

FOX AND GIBBONS v. BROOK, NORTH AND GOODWIN

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.):
March 23rd, 1994

Legal Profession—costs—non-contentious business—taxation—rules on recovery of costs under Solicitors Act 1974 apply to Gibraltar under Supreme Court Ordinance, s.33(1)—Solicitors' Remuneration Order 1972 inapplicable

Legal Profession—costs—non-contentious business—taxation—failure to inform client of right to seek taxation under Solicitors Act 1974 may be special circumstances warranting order for taxation out of time under s.70(3)(a)—limited inherent jurisdiction to refer bill to taxing master on issue of reasonableness in interests of justice

Legal Profession—costs—non-contentious business—taxation—may not impose conditions on referral to taxation other than payment of costs acknowledged as owing

The respondent firm brought proceedings to recover costs for work performed on behalf of the appellant firm.

The appellant firm of solicitors engaged the services of the respondent firm to advise on the legal aspects of a commercial property transaction. When the respondent submitted its unitemized bill for £27,000, the appellant challenged its reasonableness. It admitted that £3,315 was due, but no more. Eighteen months later, following lengthy negotiations, the respondent issued a writ claiming payment of the costs.

The appellant's defence alleged that the respondent had no cause of action, since it had failed to inform the appellant of (a) the right to require the respondent to obtain a remuneration certificate under art. 3(1) of the Solicitors' Remuneration Order 1972; or (b) the provisions as to taxation in the Solicitors Act 1974. Furthermore, the amount claimed was excessive. The appellant requested taxation of the bill of costs. It later amended its defence to state simply that it was willing to pay a fair and reasonable amount.

The respondent applied to strike out the amended defence under O.18, r.19, or alternatively for summary judgment under O.14, or an adjudication under O.14A as to whether the appellant could claim that the bill was unreasonable without relying on the 1974 Act or the 1972 Order and without seeking a taxation of costs. The appellant applied to further amend its defence to seek taxation out of time, in the event that taxation was a necessary pre-requisite of leave to defend. The court gave the

appellant leave to defend, referring the bill for taxation, on condition that the appellant pay the respondent £13,500.

On appeal, the appellant submitted that (a) it was not bound by the procedure under the Solicitors Act 1974, since the Supreme Court Ordinance, s.33(1) did not incorporate into the law of Gibraltar English law on solicitors' costs; (b) nor could the court order the taxation of a bill under its inherent jurisdiction; (c) even if the 1974 Act did apply here, the respondent could not sue for payment of its bill, since it had not complied with the requirement of art. 3(2) of the Solicitors' Remuneration Order that it should first inform the client of its rights; and (d) the court had erred in requiring it to pay £13,500 as a condition of ordering taxation.

The respondent submitted in reply that (a) the court should not have ordered taxation, since under s.70(3)(a) of the 1974 Act (applicable in Gibraltar by virtue of s.33(1) of the Supreme Court Ordinance), taxation was available only in special circumstances if a client challenged a solicitor's bill more than 12 months after the delivery of the bill; (b) there was no requirement that the appellant should be informed of its rights under the 1974 Act, since the Solicitors' Remuneration Order did not apply to Gibraltar; (c) the appellant had failed to apply for leave to seek taxation out of time; and (d) court had power to impose the present condition upon the referral to taxation.

Held, allowing the appeal in part:

(1) The provisions of the Solicitors Act 1974 relating to the recovery and taxation of solicitors' costs applied in Gibraltar, since on the proper construction of the Supreme Court Ordinance, s.33(1), they fell within "the law in England for the time being in force relating to ... solicitors." The Solicitors' Remuneration Order 1972, however, did not apply, since on the face of it, its terms were inappropriate here, where there was no governing body comparable to that in England to determine the reasonableness of costs. Furthermore, by the local Supreme Court Rules, r.10 and Schedule 2, para. (r), English rules of practice or procedure did not apply in proceedings relating to solicitors, and r.54 provided that solicitors here would be allowed the costs prescribed by Appendix 2 to O.62 of the English Rules of the Supreme Court (page 305, line 33 – page 306, line 33).

