H. C. OF A. 1952.

BESIER v. FOSTER.

Dixon J. McTiernan J. Williams J. Webb J. Fullagar J.

argument that Commonwealth authority as distinguished from State authority is non-essential is an argument which disregards what the words say and attempts to introduce into them a change of actual meaning. It is however next submitted that an implication should be drawn from the surrounding circumstances and from the text of the contract that in case of a transfer of land sales control from the Federal to the State governments (provided the new authority acts upon the same principles) the contract should proceed as under that new authority and the new authority should fulfil the function which the paragraph of the contract expressly reposes in the delegate of the Treasurer under the Commonwealth regulations. To make an implication to the effect of that described appears to us to go beyond anything warranted by the principles upon which implications are made to give efficacy to a contract where a term has been unexpressed or some matter has been omitted. In fact the parties may or may not have contemplated the possibility of a new authority arising and the old authority ceasing. Upon either hypothesis they have expressed themselves in exact terms and there is no basis for introducing into their contract an unexpressed term as a necessary implication to overcome the difficulty in which one party to the contract finds himself. As this is a matter which is fatal to the success of the action for specific performance we think we should pronounce upon it now and not proceed to investigate the other matters raised by way of defence, some only of which we have adverted to. The appeal should therefore be allowed and the judgment of *Gibson* J. restored.

The order will be :—Appeal allowed with costs. Order of the Supreme Court discharged. Appeal to the Supreme Court dismissed with costs. Order of *Gibson* A.J. restored.

Appeal allowed with costs. Order of the Supreme Court discharged. Appeal to the Supreme Court dismissed with costs. Order of Gibson A.J. restored.

Solicitors for the appellant, *Finlay, Watchorn, Baker & Solomon.*
Solicitors for the respondent, *Dixon & Parker.*

R. D. B.

[HIGH COURT OF AUSTRALIA.]

SUNDELL . . . . . APPLICANT;
APPELLANT,

AND

QUEENSLAND HOUSING COMMISSION . RESPONDENT.
RESPONDENT,

H. C. OF A. 1954.

BRISBANE, *Aug.* 6, 13;

SYDNEY, *Sept.* 10.

Webb J.

Costs—Taxation—Review—Appeal costs—Fees of counsel—Number of counsel—Quantum—Third counsel—High Court Rules, O. 71, *r.* 74.

In default of the application of a wrong principle or a mistake having been made by the taxing officer, mere questions of the *quantum* of counsels' fees, whether on brief, refresher fees or conference fees, are not open to review.

By the unanimous decision of four justices of the High Court an appeal was allowed from a unanimous decision of three justices of the Supreme Court of Queensland. The decision turned on the meaning of certain provisions in an agreement and on the effect of a submission to arbitration under those provisions. The hearing of the appeal took slightly less than three days, and there was no review of the evidence in the High Court or in the Supreme Court, although there was a possibility that such a review might be required. The taxing officer reduced leading counsel's fees from 350 guineas to 150 guineas and an application to review his decision was dismissed.

An application to review the decision of the taxing officer disallowing a third counsel for the successful appellant was also in the circumstances dismissed, notwithstanding that four counsel were briefed by the respondent on the appeal.

APPLICATION.

On the taxation of the party and party costs of a successful appellant before the High Court the taxing officer disallowed, either wholly or in part, fifteen items in the bill of costs brought in by the appellant against the respondent. With one exception, such items related to counsels' fees on brief, refreshers, conference and clerks' fees, and included the total disallowance of all fees paid to

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the third counsel for the appellant on the hearing of the appeal.

The successful appellant brought the present application for an order to review the taxation of such costs.

Further facts appear in the judgment of *Webb* J. hereunder.

H. T. Gibbs, for the appellant.

J. S. Hutcheon Q.C. and *S. Dodds*, for the respondent.

Cur. adv. vult.

Sept. 10.

The following written judgment was delivered by :—

WEBB J. This is an application for an order to review the taxation of the party and party costs of the successful appellant, Sundell, in this Court on an appeal from an order of the Full Court of the Supreme Court of Queensland setting aside an award of an umpire for the sum of £7,023 2s. 7d. in favour of the appellant. The award was made with respect to one of several disputes referred to arbitration. The appeal was allowed with costs.

