[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF LAND TAX Appellant;
Respondent,

AND

JOWETT . . . . . Respondent.
Applicant,

ON APPEAL FROM RICH J.

H. C. of A. 1930.

Melbourne, *Oct.* 10.

Rich J.

*Nov.* 2.

Isaacs C.J., Gavan Duffy and Starke JJ.

*Costs—Land tax appeal—Costs of notices of objections and requests that objections be treated as appeals—Costs of perusing reports of Royal Commissions and of obtaining copies of transcripts and reports of Commissions and of address to Commission—Costs of employing Melbourne counsel to conduct case in Brisbane —High Court Rules* 1928, *O. LIV., rr.* 42, 60.

The District Registrar in Brisbane disallowed certain items in the respondent's bill of costs. These items constituted three groups. The first related to notices of objections to assessments for various years in respect of land tax for various leaseholds, requests to the Commissioner that the taxpayer required such notices to be treated as appeals and transmitted to the High Court, letters refusing to accept amended assessments issued by the Commissioner and insisting on the transmission of the objections, and attendances on the Commissioner and his officers. The second group related to the perusal by the respondent's solicitor of transcripts of reports of Royal Commissions appointed to inquire into the proper method of valuation of Crown leaseholds in Australia, and the obtaining of copies of transcripts and reports of the Royal Commissions for the use of counsel. The third group related to the employment of Victorian counsel to appear at the hearing in Brisbane.

*Held*, by *Rich* J., that the respondent should be entitled to the costs of the three groups of items.

*Held*, by the Full Court on appeal, as to the first and third groups, that the respondent was entitled to the costs of these groups of items.

Decision of *Rich* J. affirmed.

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APPEAL from the High Court (*Rich* J).

Edmund Jowett, having successfully appealed to the High Court against a decision of the Commissioner of Taxation on certain assessments to land tax, brought in his bill for the taxation of his costs pursuant to the order of the High Court. The bill was taxed before the District Registrar in Brisbane, who disallowed certain items which fell into three groups. Items 2-22 formed the first group, and consisted of notices of objection to assessments for various years and in respect of various leaseholds, requests to the Commissioner that the taxpayer required such notices to be treated as appeals and transmitted to the High Court, letters refusing to accept amended assessments from time to time issued by the Commissioner and insisting on the transmission of the objections, and attendances on the Commissioner and his officers. Items 2-13 related to drawing and engrossing notices of objection, completion and lodgment of the objections and instructions to appeal against the assessments. The second group comprised items 47, 79, 83 and 87. Item 47 related to the perusal by Jowett's solicitor of transcripts of reports of Royal Commissions appointed by the Commonwealth Government to inquire into the proper method of valuation of Crown leaseholds in Australia. Item 79 related to attendances for obtaining on loan copies of transcripts and reports of the Royal Commissions for the use of counsel and for production in Court and subsequently returning the same. Items 83 and 87 related to obtaining copies for counsel of the address of Mr. *Owen Dixon* K.C. (as he then was) before the last of those Commissions. The third group comprised item 118 relating to counsel's fees and refreshers and the employment of Victorian counsel to appear at the hearing in Brisbane.

The District Registrar disallowed all these items, and Jowett applied on summons to review the taxation.

The matter was heard by *Rich* J. on 10th October 1930.

*Russell Martin and Byrne*, for the applicant.

*Herring*, for the respondent, the Commissioner of Land Tax.

RICH J. delivered the following judgment:—

This is an application to review the decision of the District Registrar in Brisbane disallowing certain items upon taxation of appellant's bill of costs, which costs arose out of an appeal by the appellant against his assessment to land tax in respect of certain Crown leaseholds in Queensland.