(2) The court had properly given leave to defend and referred the respondent's bill for taxation under s.70(3)(a) on the ground that special circumstances existed. The appellant had provisionally applied for leave to seek taxation out of time. In the absence in Gibraltar of equivalent legislation to the 1972 Order there was no safeguard to prevent a solicitor from suing for his costs without drawing the client's attention to his right to have the bill taxed. The respondent was at an undue advantage, even more so since the Gibraltar taxing master had never before been required to tax a bill for non-contentious business such as

this. The public would benefit from an amendment to the Supreme Court Rules on the lines of art. 3 of the 1972 Order. The court could also have exercised its limited inherent jurisdiction to refer the whole or any part of the bill to the taxing master on the issue of reasonableness, in the interests of justice. That procedure, however, was more appropriate when specific items on a bill of costs were challenged (page 307, lines 11–25; page 307, line 42 – page 309, line 7; page 309, lines 11–15).

(3) However, the lower court had had no justification for imposing the condition that the appellant should pay £13,500 to the respondent. Only the sum admitted to be due by the appellant should be paid over prior to taxation. The respondent would be granted judgment in the sum of £3,315 plus interest and would repay the balance of the money paid by the appellant with interest. With this exception, the lower court's orders were confirmed (page 309, lines 6–10; lines 16–22).

Cases cited:

- (1) *Harrison v. Tew*, [1990] 2 A.C. 523; [1990] 1 All E.R. 321, considered.
- (2) *Park, In re, Cole v. Park* (1889), 41 Ch. D. 326; 59 L.T. 925; on appeal (1889), 41 Ch. D. 326; 61 L.T. 173, followed.

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.33(1): The relevant terms of this sub-section are set out at page 305, lines 37–41.

Supreme Court Rules, r.10: The relevant terms of this rule are set out at page 306, lines 25–27.

r.54: The relevant terms of this rule are set out at page 306, lines 29–31.

Schedule 2, para. (r): The relevant terms of this paragraph are set out at page 306, line 28.

Solicitors Act 1974 (c.47), s.69(1): The relevant terms of this sub-section are set out at page 306, lines 35–37.

s.69(2)(a): The relevant terms of this paragraph are set out at page 306, line 38.

s.70(1): The relevant terms of this sub-section are set out at page 306, line 43 – page 307, line 1.

(2): The relevant terms of this sub-section are set out at page 307, lines 3–5.

(3)(a): The relevant terms of this paragraph are set out at page 307, lines 5–7.

s.72(4): The relevant terms of this sub-section are set out at page 307, lines 8–10.

Solicitors' Remuneration Order 1972 (S.I. 1972/1139), art. 3(1): The relevant terms of this paragraph are set out at page 306, lines 12–15.

art. 3(2): The relevant terms of this paragraph are set out at page 306, lines 16–21.

C. Salter for the appellant.
A. Hochhauser for the respondent.

FIELDSEND, P., delivering the judgment of the court: This appeal concerns a claim by one firm of solicitors against another firm for work done for the latter. In October 1988 the appellant firm (“the defendant”) sought advice from the respondent (“the plaintiff”) about the formation of a Gibraltar company to be used in a substantial property transaction in the London Docklands and about a number of matters connected with the proposed transaction. The plaintiff completed the work in November 1988 and submitted its “invoice” to the defendant on May 5th, 1989 for “professional charges for advice” in the sum of £27,000. The amount of these charges was at once challenged as being excessive by the test of fairness and reasonableness.

Up to this time the defendant was an English firm and not (unlike the plaintiff) also a firm in Gibraltar. In September or October 1989 the defendant also established itself as a firm in Gibraltar. After some correspondence which did not solve the dispute between the parties, the plaintiff issued a writ on February 13th, 1991 claiming “£27,000 for professional services rendered.”

On March 27th, 1991 the defendant served a defence claiming:

1. The plaintiff had no cause of action by reason of its failure to inform the defendant of (a) its rights to require the plaintiff to obtain a remuneration certificate; or (b) the provisions of ss. 70, 71 and 72 of the (English) Solicitors Act 1974, as required by art. 3(2) of the (English) Solicitors’ Remuneration Order 1972.

2. The amount claimed was excessive.

The defendant requested taxation by the court of the invoice pursuant to s.70 of the Solicitors Act 1974 and pursuant to the inherent jurisdiction of the court.

