COLE v. CUMMINGS, CUMMINGS and CUMMINGS

SUPREME COURT (Marke, J.): June 19th, 1964
(Civil Case No. 279/62)

[1] **Civil Procedure—costs—taxation—fees of second counsel—entirely within taxing master's discretion:** The question whether the fees of a second counsel should be allowed on taxation of costs is, though not always purely a question of quantum, a matter entirely within the discretion of the taxing master and the court will rarely interfere unless a matter of principle is involved (page 70, lines 14–18; 37 to page 71, line 4).

[2] **Civil Procedure—costs—taxation—fees of second counsel—two-thirds rule not applied—single sum allowed for two counsel on taxation—court not entitled to interfere:** The fact that a taxing master taxing party and party costs has allowed a single amount in respect of counsel's fees where two counsel have appeared will not by itself entitle the court to deal with the matter as other than a question of quantum (page 71, lines 23–26).

[3] **Civil Procedure—costs—taxation—party and party costs—expenses allowable if necessary and proper when incurred:** Expenses allowable on a party and party taxation are those which were necessary and proper at the time they were incurred (page 71, lines 31–33).

[4] **Civil Procedure—costs—taxation—quantum—taxing master's decision generally conclusive:** A taxing master's decision on a mere question of quantum, where no question of principle is involved, is generally conclusive and the court will not interfere in the absence of particular circumstances (page 71, lines 8–17).

[5] **Civil Procedure—costs—taxation—surveyor's fees—claim for land—surveyor's fees allowable, where no title deeds:** Fees for surveying land and preparing a plan for use at the hearing of a claim for a declaration of title to land by a party who relies on long possession and puts no title deeds in evidence are necessary and proper expenses allowable as party aud party costs (page 71, lines 28–41).

[6] **Legal Profession—remuneration—costs—fees of second counsel—entirely within taxing master's discretion:** See [1] above.

[7] **Legal Profession—remuneration—costs—two-thirds rule not applied—single sum allowed for two counsel on taxation—court not entitled to interfere:** See [2] above.

The plaintiff brought an action against the defendant claiming a declaration of title to land, an injunction and damages for trespass and the defendants counterclaimed for a declaration of title to the same land, an injunction and damages for trespass.

The plaintiff's action was discontinued at the hearing and the defendants proceeded with their counterclaim. This was based on long possession and no documents of title were put in evidence. The defendants were represented by two counsel and exhibited a surveyor's plan of the land. They obtained judgment with costs, which were taxed.

The plaintiff carried in before the taxing master his objections to two items of the bill. To one item, on which a single amount was allowed for fees of counsel, he objected that the fee was excessive having regard to the two-thirds principle that second counsel should receive no more than two-thirds the fee allowed to his leader. He did not request particulars of the allocation of the fee between the two counsel. To the other item, allowing the surveyor's fees for surveying the land and preparing the plan, he objected on the ground that they were an unusual expense.

The taxing master disallowed the objections and the plaintiff applied to a judge at chambers for an order reviewing the taxation.

Cases referred to:

(1) *Bartlett* v. *Higgins,* [1901] 2 K.B. 230; (1901), 84 L.T. 509, applied.

(2) *Baruwa* v. *Ogunshola* (1938), 4 W.A.C.A. 159, applied.

(3) *Coon* v. *Diamond Tread Co. (1938), Ltd.,* [1950] 2 All E.R. 385; (1950), 66 (2) T.L.R. 8.

(4) *Ginn* v. *Robey,* [1911] W.N. 28; (1911), 46 L. Jo. 72, followed.

(5) *In re Ogilvie, Ogilvie* v. *Massey,* [1910] P. 243; (1910), 103 L.T. 154, followed.

(6) *In re Park, Bott* v. *Chester,* [1921] W.N. 259; (1921), 66 Sol. Jo. 2, distinguished.

McCormack for the plaintiff;
E. L. Luke for the defendants.

