Michael Ralph Goldman v Walpurga Hesper [1988] ADR.L.R. 07/26

CA on appeal from an order of Mr Justice Eastham before Lord Donaldson MR; Woolf LJ; Taylor LJ. 26th July 1988

THE MASTER OF THE ROLLS: I will ask Lord Justice Taylor to deliver the first judgment.

JUDMENT : LORD JUSTICE TAYLOR:

1. This case raises a question of principle about taxation of costs upon which there have been conflicting decisions. The question is whether on a taxation the paying party is entitled to see all the documents relied upon by the claimant., including those which are privileged. The appellant is a solicitor. He and the respondent lived together for some time at No. 73 Wood Vale, Highgate, and he had two children by her. The parties fell out and the appellant brought proceedings to determine the property rights in the house. In the ensuing litigation the appellant acted and appeared at all stages on his own behalf, whilst the respondent was represented by solicitors and counsel. Before this court, however, both parties have been represented by counsel.

2. On 6th February 1985 the matter came before Mrs Calvert Q.C sitting as a deputy High Court judge. She declared the house to be held in equal shares, ordered a sale and ordered the appellant to pay half the respondent's costs, to be taxed in accordance with the Legal Aid Act 1974. The case went back before Mrs Calvert on 5th August 1985 at the appellant's instance, but his application then was dismissed and he was ordered to pay all the respondent's costs on a common fund basis.

3. On 21st February 1986 the respondent delivered her bill of costs. The appellant wrote to the respondent's solicitors seeking permission to inspect all the papers lodged in support of the taxation. They refused, but the appellant had also written direct to the respondent. He enclosed a form of consent for her to sign, which she did, in the following terms (and I refer to page 42 of the bundle): "*Dear Sirs, ...*

   "*I understand that my bill of costs in the above matter is to be taxed at 2.30 on Tuesday the 13th May 1986 in ... the Divorce Registry.*

   "I understand also that M.R. Goldman wishes to inspect the papers lodged in support of the bill and requires about 2 hours for such inspection.

   "I agree to his said inspection and waive any privilege that I may have for any papers or documents contained in the said papers."

4. On 7th May 1986, however, the respondent withdrew that waiver in a letter which was in the following terms: *"It has been made clear to me, after consultation with The Law Society and yourself, that it is not in my financial interest to grant Mr. M.R. Goldman the privilege of inspecting the papers lodged. In that case, I withdraw my privilege."*

5. It is convenient at this stage to break off from the chronology to deal with the point which was taken briefly by Mr Pleming on behalf of the appellant, namely, that once a waiver of privilege had been made by the respondent she could not go back on it. Mr Pleming did not advance any authority for that proposition and did not develop it more than simply to state it. He was wise in my judgment to make no more of it than that because it has little merit. In my judgment it cannot succeed. In this instance no action had been taken on the letter of waiver, and the situation is not the same as might have been if there had been some documents already dispatched to be inspected by the appellant. Here nothing had been done and nothing was spoiled. The pass had not been sold, and in my judgment the respondent was perfectly entitled, on taking advice, to withdraw the waiver and her withdrawal was effective.

6. On 29th April 1986 there was an application by the appellant for leave to inspect the papers in advance of taxation. That was dismissed by Mr Senior Registrar Tickle. The appellant appealed from that, but Mr Justice Lincoln on 9th May dismissed his appeal with costs.

7. Between 13th May and 20th June the Senior Registrar conducted a taxation. When he concluded it, the appellant lodged an objection. The respondent filed answers, and on 1st August the Senior Registrar gave his reserved decision whereby he adhered to his original order. The appellant then sought a review of the taxation by a judge, and it was thus that the matter came before Mr Justice Eastham, sitting with two assessors, on 6th February 1987. The appellant argued, as he had before the Registrar,

the point of principle raised on this appeal. He sought also to challenge a number of individual items on the taxation. The learned judge rejected his argument on the principal point, but made two minor adjustments on two items. This resulted in a reduction of £29.25 from a total bill approximating to £4,000. Mr Justice Eastham ordered the appellant to pay 75 per cent of the respondent's costs of the review.