In June 1991 the parties consented to an order on a summons by the defendant of April 30th, 1991 for the determination of two preliminary points, namely: (a) whether the defendant could rely on ss. 70, 71 and 72 of the Solicitors Act 1974 and the Solicitors’ Remuneration Order 1972; or alternatively, (b) whether the defendant could invoke the inherent jurisdiction of the court to order taxation of the plaintiff’s “bill of costs.”

This summons was not proceeded with, unfortunately, because it might have clarified the issues at an early stage. Instead, the defence was amended on November 4th, 1991 to delete all reference to the legislation and to aver that the plaintiff was entitled only to fair and reasonable remuneration for the work which, without putting a figure upon it, it said it was willing to pay. There was no claim for taxation of the amount of the charge.

On August 11th, 1992 the plaintiff, by summons, claimed:

(a) that the amended defence be struck out under O.18, r.9 as disclosing no reasonable defence; alternatively

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(b) there be final judgment for the plaintiff under O.14; and/or

(c) an adjudication under O.14A on the question whether it was possible for the defendant to contend the sum claimed was unreasonable when it did not (i) rely on the provisions of ss. 70, 71 and 72 of the Solicitors Act 1974 or art. 3(2) of the Solicitors' Remuneration Order 1972, or (ii) seek to obtain a taxation out of time.

The case came on for hearing on March 22nd, 1993 and it is apparent from the arguments before the learned judge below, from his judgment and from the arguments before this court that there were a number of alternative contentions advanced which, depending on the way each was resolved, would have a different effect upon the nature of the order that should have been or now should be made.

What is basic to this case, however, is that there is a genuine dispute between the parties as to whether the amount claimed in the invoice of May 5th, 1989 is a fair and reasonable charge for the work done. The defendant has raised a *prima facie* issue on this point by the affidavit of Mr. Caruana as to what would be a fair remuneration for the work. What the court below and this court is concerned with is whether the defendant is precluded from advancing this defence.

The plaintiff's contention is that the Solicitors Act 1974 ("the 1974 Act") applies in Gibraltar and provides a code regulating the whole question of the quantum of solicitors' fees and their recovery, that it provides a way in which such fees can and must be taxed, and that there is no room for the application of common law rules. Fees, it is said, can only be queried through taxation as provided for in ss. 69–72 of the 1974 Act.

Mr. Salter, for the defendant, contends that the 1974 Act does not apply in Gibraltar in regard to the matter of solicitors' costs. But he says that, in the alternative, if it does, then the Solicitors' Remuneration Order 1972 also applies, and that as the plaintiff has not complied with art. 3(2) of that Order, it is not entitled to bring the proceedings for recovery of its fees.

At the forefront of Mr. Hochhauser's argument is the contention that the 1974 Act applies to Gibraltar. He relies not on the provisions of ss. 2 and 3 of the English Law (Application) Ordinance, but on s.33(1) of the Supreme Court Ordinance which reads:

"Subject to the provisions of this Ordinance and of any rules of court for the time being in force the law in England for the time being in force relating to barristers and solicitors shall extend to Gibraltar, and shall apply to all persons practicing as barristers or solicitors in Gibraltar."

Prima facie this supports his contention. But Mr. Salter for the defendant argues that having regard to the whole of Part IV of the Ordinance headed "Barristers and Solicitors" in which this section appears, s.33(1) does not incorporate the provisions of the 1974 Act as to costs into the law of

Gibraltar. I do not find this argument convincing. There is nothing in the form of Part IV of the Ordinance from which to conclude that the generality of the words of s.33 must be read so as to exclude the law of England in regard to solicitors' costs and their recovery.

