order as to the costs of the present application." The test on appeal 11. Both counsel were agreed that the Court has to exercise its own discretion whilst paying due regard to the decision of the Master. Mr Blakely submitted that, if I were to approve the principle of an award of a fixed sum by way of costs, I should not interfere with the sum assessed by the Master unless I concluded that it was plainly wrong. In view of the decision at which I have arrived, this issue does not arise and I express no opinion on it. The parties' submissions 12. Mr Parslow submitted that the decision of the Master unfairly penalised the plaintiff for what had occurred. He submitted that it was entirely the defendant's fault that the proceedings had got as far as they had and had not settled at a much earlier stage. This was because the defendant, who professed at all times to be willing to pay a reasonable fee, never quantified it and never actually made any offer until the payment into Court of £4,000 some three weeks before the trial date. The plaintiff had therefore been left with no alternative but to progress the action. He accepted the general principle, emphasised by the Esteem judgment, that regard had to be had to the amount of the claim and that the costs incurred should be in proportion to the amount at stake. He also accepted that it might reasonably be argued that the £13,000 was excessive. However he submitted that the remedy for this was upon taxation rather than by assessing a fixed figure with no knowledge as to how this figure related to those costs which were reasonably incurred. The figure had been plucked from the air in the sense that it had never been suggested to either party during the course of argument, nor had the plaintiff had an opportunity of addressing the Master on the figure or of relating it to the costs which were reasonably and properly incurred in pursuing the action. There was nothing exceptional about the case which justified departure from the normal rule which was that a plaintiff was entitled to his taxed costs up to the date of a payment in. Furthermore the Master had acted inconsistently. The Act recorded him as having decided to award the plaintiff his costs up to the date of payment in but the Master had then in effect destroyed the effect of that order by confining such costs to the sum of £750. In effect the Master's displeasure at the party's conduct of this litigation had led him to penalise the plaintiff unfairly. 13. Mr Blakeley, on the other hand, put the entire blame for the fact that the matter had not

settled earlier on the plaintiff. The plaintiff had said in his letter of 8th February that he did not wish to negotiate and it was entirely reasonable for the defendant to take him at his word and not therefore make any offer until the payment in. The Master was entitled to take the view that the matter should never have got as far as it did and should never have incurred the level of costs which it had. He was further entitled to send out a clear message to all advocates and litigants as to the possible consequences of proceeding with litigation in such circumstances rather than resorting to alternative dispute resolution or negotiating a sensible compromise. Decision 14. I have every sympathy with the reasoning which led the Master to his decision. He was endeavouring loyally to give effect to the sentiments of the Court of Appeal in *Esteem*. As this Court said in *Sinel -v- Goldstein* [2003]JRC090 at para 7 :- "The legal profession has apparently not yet entirely come to terms with the overriding objective of bringing proceedings to trial at a level of cost which is reasonable and commensurate with the sum in dispute." Where, in a case concerning some £8,000 and a simple factual issue, the plaintiffs have run up time costs of some £13,000 even before trial, it is clear that the message sent out by the Court of Appeal in *Esteem* has not been properly absorbed. Where the Master takes steps to reinforce the message sent out in *Esteem* and *Sinel*, the Court will support him wherever possible. 15. However, I have reluctantly come to the conclusion that, on this occasion, the Master allowed his laudable objectives to lead him into taking a step too far and reaching a decision which was not fair to the plaintiff. My reasons for so concluding are as follows:- (i) The procedure of making a payment into Court is a useful one. It enables a defendant to protect himself in respect of costs in the event of the Court awarding no more than he has paid in. It also places pressure on a plaintiff to consider whether it is really worth proceeding, because he will be at risk of an adverse order for costs if he proceeds and does not beat the payment in. In England, under the old Rules of the Supreme Court, the court was obliged to award a plaintiff, who accepted a payment in, his costs up to the date of acceptance. In Jersey there is a discretion. Nevertheless it is important, if the underlying purpose of payments in is to be met, that the parties should know where they stand and that the normal consequences as to costs should generally follow. These are that if a plaintiff accepts a payment in, he can usually expect to be awarded his costs up to the date of the payment. If he refuses the payment in and the sum eventually awarded by the Court does not exceed the sum paid in, the plaintiff has to bear not only his own costs from the date of payment in but also those of the defendant from that date. There is good sense in these general rules as they exert pressure on both sides to be reasonable when deciding respectively whether to make or accept a payment in. In my judgment there must be some good reason to depart from the normal policy. (ii) I see no good reason to reach a decision in this case which essentially deprives the plaintiff of all his costs up to the date of the payment in. Each party blamed the other as to why the matter had got as far as it did before a compromise was reached. In my judgment both were to blame. Nevertheless I consider that, ultimately, more responsibility lies on the head of the defendant. The plaintiff had carried out the valuation work and was undoubtedly entitled to a fee. He claimed a scale fee; the defendant said that he was only entitled to a