8. On 24th February 1987 the appellant went back before Mr Justice Eastham; who granted him leave to appeal to this court. By his notice of appeal the appellant challenges the learned judge's ruling that he cannot inspect the documents. The respondent has put in a counter-notice challenging the learned judge's award to her of only three-quarters instead of all her costs of the review.

9. The appellant has throughout based his main argument on the-proposition that a party should, as a matter of natural justice, be entitled to see any document which his opponent seeks to use. He maintains that only by seeing the documents in this case can he be in a position to know whether, and in what way, to challenge any item of cost claimed. It is wrong for the Registrar to see and act upon his opponent's documents whilst he is denied sight of them. He has relied at each stage upon the decision of Mr Justice Hobhouse in **Pamplin v. Express Newspapers Ltd**. [1985] 2 A.E.R. 185. In that case the learned judge considered the conflict between two legal principles: first, the natural justice or fairness point, as raised by the appellant here; secondly, the right of a party to confidentiality in respect of privileged documents. He concluded that in the last resort the first principle must prevail. At page 190 of the report he said this: *"The answer is that, ultimately, the principle that each party must have the right to see any relevant material which his opponent is placing before the tribunal, and which that tribunal is taking into account in arriving at its decision, must prevail. In the final resort, the claimant must be put to his election whether he wishes to waive his privilege and use the material or to assert his privilege and retain the confidentiality of the document which the respondent is asking to see."*

10. The learned judge went on to say that the need for election would rarely arise, either because the parties would be content to trust the expertise and experience of the taxing officer;

11. or because the claimant might waive his privilege; or because, as in the case before him, sight of the documents was not necessary and the application for it was a mere fishing expedition. He held that no question of election arose at the time the claimant's documents were lodged, but if a factual issue arose on the taxation which was bona fide - not a sham or fanciful dispute - then the Master or taxing officer might have to put the claimant to his election whether to waive the privilege or not rely on the document. The learned judge said (at page 190G):

12. "The respondent may then take the stand, that, if the claimant wishes to adduce evidence, he (the respondent) wishes to see it and comment on or contradict it. This will mean that the claimant will then have to elect whether he wants to use the evidence and waive his privi-iege or seek to prove what he needs in some other way. The type of situation which this visualises is where, in the ordinary course, the claimant would seek to prove his allegation by simply producing a document. If, however, the respondent objects to the claimant using the document without his seeing it as well, the claimant may prove the allegation in another way; for example, if it is the solicitor who conducted the litigation who is attending the taxation, by that solicitor formally or informally giving oral evidence. The respondent could then formally or informally cross examine the solicitor. The master would then decide, having taken into account any counter-evidence relied on by the respondent, whether he accepted the claimant's allegation. I do not visualise that this would happen, at least not often, but it does serve to illustrate the essentials of the situation."

13. The Senior Registrar in the present case declined to allow inspection or put the claimant to her election. In the course of his judgment he said this (and I refer to page 75 of the bundle): *"Throughout the proceedings the Plaintiff claimed the privilege of inspecting the Defendant's file of papers lodged for the purpose of the taxation and the hearing of his objections. He quotes as authority the case of Pamplin ... Having failed on appeal to see the papers before taxation he repeated his request time after time during the taxation and he does so in his objections. In effect he wished to see every letter, attendance note and instructions to Counsel. In the judgment in the* ***Pamplin*** *case Hobhouse J. said"* (and then he refers to the Weekly Law Report reference which I should give - [1985] 1 W.L.R. 689) "at p.695, letter E,

'Taxation, although adversarial, is not subject to all the incidents of ordinary litigation. RSC Order 62 is, for present purposes, a self-contained code. The provisions of other orders for discovery and inspection of documents, etc, do not apply'.

