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ROLLS COURT

Greenwood
and
Churchill. In re Baker and Hodgson

248 GREENWOOD V. CHUKCHILL MBBAV.160. [160] greenwood v. churchill. In re baker and hodgson. June 11, 24, 1851. An order was made, on petition and by consent. Held, that it could only be varied by a proceeding in the nature of one to correct the agreement, on the ground of fraud or suppression of facts. Two solicitors, A. and B., dissolved partnership, and it was agreed that B. should be entitled to half the profits of a suit instituted by them. After some time, an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B., been already taxed and received by A. Held, under the circumstances, that the order comprised all such costs, and the previous costs having been omitted in the Master's certificate, the Court, upon a petition to review the taxation, referred the matter back to the Master. This was a petition presented by Mr. Baker, a solicitor, and the facts which gave rise to it were as follows :-In 1822 Messrs. Hodgson & Baker formed a partnership as solicitors. During this partnership, this suit of Greenwood v. Churchill was instituted by them, and, in consequence of the Plaintiff's poverty, it was not their intention to call on her for the payment of any costs until funds should be obtained in the suit. On the 24th of June 1837, a dissolution of partnership took place, and shortly after the dissolution an agreement was come to, relative to this suit, which was stated thus by Hodgson-viz., " that Baker should, nevertheless, be interested with me in the future profits of the suits, and that such profits should be divided in moieties between us." The suit was continued accordingly, and in December 1848, after various proceedings, not necessary to be referred to, a petition was presented by Mr. Baker, praying for an order, which, if obtained, would, for a time at least, have deprived the Plaintiff Mrs. Greenwood of her only means of subsistence. This petition, though presented in December 1848, stood over from time to time, and ultimately, in August 1849, an order [161] was made upon it, which, as far as it is material, was in these words :- It was ordered, by consent, that it should be referred to the Taxing Master to whom the taxation

of costs in these causes had been referred, to tax the costs, charges and expenses of the Plaintiff's properly incurred in the first-mentioned cause; and otherwise in relation to the matters comprised therein down to the 24th of June 1837, &c., &c.; and it was, by the like consent, ordered that the amount should be paid to Baker out of the first monies which should be payable out of Court to the said Plaintiffs. And the Taxing Master was ordered to tax the costs, charges and expenses of the Plaintiffs from the said 24th day of June 1837 down to the 16th day of December 1848 (when the petition was presented), and from which time it was declared that Baker was to cease to have any interest in the costs of this suit. And it was further ordered, that out of the monies payable out of Court to the Plaintiffs, the amount of such costs, charges and expenses should be paid to Hodgson, " he thereby undertaking, within fourteen days after he should receive the same, to pay to the Petitioner one moiety of the profits arising from such last-mentioned costs, charges and expenses. And in case the parties should differ as to the amount of such moiety of profits, then it was, by the like consent, ordered, that it should be referred to Mr. John Coverdale or Mr. James Leman " to settle and determine the amount; and his certificate was to be binding and conclusive on all parties. Under this order, the parties went before the Taxing Master to tax the costs mentioned in this order. He accordingly taxed them as he considered right under this order, and gave his certificate in February 1851. [162] Under this taxation the costs of five interlocutory proceedings, which had been taxed prior to the order of August 1849, and paid to Hodgson, amounting in the whole to £600, were omitted, and Mr. Leman, the arbitrator, considered that he could only regard, as coming within his province as arbitrator, the costs which the Master had included in his certificate. In this state of things Mr. Baker presented this petition, praying a declaration that, under the order of the 4th day of August 1849, the Petitioner was entitled to one moiety of the said profits arising MBEAV.ltt. GREENWOOD V. CHURCHILL 249 from the costs, charges and expenses so already taxed and received by Hodgson : that Hodgson might be ordered, under his said undertaking contained in the order of the 4th day of August 1849, forthwith to pay one moiety of the profits to the Petitioner Baker; and that it might be declared that the arbitrator had authority, under the order of the 4th day of August 1849, to settle and determine the amount of the moiety of profits, and that the amount might be ascertained by him accordingly, or by one of the Masters, and that, if necessary, the costs, &c., taxed and received might be relaxed. * The grounds for bringing forward this petition were stated to be as follows : Mr. Baker alleged that he was, when he consented to this order of August 1849, ignorant of the fact that Mr. Hodgson had received the costs of the five interlocutory proceedings, and that he would not have consented to that order, unless it had expressly included such costs; and he also contended, that these costs were, in fact, according to the proper construction of the order of August 1849, included in it. Mr. Hodgson, on the other hand, contended that the order did not include these costs, and that if Mr. Baker [163] did not know that such costs had not been previously taxed and paid, it was his own fault, for that he was set upon inquiry : that no knowledge was withheld from him, and that if he had asked any question on the subject, full information would have been afforded him. He also asserted, or, at least, he being too unwell to make any affidavit, his partner and clerk asserted on his behalf, that he would not have consented to this order unless he had understood it not to include the costs in dispute. The petition now came on for hearing. Mr. R. Palmer and Mr. Lewin, in support of the petition. Mr. Roupell and Mr. Cole, contra. Mr. R. Palmer, in reply ; Cooper v. Ewart (15 Simons, 564, and [2 Phillips, 362](#)). the master of the rolls reserved his judgment. June 24. the master of the rolls [Sir John Romilly]. The prayer of this petition is peculiar, and it is urged by Mr. Roupell, that in substance, it prays to vary the order of August 1849 ; and that it is not and cannot be treated as a petition to make the Taxing Master review his certificate, and that to make such a declaration as