I am satisfied that on a proper interpretation of s.33(1) of the Supreme Court Ordinance the provisions of the 1974 Act in regard to solicitors apply in Gibraltar in relation to costs. 5

I am equally satisfied that the Solicitors' Remuneration Order 1972 does not apply to Gibraltar. This is an Order made by a committee appointed under s.56 of the 1974 Act to make orders as to solicitors' remuneration for non-contentious business. The Order provides in art. 3(1) that a solicitor's client "may require the solicitor to obtain a certificate from The Law Society" as to the fairness and reasonableness of the solicitor's charges and that the sum so fixed "shall be the sum payable by the client." It goes on to provide in art. 3(2) that— 10

"before a solicitor brings proceedings to recover costs on a bill for non-contentious business he must, unless the costs have been taxed, have informed the client in writing— 15

(i) of his right under paragraph (1) of this article ... and

(ii) of the provisions of the Solicitors Act 1974 relating to taxation of costs." 20

On the face of the Order, it is not appropriate to Gibraltar, where there is no Law Society or other such body that might fulfil the function of determining the reasonableness of costs. But, further, r.10 of the Gibraltar Supreme Court Rules provides that "no English rule or practice or procedure shall apply or be followed in the court so far as it relates to any of the matters listed in Schedule 2." Paragraph (r) of Schedule 2 lists "proceedings relating to solicitors." In addition, r.54 of the Rules provides that "the costs to be allowed to solicitors shall be those set out in Appendix 2 to Order 62 of the [English] Rules of the Supreme Court, 1965..." 25

These conclusions clear at least some of the ground away and allow concentration on the main issues in the appeal.

I turn now to the English law under the 1974 Act. Section 69(1) provides that "no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered." Sub-section (2)(a) provides that it must be "signed by the solicitor, or ... by one of the partners of [his] firm" and according to 2 *The Supreme Court Practice 1993*, para. 3694, at 1208, it must contain sufficient information to enable the client to obtain advice as to its taxation. No point has been taken that the invoice does not comply with this requirement. 30

Section 70(1) provides that if "before the expiration of one month from the delivery of a solicitor's bill," the client applies, the court has to "order that the bill be taxed and that no action be commenced on the bill until the 35 40 45

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5 taxation is completed.” By sub-s. (2), if after a month (but before 12
months) from delivery or payment of a bill a client seeks taxation the
court may “on such terms, if any, as it thinks fit ... order (a) that the bill
be taxed; and (b) that ... any action already commenced be stayed, until
10 the taxation is completed.” Section 70(3)(a) provides that “after the
expiration of 12 months from the delivery of the bill ... no order [for
taxation] shall be made except in special circumstances...” Section 72(4)
provides that “the certificate of the taxing officer shall, unless it is set
aside or altered by the court, be final as to the amount of the costs covered
by it...”

15 This seems to provide a code which does justice between solicitor and
client in regard to costs for non-contentious business, with the important
safeguards provided by art. 3 of the Solicitors’ Remuneration Order 1972
that I have set out earlier. In Gibraltar, however, there are no such
provisions, for as I have found, the Order does not apply here and there is
nothing to prevent a solicitor from bringing proceedings for his costs
without ever drawing the attention of the client to the provisions of the
1974 Act relating to the taxation of costs.

20 This gives a solicitor an unwarranted and undue advantage over a
client who cannot be expected to have knowledge of his right or his duty
to have the bill taxed. This is the more so in the present case where it is
common cause that in Gibraltar the taxing master has never been called
upon to tax a bill in respect of non-contentious business for which there is
at present no machinery, a fact which must have been known to the
25 plaintiff.

In England the whole question was considered in *Harrison v. Tew* (1).
That was a case where 12 months after an apparently agreed bill had been
paid to a solicitor by his deducting it from moneys received on behalf of
the client, the client sought to challenge the amount of the bill. The client
30 contended that the bill was excessive and sought to have it taxed, but the
House of Lords held that the court had no power to do this under its
inherent jurisdiction, no reliance having been placed on special circum-
stances.

35 The earlier cases—including *In re Park, Cole v. Park* (2)—were
considered. This latter case concerned a bill of £221.3s.1d. which had
been delivered to a client more than 12 months before his death and not
objected to, and of which £200 had been paid. The client’s executor
alleged that some of the charges were unreasonable and sought relief. The
court held that despite the lapse of time, the bill ought to be referred to the
40 taxing master to inquire and state whether any and which of the particular
items objected to were fair and proper to be allowed and in what amount.
Stirling, J. and the Court of Appeal held that in dealing with solicitors’
costs the court had a three-fold jurisdiction: (a) under the statutory
jurisdiction of the Solicitors Act; (b) under its inherent jurisdiction; and
45 (c) under its ordinary jurisdiction in dealing with contested claims.