This application is in respect of fifteen items in the appellant's bill of costs under the judgment of this Court. With one exception all the items disallowed or in part disallowed were for counsels' fees on brief, refreshers, conference fees and clerks' fees, including the total disallowance of all the fees paid to a third counsel.

The objection of the applicant to the disallowances may be summarized as follows : (1) that the appeal related to the construction of an agreement for the erection of prefabricated houses involving prices amounting in all to over £1,000,000 ; (2) that the appeal was of great commercial importance to the parties because it determined not only the claims and disputes the subject of this appeal but also questions relating to the jurisdiction of arbitrators and umpires appointed under the agreement and the rights of the parties to require questions and disputes to be referred to arbitration and to the validity of awards ; (3) that the agreement was one of great complexity and difficulty ; (4) that the appeal involved a close consideration of detailed evidence, the record comprising 2,388 folios ; (5) that it was expected that the hearing of the appeal would be lengthy and it did in fact exceed twelve hours ; (6) that the counsel concerned had a reputation for great skill and learning ; (7) that it was reasonable to have at the hearing of the appeal senior counsel who conducted the case for the appellant before the arbitrator and umpire and was familiar with the evidence so as to argue questions arising on the evidence as it was

reasonably expected that the Court might require to hear argument as to the effect of the evidence; (8) that three leading counsel and a junior counsel appeared for the respondent on the appeal, and (9) that the conference occupied more than two hours and there were several consultations where no fee was marked.

The answers of the taxing officer may be summarized as follows: (1) that although £7,000 was involved the appeal concerned an arbitration and was on grounds of law; (2) that in the Full Court of Queensland the appeal was argued for the appellant to the High Court by a senior member of the Bar (but not Queen's Counsel) who was one of the applicant's counsel in the High Court; (3) that the taxing officer took into account the nature and importance of the case.

Before me the applicant sought to rely on the fact that sums aggregating £24,000 had been awarded in a number of arbitrations under the same contract. This ground was not taken in the applicant's objections in writing, although his counsel said it was mentioned to the taxing officer. However points not raised in the objections cannot now be raised: *Re Nation*; *Nation* v. *Hamilton* (1); *Shrapnel* v. *Laing* (2), per Lord *Esher* M.R. In *Mentors Ltd.* v. *Evans* (3), *Fletcher Moulton* L.J. said (4) that it is a fundamental principle that the applicant is strictly tied to the objections made by him to the taxing officer and answered by the latter.

The questions that arise are: (1) as to the *quantum* of fees; and (2) as to the number of counsel.

As to (1): mere questions of *quantum* of fees whether fees on brief, refresher fees or conference fees, are not open to review, unless a wrong principle has been applied or a mistake made by the taxing officer: see *Turnbull* v. *Janson* (5), per *Lopes* J. (6) and *Lindley* J. (7); *Brown* v. *Sewell* (8), per *Jessel* M.R.; *Greaves* v. *Nabarro* (9). The taxing officer reduced leading counsels' fees from 350 to 150 guineas, and made corresponding reductions in other counsels' fees. Such a large reduction calls for serious consideration. However, I am satisfied that, although the appellant displayed wisdom in securing the services of one of the ablest leading counsel in Australia, even at the cost of paying him a fee determined by his great eminence at the Bar, still, having regard to the nature of the case, I am unable to conclude that the taxing officer must have

(1) (1887) 57 L.T. 648.
(2) (1888) 20 Q.B.D. 334, at p. 337.
(3) (1912) 3 K.B. 174.
(4) (1912) 3 K.B., at p. 178.
(5) (1878) 3 C.P.D. 264.
(6) (1878) 3 C.P.D., at pp. 269, 271.
(7) (1878) 3 C.P.D., at p. 270.
(8) (1880) 16 Ch. D. 517, at p. 520.
(9) (1940) 56 T.L.R. 339.

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applied a wrong principle or made a mistake in making so great a reduction in counsels' fees. Neither the law nor the facts were complicated. The decision turned on the meaning of a few provisions in the general conditions of contract and on the effect of a submission to arbitration under those provisions. The hearing of the appeal did not take quite three days. There was no review of the evidence in this Court or in the Supreme Court, although there was a possibility that a review would be called for. No doubt the case was of great importance to the parties, and perhaps of some general importance, and the points of law raised were somewhat difficult. The unanimous decision of three Supreme Court justices was set aside by the unanimous decision of four justices of this Court. But in my opinion the case was not of such exceptional importance or difficulty that it can properly be said that the allowance of a higher fee than 150 guineas on brief was necessarily called for, and that such a reduced fee must have been based on a wrong principle or have been due to a mistake.