reasonable fee. Yet, until the payment into Court, the defendant made no offer of any sum. It is true that he indicated in correspondence and in the Answer that he accepted an obligation to pay a reasonable fee. But at no stage did he flesh out this general observation until a mere three weeks before the original trial date when he made the payment in of £4,000. Mr Blakeley submitted that the defendant had acted reasonably in this regard because of the letter of 8 th February 2002 where the plaintiff had said that he was not willing to negotiate. In my judgment that cannot excuse the defendant from formulating what he considered to be a reasonable fee for so long. There was nothing to prevent the defendant from making the same payment into Court at the time of filing the Answer in June 2002. In the absence of any offer from the defendant, I do not consider it to have been unreasonable for the plaintiff to have instituted or continued the proceedings. (iii) The question however is whether the plaintiff should be entitled to all his costs up to the date of payment in. I do not think he should. He was resolute about claiming his scale fee of over £8,000. He wrote before action on 8 th February saying that he was not willing to negotiate a lesser sum. This may well have contributed to the defendant's approach to the litigation. In fact he settled for £4,000 which was some 46% of the sum which he claimed. In many cases, where the question of loss or damage is not straightforward, a plaintiff is not penalised in costs merely because he does not achieve the full amount claimed. He is still adjudged to have been the 'winner' and is awarded his costs. But in a case of this nature, I do not consider that the plaintiff has been the unambiguous winner. In my judgment he has been a partial winner. He has 'won' to the extent that he has recovered some money but he has not achieved a scale fee. In my judgment the justice of the case would suggest that this should be reflected by awarding him only 50% of his costs up to the date of payment in and indeed Mr Parslow, during the course of the hearing before me, conceded that he could not realistically ask for more than 50% of his costs. On a point of detail, the plaintiff sought his costs up to the date of acceptance of the payment in but I note that the summons before the Master sought only costs up to the date of the payment in and I think that the plaintiff is therefore confined to that date. (iv) In his decision the Master agreed in principle that the plaintiff should be entitled to his costs up to the date of payment in but then imposed a limit of £750, which in effect completely undermined the effect of awarding the plaintiff his costs. The Master was quite straightforward about his reasons for so ordering. It was to reflect his disapproval of the fact that matters had been allowed to get as far as they had before settlement. While Mr Parslow did not question the jurisdiction of the Master to order a fixed sum by way of costs, he argued that such a power should rarely be exercised and then only after allowing the parties to make submissions on the figure. In my judgment this submission was correct. On this occasion the Master simply came up with the figure when giving his decision. In effect he acted as a taxing officer without any of the necessary information. Other than the knowledge that the plaintiff's total time costs were said to be £13,000, he had no knowledge as to the nature of the plaintiff's costs. He did not know on what the plaintiff's advocates had spent time and whether this was reasonable. He did not know whether any of the plaintiff's costs had been contributed to by actions on the part of the defendant. He did not know

