IN THE HIGH COURT OF AUSTRALIA.

J A F F E.

V.

THE COMMONWEALTH OF AUSTRALIA AND OTHERS

REASONS FOR JUDGMENT.

Mr. Justice Williams

No 3 of 1943

Delivered at SYDNEY

on MONDAY, 14th JUNE, 1943.

40358 A. H. Pettifer, Acting Govt. Print.

JAFFE

V

THE COMMONWEALTH OF AUSTRALIA & OTHERS

Judgment — Williams J.

This is a summons to review the taxation of certain items in the plaintiff's bill of costs upon a motion for an interlocutary injunction in an action commenced on 8th January 1943 in which the following relief was claimed in the writ:-

1. That the defendants or either of them, their Agents Officers or servants are not entitled to call upon the plaintiff to do labour or service as requested by certain directions given to the plaintiff.
2. That the defendants or either of them, their Agents officers or servants be restrained from compelling or instructing or causing the plaintiff to do the aforesaid labour or service.
3. That the defendants or either of them, their Agents officers or servants be restrained from preventing the plaintiff by any means whatever from returning to his home in Sydney.
4. Damages in addition to or in lieu of the relief asked for by the 3rd and 2nd prayers hereof.

The notice of motion was filed on 18th January 1943, and prayed for an order that the defendants should be restrained until the hearing of the action from purporting to exercise powers claimed to be conferred upon them by the National Security (Aliens Service) Regulations for the purpose of compelling the plaintiff to perform work directed by the Allied Works Council and for a further order that the defendants should be restrained until the hearing of the action from preventing the plaintiff from returning to his home in Sydney.

The affidavits filed on behalf of the plaintiff

showed that he was an alien who for some time prior to December 1942 had been employed in an undertaking classified as a protected undertaking under the National Security (Man Power) Regulations. In that month he was forcibly arrested by officers of the Allied Works Council, who claimed that his services had been lawfully impressed under Regulation 8 of the Aliens Service Regulations, and sent to work at Alice Springs in the Northern Territory.

The motion came on for hearing before me on Monday 1st. February 1943, when it was adjourned at the request of the defendants till Thursday 4th February, on which date counsel for the defendants gave an undertaking until the hearing in accordance with the terms of the notice of motion and agreed to pay the plaintiff's costs of the motion, such costs to be taxed forthwith. It is to certain objections to the taxation of these costs that the present summons relates.

The plaintiff had volunteered and been accepted for service in the military forces of the Commonwealth within 14 days after the Aliens Service Regulations came into force within the meaning of Regulation 7, so that the defendants' counsel apparently took the view that the plaintiff was exempt from the provisions of Regulation 8 and had been wrongfully arrested.

The plaintiff has since been returned to Sydney pursuant to the undertaking, so that the result of the motion was to dispose of claims 2 and 3 in the writ, leaving the claim for damages to be dealt with at the trial. It was necessary for the plaintiff's solicitor to investigate all the facts relating to the plaintiff's arrest and subsequest transportation to Alice Springs in order to prepare the necessary evidence to support the plaintiff's case upon the hearing of the notice of motion. This evidence will also be required at the trial.

On the taxation the plaintiff's solicitor claimed £26/5/0 as instructions for brief but this item was reduced by the taxing officer to £5.5.0. The question of quantum to be allowed upon such instructions is one peculiarly within the

province of the exercise of the discretion of the taxing officer, so that the Court is slow to interfere provided he has acted upon proper principles. But, where it appears that the taxing officer has acted on a wrong principle, the Court will review the taxation and remit the item for reconsideration. As I read the reasons of the taxing officer for the drastic reduction of this item, he considered inter alia that the trial had still to follow and that portion of the time claimed by the plaintiff's solicitor as time during which he had been exclusively engaged in and about the preparation of the case for the hearing of the motion may have been spent upon negotiations that were being carried on with a view to securing the release of the plaintiff and his return to Sydney. I understand this to mean that the taxing officer considered that the investigation which the solicitor made of the facts relating to the plaintiff's arrest and subsequent transportation to Alice Springs before and after the writ were relevant to his negotiations for the plaintiff's release and to his claim for damages rather than to the preparation of the plaintiff's case for the hearing of the motion.