The items so disallowed fall into three groups. Items 2-22 form the first group, and consist of notices of objection to assessments for various years and in respect of various leaseholds, requests to the Commissioner that the taxpayer required such notices to be treated as appeals and transmitted to the High Court, letters refusing to accept amended assessments from time to time issued by the Commissioner and insisting on the transmission of the objections, and attendances on the Commissioner and his officers. In my opinion the notices of objection (items 2-13) form the very keystone of the appeal of the taxpayer to this Court. Mr. *Herring* contended that it is the request to forward the notices that constitutes the appeal, but I cannot agree with that contention. The request merely sets the appeal in motion, but having been set in motion, the thing which is before the Court is the taxpayer's notice of objection, and it is the foundation of the appeal. As soon as the letter requesting that the notice of objection be transmitted to the Court is sent, there is a relation back to the notice of objection itself which becomes the appeal. That being so, I consider the remaining items in this first group necessary and proper steps in the appeal, and I accordingly allow the appellant the costs of items 2-22.

Four items comprise the second group of objections, namely, 47, 79, 83 and 87. Item 47 relates to the perusal by appellant's solicitor of transcripts of reports of Royal Commissions appointed by the Commonwealth Government to inquire into the proper method of valuation of Crown leaseholds in Australia. Items 83 and 87 refer to copies for counsel of the address of Mr. *Owen Dixon* K.C. (as he then was) before the last of those Commissions. So far as items 47 and 79 are concerned I propose to allow the objection. Solicitors are responsible for giving proper and adequate instructions to counsel: it is not sufficient to collect a mass of documents and pass them over to counsel to do their best or their worst with. It is a

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solicitor's duty to instruct counsel, and it was necessary in this case, in order to instruct them fully, to peruse these reports and to select relevant portions of them for the purpose (*inter alia*) of cross-examination of departmental witnesses who had given evidence before the Royal Commissions. If the solicitor in this case had come before the Court without having done this work, he would have neglected his duty. It was manifest that the very thing which had been submitted to Royal Commissions for solution was now propounded to the Court. I therefore allow items 47 and 79; and, agreeing with appellant's objections as to items 83 and 87, I also allow them, provided, however, that they are not included in item 79.

The third group is really comprised of item 118 relating to counsel's fees and refreshers. The first question here involved is whether the appellant was justified in sending Victorian counsel to the hearing of the appeal in Brisbane. In my opinion, and I was the Judge who heard the appeal, such a course was justified. This is a Federal Court and the case was a Federal case, and a litigant in proper circumstances is entitled to select counsel from within the Commonwealth and, in my opinion, such circumstances were present in this case.

This was not an ordinary case. It was a test case and the judgment fixed the method of valuation of Crown leaseholds and has been acted upon since by the Commissioner and taxpayer appellants in the preparation and conduct of their respective cases. Mr. *Owen Dixon* K.C. (as he then was) and Mr. *Russell Martin* having appeared before the last of the Royal Commissions were on that account considered by the solicitor, and on good grounds, to be eminently fitted to handle such a case as this. It was a wise and proper precaution for the solicitor to brief the counsel he thought the most familiar with this type of case. I am not dealing now with individuals, I am dealing with a principle: the case was of great importance both to the Department, to the appellant and to Crown leaseholders in general; it dealt with the method of valuation of great tracts of land and involved questions both of law and fact. In my opinion appellant might reasonably have asked for the costs of three counsel and not those of two. The second question raised

by this objection, namely, the allowance of refreshers beyond the maxima fixed by O. LIV., r. 60, of the *High Court Rules*, turns on the effect of r. 42 of that Order upon r. 60. I think it is clear that r. 42 gives the taxing officer a discretion in special circumstances, such as there are in this case, to go beyond the maxima for refreshers set out in r. 60. (See *Cavendish* v. *Strutt* (1); *Stewart & Co.* v. *Weber* (2), and *In re Ermen*; *Tatham* v. *Ermen* (3).) These cases were all decided long before the present *High Court Rules* came into being, and the Judges who drew up these Rules must be taken to have known the English Rules (upon which our Rules are based) and the construction applied to those English rules, and this construction must be taken to have been adopted in the *High Court Rules*. For these reasons I propose to refer item 118 back to the learned District Registrar on the question of quantum and with the observations that this case is one which justifies the briefing of counsel from one State to attend the hearing in another State and that r. 60 is subject to r. 42.

From this decision the Commissioner of Land Tax now appealed to the Full Court.