the prayer asks, declaring that under the order certain rights belong to the Petitioner, is, in substance, to make a variation in the order of August 1849. [164] This is denied by Mr. Roundell Palmer, who says, that in substance, this may properly be treated as a petition to make the Master review his certificate. If it be true, as contended by counsel, that no order can be made on this petition without, in substance, varying the order of August 1849, I am of opinion that I cannot do so. The order was made by consent, after much care and deliberation : nearly eight months had elapsed from the time of presenting the petition before this order could be settled : the terms of it were arranged between Hodgson and Baker, Hodgson not being a Respondent to the petition originally, and in no way affected by it, except so far as it might affect him through his client Mrs. Greenwood, I have consulted Sir George Turner, who fully confirms the statement made by Mr. Roupell, of his reluctance to bring on the petition, and of the care and deliberation with which the terms of the order were framed and considered. I am, therefore, of opinion that I cannot make any alteration in the order, unless a proceeding were instituted before me, in the nature of one to cancel an agreement on the ground of fraud or suppression of facts. (See *Bradish v. Gee*, [Ambler, 229](#) ; *HlwndeU v. Macartney*, 2 Ridg. P. C. 557, 591). This petition is not such a proceeding; and I therefore forbear to consider how far, upon the facts as here set forth in the affidavits, there was either such an intentional or accidental suppression of facts, as, on the ground of fraud or mistake, might entitle Baker to set aside or vary the order of August 1849. Thus far I may say that, upon a perusal of the affidavits, I feel satisfied that Baker was ignorant of the fact of the taxation and payment of the five bills of costs; and I [165] am also equally satisfied, that there was no intention on the part of Hodgson to conceal that fact from Baker, and that he might easily have ascertained how the matter really stood, if anything had suggested to him any such inquiry. The only other point remaining is, what is the proper construction to be put on 250 GBEENWOOD V. CHURCHILL M BEAV. 16. this order of August 1849? Upon this point I think, that Mr. Leman has correctly construed the order, when he considered that he could only deal with the costs included in the Taxing Master's certificate. But, for the reasons which I am about to state, I am of opinion that, according to the true construction of the terms of this order, the Taxing Master's certificate ought to have included the costs relative to the five interlocutory proceedings, already taxed and paid under the orders made by the Court. It is not denied, nor could it be with reason, that, if no costs had been taxed and paid to Hodgson, this order would have included the costs of those five interlocutory proceedings, which form the subject of the present dispute. The words of the order are manifestly large enough to include them ; the order is perfectly silent as to the existence of any previous order for taxation of costs : it does not say costs not already taxed, and both the petition and the affidavits, on which the order was founded, are silent as to any costs having been already taxed. In this state of things, the question on the true meaning of the order is this: whether I am to read the words " the costs, charges and expenses of the Plaintiffs properly incurred in the said suits and otherwise in relation to the matters comprised therein," as meaning "all the costs," &c., or whether I am to read these words as equivalent to "such of the costs, [166] &o., as have not already been taxed and paid." I have no doubt but that the former, which is the primd facie meaning, is the proper construction. It is true that in ordinary cases, where the costs are taxed for the purpose of ascertaining the amount due to the solicitor, these words might bear the latter construction, or if they did not, the Court would restrain the solicitor from receiving more than the amount due to him; but in order to construe this order properly, the acopa and object of it must be looked at. These costs are to be taxed, not for the purpose of ascertaining what is due to Hodgson, but for the purpose ostensibly of giving Baker half the profits of conducting these suits ; and the profits are extended to and directed to include the profits derived from the costs, charges and expenses properly incurred in the suits and otherwise in relation to the matters comprised