At page 696, letter A, he said, "*'It is the duty of the master to conduct the taxation as efficiently and economically as is consistent with doing natural justice to both sides. It is his duty to prevent the respondent from misusing or abusing the taxation proceedings'.*" Then the learned Registrar went on: *"It could be said, with some justification, by the Defendant's Solicitor that I did not prevent the respondent from misusing the taxation proceedings and that I allowed the Plaintiff e.g. to question every attendance. The difficulty with which I was faced was firstly, that the Defendant had raised matters during the proceedings which were not chargeable as between party and party because they were not 'necessary either for disposing fairly of the cause or matter or for the saving of costs' and the decision as to apportionment between party and party costs and common fund costs was a delicate one; and, secondly, the Plaintiff, who is a solicitor, questioned the need for attendances on the dates given and these have to be investigated in detail. Where the Plaintiff challenged an attendance I required the Defendant's Solicitors to give an explanation of the circumstances justifying it. I checked the attendance note and gave the Plaintiff the opportunity to reply. I considered it unnecessary and impracticable in this case to have the Defendant's Solicitor give evidence on oath and to allow the Plaintiff to cross examine her. The same procedure was adopted in respect of instructions to Counsel. Most of the correspondence allowed in the party and party column was in the Plaintiff's possession; the remainder was minimal. If taxations are to be conducted expeditiously the party attacking the bill cannot expect an inquiry into every single letter in a large bundle of correspondence."*

14. Before the learned judge the appellant again relied on **Pamplin**. However, the court was also referred to an earlier decision of Mr Justice Melford Stevenson in **Hobbs v. Hobbs and Cousens** [1960] Probate 112. That was a divorce case in which the co-respondent was ordered to pay costs. On the taxation the co-respondent objected to two items on the husband's bill. One was "***instructions for brief",*** and the co-respondent applied to inspect the brief and its contents. Mr Justice Melford Stevenson held that he could not inspect them. He stressed the importance of privilege, and went on (at page 116) as follows: "*That is the principle with which the co-respondent in the present case finds himself faced when he says that he ought, as a matter of justice and common sense, to be allowed to inspect and closely examine the contents of the brief which has been delivered to counsel on behalf of his adversary. I am satisfied that he is not entitled to inspect that brief or its contents; and I so determine the question that has been submitted to me on this reference."*

The learned judge went on later in his judgment to say: *"Even if there were any doubt as to the view which I have expressed about the area covered by legal professional privilege, it is quite plain that in litigation in this Division it would have the most intolerable consequences if someone in the position of the present co-respondent were permitted to see the inside of the brief which was delivered on behalf of the petitioner."*

15. Mr Justice Eastham decided to follow the decision of Mr Justice Melford Stevenson rather than that of Mr Justice Hobhouse. He took the view that the latter's attempt to find a way of reconciling privilege and natural justice was impracticable because it would be almost impossible to have the claimant's solicitor cross-examined, whether formally or informally, without referring to the privileged documents.

16. Before this court Mr Pleming, in a most attractively presented argument, has accepted that there are here two conflicting legal principles, as identified by Mr Justice Hobhouse.

17. His submission is that openness of justice should prevail so that the paying party should see such documents as are necessary to enable him to challenge the bill if appropriate. "Can't see - won't pay" is the terse expression of that argument.. He suggests that waiver of privilege should be partial only in the sense that it would be for the purposes of taxation only and not in regard to any subsequent or continuing substantive proceedings. Alternatively he submits that the taxing officer should so conduct the taxation as to indicate to the paying party or his lawyer the time, relevance and expense framework of any privileged documents relied upon, but not the content. His last fall-back position is an adoption of Mr Justice Hobhouse's suggested procedure despite its difficulties.

18. The starting point in considering how far privilege extends in this context is in my judgment to look at the procedure for lodging documents on taxation. This is now laid down in Order 62 of the Rules of the Supreme Court which dates from April 1986 and is therefore later in time than the cases cited. Previously procedure was governed by a practice direction only - [1979] 1 A.E.R. 958. Order 62, rule 29, sub-rule (7) is at page 985 of the current White Book, and, so far as is relevant, reads as follows:
"A party who begins proceedings for taxation must, at the same time, lodge in the appropriate office - .....
(c) unless the taxing officer otherwise orders, a bill of costs ... and
(d) unless the taxing officer orders, the papers and vouchers specified below in the order mentioned (iii) a bundle comprising fee notes of counsel and accounts for other disbursements; ...
(v) cases to counsel to advise with his advice and opinions and instructions to counsel to settle documents and briefs to counsel with enclosures, arranged in chronological order; ...
(vii) the solicitor's correspondence and attendance notes".