The House of Lords did not specifically consider this case, though it mentioned it ([1990] 2 A.C. at 535). It did not specifically overrule it, merely saying (*ibid.*, at 538) in regard to the third head of jurisdiction, that, on the facts of *Harrison v. Tew* (1), any claim for an account relying on that head would have been met by a plea of settled account.

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It seems, therefore, despite the decision in *Harrison v. Tew*, that in certain circumstances a bill can be challenged outside the provisions of the 1974 Act if it has not been taxed: see *Cordery on Solicitors*, 8th ed., at 207–208 (1988), as amended by the 8th ed. Supplement, at A13 (1991). This, however, seems to be where particular items are challenged which can be pinpointed and referred to the taxing officer for him to inquire into and to state whether any of them were fair and proper amounts and should be allowed.

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That, of course, is difficult where, as here, there is no breakdown in the bill of a global amount or even any indication of the time spent and of the hourly charge, but in principle I can see no reason why even a bill such as the present one could not be dealt with on this basis if necessary to do justice between the parties, and I would be inclined to say that in the present case the learned judge would have been entitled to refer the question of the reasonableness of the plaintiff's charge to the taxing master for a report. Whether one calls this "ordering a taxation" or not is not of any real importance: see *In re Park* (41 Ch. D. at 333) and the remarks of Cotton, L.J. in the Court of Appeal (*ibid.*, at 338–339).

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But this is not how the learned judge below proceeded. He considered whether there were special circumstances, and having found that there were, referred the plaintiff's bill to the Registrar as taxing master, presumably under s.70 of the 1974 Act, whereupon the plaintiff was said to be at liberty to sign judgment for the amount taxed. Mr. Hochhauser contends that he was not entitled to do this, as there was no application for him to do so and no application for taxation out of time because of special circumstances.

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Because of the various issues that arose before the learned trial judge—the applicability of the 1974 Act, the applicability of the Solicitors' Remuneration Order and the effect of *Harrison v. Tew* in both English law and in Gibraltar—the various contentions became somewhat confused and confusing. It does appear, however, from the written argument put before the learned judge by Mr. Salter, that if it were found that the defendant had to go to taxation before it could defend the claim, he sought leave to amend to seek a taxation out of time.

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The learned judge gave an *ex tempore* decision without any reasons at the end of the hearing, followed by reasons some 16 days later. Mr. Salter, therefore, did not know whether it was going to be necessary for him to make the amendment he said he would seek if the form of the decision required it. In my view, the issue had been sufficiently raised and, having regard to the circumstances relied on by Mr. Salter and the learned

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judge—that neither firm initially knew how to proceed, that there was no previous decision on the applicability of the 1974 Act to Gibraltar, and that there was no facility of procedure for taxing bills in non-contentious matters—there was no prejudice to the plaintiff in the court’s proceeding
5 as if such an issue had been formally raised.

In my view, the judge was entitled to take the view he did and to give leave to defend referring the bill for taxation. As to the conditions he imposed, he was clearly entitled to order payment of the £3,315 admitted to be due, but there was no basis on the papers before him for ordering the
10 defendant to pay £13,500 as a condition precedent to going to taxation.

Finally, I think that urgent consideration must be given to amending the Supreme Court Rules to preclude a solicitor’s taking proceedings to recover costs from his client before he has informed him in writing of the provisions of the 1974 Act, and such writing should be filed with the
15 court and served with the writ.

The proper order should be that there should be judgment for the plaintiff in the sum of £3,315 with interest. The balance of the money paid by the defendant should be refunded by the plaintiff together with interest at 8%. The defendant is to have leave to defend. The plaintiff’s
20 bill should be referred to the taxing officer for taxation under the Solicitors Act 1974.

To this extent the appeal is allowed.

As for costs, the plaintiff is to pay one-third of the defendant’s taxed costs of the hearing below and the plaintiff is to pay one-half of the
25 defendant’s taxed costs of appeal.

There will be no stay of execution pending any application to the Judicial Committee of the Privy Council for leave to appeal.

Appeal allowed in part.