*Herring*, for the appellant. The appeal was not instituted until the notice of objection was actually forwarded as an appeal, and the respondent cannot include in his bill items of expenditure incurred before this time (*Land Tax Assessment Act* 1910-1927, sec. 44 (K) and (M); *Land Tax Regulations* 1912-1914, Part IV.). It was unreasonable to bring counsel from Melbourne to Brisbane to conduct this case. In order to bring the matter within O. LIV., r. 42, of the *High Court Rules* 1928, it is necessary to show that such action was necessary for the attainment of justice, and to go so far as to say that there was no one in Queensland capable of conducting the case (*Western Australian Bank* v. *Royal Insurance Co.* (4); *Alexander Stewart & Sons Ltd.* v. *Robinson* [*No.* 2] (5); *Norton* v. *Herald* (6); *Commissioner of Income Tax* (*Q.*) v. *Bank of New South Wales* (7)).

(1) (1904) 1 Ch. 524.
(2) (1903) 89 L.T. 559.
(3) (1903) 2 Ch. 156, at p. 163.
(4) (1908) 7 C.L.R. 385.
(5) (1921) 29 C.L.R. 325.
(6) (1913) 17 C.L.R. 76.
(7) (1914) 18 C.L.R. 207.

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*Wilbur Ham* K.C. (with him *Russell Martin*), for the respondent. On the institution of the appeal there is a relation back of the appeal to include the items claimed in this bill of costs. The sending of counsel from Melbourne to Brisbane was, in the circumstances of this case, no more than an ordinary prudent man would have done to protect his interests.

*Cur. adv. vult.*

NOV. 2.

THE COURT delivered the following written judgment:—

This appeal concerns two groups of costs. The first relates to matters of expense incurred by the respondent prior to his requiring under reg. 40 (2) that his objection to the Commissioner's assessment be treated as an appeal. The second relates to the briefing of Melbourne counsel to attend the hearing of the appeal in Brisbane. The taxing officer thought that such prior expenses were legally excluded from consideration as costs chargeable between party and party. *Rich* J., on review of the taxation, thought they were not so excluded, and, there being no dispute as to quantum, allowed them. As to the second, the taxing officer thought there were no circumstances calling for the presence of counsel in Queensland from any other State, and allowed only such fees as Brisbane counsel would be entitled to. On review, *Rich* J. thought that in the circumstances the course taken was reasonable as between party and party, and remitted to the taxing officer the question what was a reasonable amount in all the circumstances.

The decision of the learned Judge cannot be disturbed. As to the first class of costs, once the taxpayer receives a decision under sub-clause 2, and is still dissatisfied, he may institute an appeal by requiring the Commissioner to transmit his objection as an appeal. As from that moment at the earliest, the objection acquires the character of an appeal, and the successful party may according to circumstances be justly allowed not only subsequent costs, but also costs of prior proceedings, which on taxation or review are considered sufficiently connected with the appeal as to be regarded as incidental to it.

With respect to counsel's fees, the importance of the case to the individual litigant, and its inherent difficulties, are elements in determining the reasonableness of his choice of counsel anywhere in Australia: there are no State lines for this purpose. The taxing officer in considering the amount of the fees will have regard to the same circumstances.

Isaacs C.J. Gavan Duffy J. Starke J.

In reviewing the taxing officer's conclusion, the learned Judge had a general discretion under O. LIV., r. 55, to "make such order as he may think just." That discretion cannot be interfered with by a Court of appeal, except on certain grounds. In *Re Oriental Bank Corporation* (1) *Cotton* L.J. (*Lindley* and *Bowen* L.JJ. agreeing) said: "In order to justify the Court of Appeal in interfering with the discretion of the Judge, it must be shown" (1) "that he has exercised it on a matter not within his discretion, or" (2) "that there has been an exercise of his assumed discretion on wrong principles, or" (3) "that there has been some great loss occasioned to some one or other by a clearly erroneous exercise of his discretion." None of these conditions have been satisfied in this case, and, therefore, the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Whiting & Byrne.*

H. D. W.

(1) (1887) 56 L.T. 868, at pp. 874-875.