MARKE, J.:

In 1962 the plaintiff brought an action for a declaration that he was entitled to a certain piece or parcel of land specifically described in para. 6 of the statement of claim, and for an injunction restraining the defendants from entering the said land and using a motor road leading to the said land and for damages for trespass. The defendants in their statement of defence denied that the plaintiff was the owner of the land referred to in para. 6 of the statement of claim

and counterclaimed for a declaration that they were entitled to the land, for an injunction restraining the plaintiff, his servants or agents from entering the said land and for damages for trespass. At the hearing on November 20th, 1963 the plaintiff applied to discontinue his action. This was granted and the defendants were left to prosecute their counterclaim. On March 20th, 1964, Betts, J. gave judgment for the defendants on their counterclaim with costs.

On May 12th, 1964 the master taxed the defendants' bill of costs and allowed £547. 19s. 8d. Mr. McCormack carried in to the taxing master his objections to items 6 and 14 of the bill. As to item 6, for which the master allowed £126, his objection is: "The fee allowed is excessive having regard to the two-thirds principle of taxation (that second counsel should receive no more than two-thirds the fee allowed to leading counsel)." As to item 14, for which the master allowed £163. 15s. 0d., his objection is:

> "Witness allowance and expenses have already been allowed to the surveyor under item 3 (p. 1 of the bill of costs). Fees for survey and preparation of the plan exhibited are not proper fees chargeable against the other party who did not incur them and are not allowable in a party and party taxation. The expense being unusual, the party who incurred the cost must pay for what he ordered."

To these objections the master answered as follows:

> "1. The objection to this item is on quantum; the two-thirds rule invoked is untenable as Mr. Ken During, who was the solicitor on the record until March 25th, 1964 was present with Mr. Luke as counsel for these defendants. Even if the 'leader and junior' principle is applicable, it is not known what fees the leader received so there is no basis on which the two-thirds principle could be calculated and, further, Mr. Ken During is not a Queen's Counsel.
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> 2. The cost of surveying and preparing a plan of property measuring 35 acres in an action for declaration of title is a 'necessary and proper' expense chargeable in a party and party bill of costs. It is an established principle that in every action for a declaration of title, for the plaintiff to succeed, he must tender a plan showing the limits of the land he is claiming, and a plan cannot be drawn without a survey having been made."

As to the first objection as to the two-thirds rate, the rule is that where there are two counsel the junior counsel should be paid

a proportion of his leader's fee; it is, upon the authority of decided cases—*Ginn* v. *Robey* (4), and other cases—a matter entirely in the discretion of the master and the court will rarely interfere in such a matter unless a matter of principle is involved, as where a master had acted on a wrong principle. In *Ginn* v. *Robey,* the claim was for £270 and two counsel were engaged by one of the parties. One of the parties asked the trial judge for a certificate that two counsel were necessary. The trial judge refused such certificate on the ground that it was a matter for the taxing master. On taxation the master allowed two counsel. On appeal, Bucknill, J., who had refused to issue the certificate for two counsel, held that two counsel were not necessary and only one counsel was allowed. On appeal it was held ([1911] W.N. at 28) that—

> ". . . the question whether the fees of two counsel should be allowed was not purely a question of quantum, but it was a question which the taxing master was much better qualified than a judge to decide, and *prima facie* the Court would not interfere in such a case." [These words do not appear in the report of the case at 46 L. Jo. 72].

In *Coon* v. *Diamond Tread Co. (1938), Ltd.* (3) it was emphasised that the taxing master had an almost unfettered discretion as to quantum.

Mr. McCormack's objection is that the fee allowed under item 6 of the bill is excessive having regard to the two-thirds principle on taxation. Item 6 reads: "Counsel's fees £168; disallowed £42." From this it is impossible for a judge on review to say what was allowed for leading counsel and what for his junior. It seems to me, that if Mr. McCormack was not satisfied with this item he might, and probably should, have asked for particulars stating what proportion of the fee represented the leading counsel's fees and what proportion the junior counsel's. Not having done so at the taxation it seems late for him to complain here. I see from the file that Mr. McCormack did file a request for further particulars in respect of item 12 of the bill. His not having requested any particulars in respect of item 6 supports the view that he did not feel that any particulars were necessary.