This was in my opinion an error on the part of the taxing officer. The whole of these investigations, whether before or after the filing of the writ and notice of motion, were relevant to the preparation of the plaintiff's case for the hearing of the motion, and the taxing officer should have taken into consideration the time which the solicitor spent in investigating these circumstances in determining what amount to allow upon instructions for brief: Frankenburg v. Famous Lasky Film Service Ltd. 1931 1 Ch. 428 at p.440: Federal Commissioner of Taxation v. Jowett 45 C.L.R. 115 at p. 120.

It is true that the claim for damages has still to be tried and that the solicitor can claim remuneration for this work in a bill rendered after the trial. A solicitor should not be paid twice for the same work, so that, if the plaintiff succeeds at the hearing, the amount already allowed on instructions for brief on the taxation of the costs of the motion will have to be taken into account in assessing the amount to be allowed

on instructions for brief at the hearing, if the plaintiff succeeds at the hearing and the defendants are ordered to pay his costs. But the plaintiff may not succeed at the hearing and the defendants may not be ordered to pay his costs; so that, if the solicitor is not allowed to charge for this work upon the present taxation, he may never recover for it on a party and party bill at all, in which case the plaintiff, upon the solicitor and own client bill, would be left to pay costs against which the defendants have been ordered to indemnify him. I must therefore remit item 11 of the particulars of objection for reconsideration. Item 1 must also be remitted. The evidence shows that the solicitor drew the notice of motion for counsel to settle. Counsel in settling the notice of motion made several alterations and had a fresh draft retyped but Order 54 Rule 19 provides that a solicitor shall receive a fee for drawing any pleading or other documents for counsel to settle. The solicitor in the present case drew the notice of motion for counsel to settle and he should be allowed the fee for drawing the same.

The plaintiff's counsel also pressed for a review of item 2 on the ground that the taxing officer, while allowing for drawing all the complete folios of the affidavit, had disallowed the portion of a folio with which it had concluded. Counsel informed me that it was the practice in England to allow for an incomplete folio as though it was a full folio but that there was no settled practice in Australia. The matter appears to me to be one for the discretion of the taxing officer with which I should not interfere.

Another item challenged was, item 19 a fee of £1.3.6 allowed to counsel for settling an affidavit. I agree that if a fee is allowed to counsel, it should not be less than £2.2.0. So I shall remit this item to the taxing officer to decide whether to allow a fee of £2.2.0 or to disallow the fee altogether.

The only other items with which I need deal are counsel's fees. items 18 and 20 The taxing officer reduced the fees on briefs, in the case of senior counsel from 36 to 25 guineas, and in the case of junior counsel from 24 to 17 guineas. He allowed

conference fees on briefs of 5 and 3 guineas respectively. The question of the quantum of the fees to be allowed to counsel is again a matter peculiarly within the exercise of the discretion of the taxing officer; so that, if he had simply adhered to his decision, it could not have been contended that the quantum could have been challenged. But when the solicitor pressed him to allow the higher fees he requested that senior counsel's notes or other material which might afford a guide to the research and time spent in working up the case should be produced. Counsel very properly refused to accede to this request which should not have been made. Counsel are not rewarded in accordance with the time spent in working up a case. Some counsel can prepare a case more rapidly than others. Every counsel should devote all the time that is necessary properly to prepare a case. The taxing officer in determining the fees to be allowed should take into account not individualities but the matters referred to in Rules 42 and 50. These rules simply embody the principles enunciated in decisions of the Courts. But there is no evidence that in arriving at his original estimate the taxing officer took any irrelevant matters into consideration. He only commenced to do this when he was pressed to increase the fees above the amounts he consideredto be reasonable. I am not prepared therefore to order the taxing officer to review his decision and I will add that I consider the fees allowed were reasonable.

Objection was also made to the reduction by the taxing officer of the fees paid to junior counsel for settling the notice of motion and affidavits, but, as I said during the hearing, this objection goes purely to quantum and I am unable to see that the taxing officer exercised his discretion on any wrong principle. On the contrary he appears to me to have allowed a reasonable fee.

The result is that the summons has partly succeeded and partly failed. In these circumstances there should be no order as to costs. I order that items 1, 11 and 19 in the particulars of objections be referred to the taxing officer for review in the light of the observations contained in this judgment.