therein. How could this be effected, unless all the costs were taxed 1 On what principle was any and what portion to be excluded ? That a portion of the costs had been previously paid to Hodgson was an advantage to him, as he had thereby obtained so much more capital for the purpose of carrying on his own business. If the costs already taxed were to be omitted from the certificate, why was no mention made of such omission 1 The absence of any such statement of omission is the stronger, as the order suggested the possibility of a previous taxation, inasmuch as it prefaces this order, by a reference to the Master to whom the taxation of costs in these causes had been referred, thereby intimating at least, that a previous order for taxation had already been made. If this order is to be construed as omitting all costs already taxed, the consequences might have been, that all the costs of the suit having been already taxed, with the exception [1673 ^ a very small portion, that small portion might be the whole of the advantage to be obtained by Baker under this order, or, in other words, that the order itself might be all but nugatory. It is true that the order says, that the amount of such costs, when certified by the Master, shall be paid to Hodgson, the solicitor of the Plaintiffs; but I am of opinion that this does not alter the meaning of the previous passage, and that these words, relating to the payment to Hodgson, must be taken to mean, that the amount of such costs, or so much thereof as shall then remain due to Hodgson, shall be paid to him. It is manifest that the Plaintiffs might, in the interval between the date of the order and the Master's certificate, have paid, voluntarily or otherwise, a part of the costs so incurred by them. In my opinion, therefore, the Master ought to have included in his certificate of costs, under the order of August 1849, the total amount of all the costs, charges and expenses of the suits and otherwise, in relation to the matters comprised therein, incurred by the Plaintiffs, including as well the paid as the unpaid portion of such costs. I do not mean to say that the Taxing Master was compelled to tax over again the costs he had already taxed. I think that he might have adopted his previous taxation for this purpose ; but I am of opinion that, in order to give effect UBEAV.188. HARRIS V. MOTT 251 to the plain and obvious meaning of this order, the Taxing Master ought to have included in the certificate the amount of the five previous bills, which had already been taxed by him. I am satisfied that this is the construction which the Court would have put on this order, if the terms of the order had been framed by the Court itself, after an adverse hearing between contending parties, upon a proceeding in the cause, of which the Court had not [168] been informed of the fact, that some costs of interlocutory proceedings had already been taxed and paid. I am satisfied that the circumstance that the order was made by consent, cannot affect the construction of it, and I am therefore prepared to give effect to the order, according to that which I consider to be its real meaning. But in what way can this best or indeed properly be done on this petition as it now stands 1 Mr. R. Palmer, who felt the force of this objection on his opening, has treated the petition all along, as one to review the Master's certificate. Mr. Roupell strongly contends that the petition is for a different purpose; and on looking at the prayer, it certainly does not, in terms, ? ray that the Master may review his certificate, but it does pray a retaxation; and think, that if a few words were introduced into the prayer of the petition, praying specifically that it might be referred back to the Master to review his certificate, for the purpose of including therein the costs of the five interlocutory proceedings already taxed by him, I might properly make an order to that effect, which is, in my opinion, the only order I can properly make. I am prepared, therefore, to give the Petitioner leave to amend his petition, by introducing a few words into the prayer for this purpose ; and upon the petition, as amended, I will make an order, referring it back to the Taxing Master to whom the taxation of costs in these causes has been referred, to review his certificate of taxation, by including therein the amount of the costs, charges and expenses of the five interlocutory proceedings, specifying them. In this view of the case, as this petition, when so amended, will be

reduced, in substance, to an appeal from the Taxing Master's decision on the construction [169] of the order, I cannot give any costs of this petition on either side ; but it must take the same course as if it had been originally a petition of the description to which I now permit it to be converted, and on which, as altered, I will make the order I have already stated.