Though it is not always easy in an application of this sort to determine whether the allowance or disallowance of an item was a matter of principle or a question of quantum, the manner in which this objection has been framed makes it entirely a question of quantum for no facts have been submitted to enable me to determine

whether or not the master has proceeded on a wrong principle. From the decided cases, unless facts are shown me, as in *In re Park, Bott* v. *Chester* (6), the practice of the courts is not to interfere with the master's decision in such cases.

Wynn-Parry, J., in *Coon* v. *Diamond Tread Co. (1938), Ltd.* (3), quotes Buckley, L.J. in *In re Ogilvie* (5), as having said as follows ([1950] 2 All E.R. at 387):

> "On questions of *quantum* the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of *quantum* the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of *quantum* in the absence of particular circumstances the decision of the taxing master is conclusive." [These words do not appear in the report of the case at 66 (2) T.L.R. 8].

In the matter before me all that is urged is that item 6 has not been split up to show what proportion of it was for each counsel. Though I have already said that the lack of these particulars will not be heard here, I would further say that the mere fact that a bulk amount has been claimed for both counsel in a bill would not by itself, without more, on an application for review entitle the court to depart from its established principles in cases of this kind. The first ground of the summons therefore fails.

This brings me to the next objection, that fees for survey and preparation of plan are not allowable on a party and party taxation and that the expense is unusual. In *Bartlett* v. *Higgins* (1), it was held that the test was whether the costs were necessary and proper at the time they were incurred.

Reading through the evidence at the hearing, it appears that the defendants' title was based on long possession. No documents of title were given in evidence. In that case it seems to me that the trial judge should be assisted by a surveyor's plan to enable him to know with certainty the limits of the land. It would have been difficult for the defendants to have discharged their duty on the counterclaim without producing a surveyor's plan. This necessity was brought out in *Baruwa* v. *Ogunshola* (2). This objection is on a matter of quantum, and my views already expressed above apply.

For the reasons stated this summons must be dismissed. The summons is dismissed, the applicant to pay the respondents' costs incident to the summons. Costs are to be taxed.

Application dismissed with costs.

PRATT *v.* KAMARA

SUPREME COURT (Bankole Jones, C.J.): July 7th, 1964
(Civil Case No. 361/63)

[1] **Limitation of Actions—land—adverse possession—superior title—acknowledgement of superior title during limitation period defeats adverse possession:** Where a person acknowledges another's superior title to land during the limitation period he cannot acquire a possessory title by adverse possession under the Statute of Limitations (page 74, lines 20–27).

[2] **Land Law—adverse possession—superior title—acknowledgment of superior title defeats adverse possession:** See [1] above.

[3] **Land Law—tenancy at will—absence of transferable interest—tenant cannot convey full title:** A "life" tenant at will has no corporeal interest in the premises and so cannot convey them in fee simple (page 74, lines 2–13).

[4] **Landlord and Tenant—tenancy at will—absence of transferable interest—tenant cannot convey full title** See [3] above.

The plaintiff brought an action against the defendant seeking a declaration of her title in fee simple to certain premises, possession of the premises and mesne profits.

Under the will of her grandfather the plaintiff received a tenancy in common with her sister and three brothers subject to a tenancy at will in favour of Hannah Thompson. Hannah Thompson lived in the premises for over 20 years; at her death one of the plaintiff's brothers took possession and employed the defendant as a caretaker. The defendant then occupied the premises for over 20 years. One brother and sister of the plaintiff each died childless and her two other brothers conveyed their shares in the tenancy in common to the plaintiff, leaving her the sole owner of the premises. The defendant then paid the plaintiff rent for several months until he was given notice to quit. The defendant refused to quit.