

### The test on appeals from a taxation of costs

The Royal Court has revised the test to be applied in relation to an appeal from a taxation of costs in the recent case of *Incat Equatorial Guinea Limited and others v Luba Freeport Limited* [2010] JRC165. The judgment also raises two general points of interest as to the principles to be applied by the Assistant Judicial Greffier (“the Greffier”) when conducting a taxation.

Following its successful defence of claims worth in excess of US\$9.1 million together with interest, Luba Freeport Limited (“Luba”) was awarded costs on the standard basis. After the bills of costs had been taxed by the Greffier, the plaintiffs appealed against the Greffier’s decision in relation to the costs incurred by Luba’s English solicitors, DLA Piper, who had been instructed to assist in relation to Luba’s defence. The appellants were represented by Advocate Michael Goulborn while Advocate James Gleeson appeared on behalf of the respondent.

#### Test on appeal

The appellants submitted that the test to be applied was the longstanding one established in *Murphy v Collins* (2000) JLR 276, namely that the Court should exercise its own discretion but give such weight as it thought fit to the decision of the Greffier. The respondent by contrast submitted that the Court should adopt the test laid down in *Downes v Marshall* [2010] JRC 155B for appeals to the Royal Court from the Registrar of the Family Division. That test was summarised as follows: “An appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or ignored relevant matters, or otherwise arrived at a conclusion which the Court believes to be wrong.”

The Court referred to two previous cases of appeals against taxation. In *Alhamrani v Russa Management Limited* (2006) JLR 176, the Court noted that the parties were agreed that the test to be applied was that laid down in *Murphy*. In *Reg’s Skips Limited v Yates* [2009] JRC 156, the Court did not specifically refer to the relevant test, but made it clear that it was not the function of the judge on appeal from taxation to engage in the same line by line exercise as that conducted by the Greffier. Instead, the appellant should confine himself to points of principle as to how the Greffier had misdirected himself or wrongly exercised his discretion.

The Court held that it should apply the test in *Downes* on appeals against taxation and summarised its reasons for so holding as follows:

1. One of the reasons for the decision in *Murphy* was that the jurisdiction was given to the court (or judge) and had simply initially been delegated to the Greffier. However, under Rule 12/3 of the Royal Court Rules 2004 (“the Rules”), the power to tax costs is conferred on the Greffier, not the Court. There is no question of any delegation. In these circumstances, the Court concluded that greater latitude should be given to the decision of the Greffier than is perhaps given in other cases where there has been a delegation.
2. The Greffier has considerable expertise and familiarity with the process of taxation, a facility which is not acquired by the court. This was an additional reason for the court to recognise the discretion conferred upon the Greffier.
3. The test in *Downes* strikes the right balance in matters of taxation. It prevents the parties simply seeking a fresh bit of the cherry, but allows the court to intervene if it thinks that intervention is required in the interests of justice and fairness.

## Points of Principle

Having established the test on appeal, the Court went on to consider two points of principle raised by the appellants. The first contention was that the Greffier must apply the Factor A and Factor B rates applicable in Jersey to all fees incurred by foreign lawyers.

The Court noted that the Rules envisaged two different situations in respect of the taxation of foreign lawyers' costs. First, where the work done by the foreign lawyer is work that could have been undertaken by a Jersey lawyer, the Rules provide that the amounts allowed on taxation should be no greater than those which would be allowed for a Jersey lawyer. Accordingly, the Court concluded that in relation to this category of work, the Greffier should apply the Factor A and Factor B rates to the fees of foreign lawyers. If a foreign lawyer's rates were higher they should be reduced to fall into line with those applicable to Jersey lawyers.

The second category envisaged under the Rules relates to work done by the foreign lawyer which could not reasonably have been done by a Jersey lawyer. In those circumstances, the Greffier should allow an amount assessed by him to be reasonable, which may be higher in some circumstances, e.g. the use of specialist counsel or solicitors. As it happened, the point proved to be academic since none of the hourly rates claimed by DLA Piper and allowed on taxation exceeded the comparable Factor A and B rates.

The second point of principle raised by the appellants was that the Greffier erred by not inspecting the files of DLA Piper. The Court held that whether to call for the files of foreign lawyers instructed in respect of Jersey litigation was a matter of discretion for the Greffier. It was reasonable for him to exercise his discretion not to inspect such files in this case since:

1. Luba had filed a very detailed bill of costs in respect of the fees and disbursements of DLA Piper;
2. the Greffier was given access to the files of Luba's Jersey Advocates, from which he would have gleaned ample information concerning the conduct of the litigation; and
3. the appellants had elected to object to DLA Piper's fees in their entirety, but without descending into any specifics. Their failure to raise objections of detail was an additional reason why the Greffier was entitled to conclude that he had sufficient information before him to conduct the taxation.

The case provides a timely reminder that it is incumbent upon the paying party in a taxation to set out all of their detailed objections in full. The Court found that the appellants' blanket objection to the English lawyers' fees and purported reservation of their rights to object to individual items did not accord with Rule 12/11(1)(a) of the Rules.

This is an important case, which has changed the law in relation to appeals against taxation. Advocate James Gleeson appeared on behalf of Luba in the original action and also appeared in the present appeal. James Gleeson continues to be instructed by Luba in connection with its defence of fresh claims amounting to in excess of US\$ 8 million brought by the Incat group.

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