As to (2): Order 71, r. 74 (*c*) requires the disallowance of unusual expenses. As Lord *Esher* M.R. pointed out in *In re Broad* (1) the employment of third counsel is an unusual expense in ninety-nine cases out of a hundred; and this case could not fairly be regarded as one in a hundred. In *Denaby & Cadeby Main Collieries* (*Ltd.*) v. *Yorkshire Miners' Association* (2), which was relied upon by the taxing officer in this case, a third counsel was disallowed and the court declined to interfere, although the case there raised a question of trade union law of great importance and the hearing took nine days. *Vaughan Williams* L.J. pointed out that the Master had not applied any wrong principle or been influenced by any wrong consideration. *Buckley* L.J. added (3) that to justify three counsel the case must be wholly special and peculiar. In *Wilson* v. *Wilson Bros. Bobbin Co. Ltd.* (4) where the specifications were comparatively intelligible and the amount of evidence was not considerable, but a large sum was at stake and the case lasted two and a half days, the Master allowed only two counsel and *Parker* J. would not interfere as he thought there was nothing particularly imprudent in going into court with only two counsel. In *Glamorgan County Council* v. *Great Western Railway Co.* (5) the liability involved was stated by counsel to be £60,000. But *Collins* J. said that although the questions of law and fact were very important they were not complicated, and that

(1) (1884) 15 Q.B.D. 420.
(2) (1907) 23 T.L.R. 635.
(3) (1907) 23 T.L.R., at p. 638.
(4) (1911) 28 R.P.C. 741, at p. 744.
(5) (1895) 1 Q.B. 21.

to justify three counsel the case must involve extraordinary complications and difficulty. His Lordship applied the test stated in *Kirkwood* v. *Webster* (1): would a reasonable and prudent man acting with ordinary prudence have ventured into court without three counsel? This test has also been applied in this Court. *Barton* J. applied it in *Donohoe* v. *Britz* (2) and, in upholding the disallowance of a third counsel, added that he could not say that the mental and physical strain involved justified three counsel. In that case there was a large amount at stake; but the most important questions were a constitutional question and the question as to the extent to which the Customs Department would be guided by the result. The test was also applied in *Kroehn* v. *Kroehn* (3). In that case *Barton* J., quoting *Parker* J. in *Peel* v. *London & North Western Railway Co.* [*No.* 2] (4), said it was the duty of the court to come to a conclusion itself in matters of this sort and not to shelter behind the taxing officer's disallowance. *Parker* J. also stated in *Peel's Case* (5) that the considerations when dealing with the question of a third counsel were the length of the documents, the time the case was likely to last, the amount involved and the commercial importance of the case; but he added that the commercial importance, the importance of the issues, and great public interest were not by themselves sufficient. His Lordship proceeded to say (6) that in a case of complication where the evidence was long and the hearing was likely to last for a considerable time, the additional fact that the case was important, both pecuniarily to the parties and commercially to the community, might have weight; but that he could not see why it was necessary for the prudent person endeavouring to get justice, but endeavouring to get it without undue expenditure of money, to employ more than two counsel in that case (7). His Lordship added (8) that there ought to be some special matter of complication; and in judging whether there was the court could consider the length of the documents, the time the case might last, the large sum involved and the commercial importance. In *Mercedes Daimler Motor Co. Ltd.* v. *F.I.A.T. Motor Cab Co. Ltd.* (9) *Joyce* J. remarked that, although it might be "very prudent" to employ three counsel, the loser was not necessarily liable for three counsel (10). *Rich* J. held in *R.* v. *Burgess*; *Ex parte Henry* (11) that a very strong case was required to induce that Court to sanction three counsel.

(1) (1878) 9 Ch. D. 239.
(2) (1904) 1 C.L.R. 662.
(3) (1913) 15 C.L.R. 137, at p. 145.
(4) (1907) 1 Ch. 607, at p. 612.
(5) (1907) 1 Ch. 607.
(6) (1907) 1 Ch., at p. 613.
(7) (1907) 1 Ch., at p. 614.
(8) (1907) 1 Ch., at p. 615.
(9) (1913) 31 R.P.C. 8.
(10) (1913) 31 R.P.C., at p. 12.
(11) (1937) A.L.R. 363.