what percentage of the plaintiff's total costs would be reflected by the sum of £750. The invariable procedure for assessing costs in civil cases is for them to be taxed. That is the time at which the reasonableness of the costs incurred should be assessed. The Court should normally only determine the allocation of costs and should leave the question of assessing the quantum of costs to the taxing officer, who will be able to see all the relevant material and hear the parties' submissions on quantum. The Court should not pluck a figure out of the air without knowing the full facts. It is true that the new Civil Procedure Rules in England enable judges to assess the quantum of costs at the conclusion of a hearing. However it is my understanding that this is normally done for particular hearings, usually interlocutory rather than the proceedings as a whole. Furthermore the parties are required to provide the judge in advance with the necessary information as to time spent and are given the opportunity of making submissions on the sum which is to be fixed. Neither of those protections were available in this case. If it is desired to introduce such a practice in Jersey, I believe that this should be done by way of an amendment to the Rules following consultation in the normal way. (v) The Master's sole reason for fixing the sum of £750 was to send out a clear message to the profession that the sentiments expressed in *Esteem* and *Sinel* have to be adhered to. As already stated, these are laudable objectives but in my judgment the correct occasion upon which to punish the legal profession for incurring unnecessary expense is upon taxation. 16. For these reasons I conclude that the interests of justice require the plaintiff to be awarded 50% of his costs on the standard basis up to the date of the payment in. I therefore allow the appeal. Taxation of costs 17. Nevertheless I would not wish it to be thought that the Court is powerless to deal with costs which have been incurred without regard to the views expressed in *Esteem* and *Sinel*. In my judgment the taxing officer should at all times bear these dicta in mind. In particular he should consider whether the costs were reasonable in the context of the particular case having regard to the amount and issues at stake. What is reasonable in a big-money case may well be thoroughly unreasonable in a case concerning a modest amount of money. In the case of standard costs, any doubts as to whether or not costs were reasonably incurred or are in a reasonable amount are to be resolved in favour of the paying party. It follows that unless the Master is satisfied in a small money case that the steps taken by the receiving party's lawyer were absolutely essential, the costs should be disallowed. 18. Relating that principle to this particular case, I accept that I have not seen any material in relation to the figure of £13,000 and any views can therefore only be provisional. Nevertheless one can only agree with the Master that, on the face of it, this is an astonishing figure which would appear to be far in excess of what could be said to be reasonable. The defendant alleges that the figure has been contributed to by the fact that the person having day to day contact of the matter on behalf of the plaintiff has changed frequently with the consequence, no doubt, that the new person had to read into the file thereby incurring unnecessary expense. I do not know if this is the case, but if it is, clearly any such time would not be recoverable from the defendant. The taxing master will have to scrutinise all the figures extremely carefully in order to allow only that time which he is quite satisfied was properly incurred having

regard to the modest sum and the simple issues at stake. 19. I cannot leave this case without expressing my agreement with the Master's assessment of it. As far as I can tell from the papers, the defendant appears predominantly to have been representing himself. For the reasons given earlier, I am quite satisfied that he should never have allowed the case to get as far as it did. He should have made a concrete offer at a very early stage and, if it was not accepted, should have considered a payment in at that time. Conversely the plaintiff should have been far more amenable to negotiation and should have been willing to open discussions on what constituted a reasonable fee. Naturally I do not know what went on between the plaintiff and his advocate but it was certainly the duty of his advocate to have proffered strong advice along these lines and to have pointed out the risks of continuing to adopt a hard-nosed approach. Both the plaintiff and the defendant will suffer the consequences of their actions because of the substantial costs which they have both incurred unnecessarily in relation to this matter. Authorities. Royal Court Rules 1992: Rule 6/26(6). Watkins -v- Egglshaw

(2002) JLR 1 . Re Esteem (27th July 2000) Jersey Unreported; [2000/150]; [2000] JLR N.41. Sinel -v- Goldstein [2003]JRC090. Heseltine-v-Strachan

[1989] JLR 1 . Murphy-v-Collins [2000]JLR 276. Page Last Updated: 29 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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