19. It is therefore clear that there is now a statutory requirement upon a claimant for costs to disclose privileged documents to the court. Normally, where prejudice exists it applies to protect disclosure not only to the opposing party, but also to the court. So the rule clearly makes inroads into that general protection. It follows that once a party puts forward privileged documents as part of his case for costs some measure of their privilege is temporarily and pro hoc vice relaxed.

20. In most cases, as Mr Justice Hobhouse observed, no problem would arise on taxation about privilege. However, when the problem does arise the taxing officer has the duty of being fair to both parties: on the one hand, to maintain privilege so far as possible and not disclose the contents of a privileged document to the paying party unnecessarily; on the other hand, he has to see that that party is treated fairly and given a proper opportunity to raise a bona fide challenge. The contents of documents will almost always be irrelevant to considerations of taxation which are more concerned with time taken, the length of documents, the frequency of correspondence and other aspects reflecting upon costs. In my judgment, the approach adopted by Mr Justice Melford Stevenson in Hobbs was too rigid and uncompromising. There may be instances in which taxing officers may need to disclose part, if not all, of the contents of a privileged document in striking the appropriate balance. He will no doubt use all his expertise and tact in seeking to avoid that situation wherever he can. I do not envisage it occurring, except very rarely. Of course it is always open to the claimant not to rely on privileged documents which he regards as peculiarly sensitive.

21. It would not be practicable or helpful for this court to seek to lay down any firm criteria as to the circumstances in which such an extreme course may be necessary. All will depend on the facts of the individual case. One factor which may affect the course taken by the taxing officer may be whether the party is represented by a lawyer or costs clerk, or whether he appears in person. Clearly in the former case there would be more opportunity for flexibility in the approach adopted by the taxing officer. He might, for example, think it appropriate to allow disclosure of privileged documents to the paying party's lawyer, but not to be divulged to his client. Although the approach suggested by Mr Justice Hobhouse may only rarely be practicable, it too may in a proper case be a useful resort. Any disclosure of privileged documents which does have to be made in the exercise of the taxing officer's discretion would in my judgment be only for the purposes of the taxation. That it is possible to waive privilege for a specific purpose and in a specific context only is well illustrated by the decision of this court in British Coal Corporation v. Dennis Rye Ltd and Another (No. 2), reported in the Times Newspaper for 7th March this year. In that case documents which had been created for the purpose of civil proceedings were disclosed to the police for the purposes of criminal investigation. The question arose as to whether the waiver of privilege in favour of the police amounted to a waiver in favour of the defendant for the purposes of the civil proceedings. Lord Justice Neill, giving the first judgment, said this: *"The documents had been disclosed for the limited purpose of a criminal. investigation and a criminal trial, in accordance with the plaintiff's duty to assist with criminal proceedings, and objectively that could not be construed as either an express or implied waiver of privilege in relation to the civil action."*

22. By the same token voluntary waiver or disclosure by a taxing officer on a taxation would not in my view prevent the owner of the document from reasserting his privilege in any subsequent context.

Applying this pragmatic approach to the present case, it seems to me that the approach adopted by the learned Registrar here was fair and reasonable. I can see no ground for considering that the fresh taxation which Mr Pleming seeks would be justified, and accordingly I would dismiss this appeal.

23. So far as the cross-appeal is concerned, Miss Jones has not addressed any argument to this court upon it. It concerns only the order for costs made by the learned judge when he awarded three-quarters of the costs, whereas the cross-notice suggests he ought to have ordered total costs in favour of the respondent. Costs in that context were of course essentially a matter of discretion. The learned judge did give reasons as to why he adopted that course, and I for my part would see no basis for taking a different view on what was a matter of discretion.

24. Accordingly, I would dismiss the cross-appeal.

LORD JUSTICE WOOLF: I agree.

THE MASTER OF THE ROLLS: I also agree.

Order: Appeal dismissed; cross-appeal dismissed; respondent to have his costs of the appeal; legal aid taxation of the respondent's costs.

MR N.P.PLEMING, instructed by Messrs Wyndhams, appeared for the Appellant (Plaintiff).
MISS K.M. JONES, instructed by Messrs Judith Walker Tayer & Co. appeared for the Respondent (Defendant).