9 pages.

ROYAL COURT

SAMEDI DIVISION

Thursday, 30th April, 1992

76.

Before the Judicial Greffier

BETWEEN	**Michael Henry Clapham, Antony Messervy, Christopher Ronald de Jersey Renouf and Peter Andrew Bertram practising under the name and style of Le Masurier, Giffard & Poch**	**PLAINTIFFS**
AND	**Andre Ghislain Pinson**	**DEFENDANT**
AND	**Advocate Graham Radford Boxall and Advocate Sarah Elizabeth Plaster née Fitz (by original action)**	**PARTIES CITED**

AND

BETWEEN	**Andre Ghislain Pinson**	**PLAINTIFF**
AND	**the partners of Le Masurier, Giffard & Poch as listed above (By counterclaim)**	**DEFENDANTS**

Application by the Plaintiffs in the original action (hereinafter referred to as "the Plaintiffs") for summary judgment against the Defendant in the original action (hereinafter referred to as "the Defendant") in accordance with Rule 6A.

Advocate J.C. Gollop for the Plaintiffs
Advocate G.R. Boxall for the Defendant

JUDGMENT

JUDICIAL GREFFIER:

Between October 1985 and June 1988 Messrs. Le Masurier, Giffard & Poch acted for Mr. Pinson in relation to divorce proceedings. The parties agreed that Advocate C.R. de J. Renouf was allocated Mr. Pinson on legal aid and I was shown the original legal aid certificate no. 0872 dated 10th October, 1988 and issued by Advocate M.L. Sinel who was then deputising for the Bâtonnier in relation to legal aid matters. That legal aid certificate had been marked with the words "normal fees". It contained a section for signature by Mr. Pinson which read as follows:-

> *"I acknowledge that the Advocate/Solicitor appointed is entitled to charge a reasonable fee for his services depending upon my financial resources. I undertake to give to the appointed Advocate/Solicitor such particulars of my financial position as he may reasonably require and to pay his fees and disbursements, when rendered, normally on completion of his work or as otherwise agreed. I understand that in the event of any dispute concerning charging arrangements for fees I am entitled to request the appointed Advocate/Solicitor to refer the dispute for adjudication by the Bâtonnier."*

This section was never signed by Mr. Pinson.

Messrs. Le Masurier, Giffard & Poch are suing in this action for their fees.

In paragraph 4(i) of his answer Mr. Pinson pleads -

"(i) The resolution of matters ancillary to the divorce proceedings of the Defendant and his former wife remains subject to appeal notice of which has been filed by his said former wife; until the resolution of the said appeal the Defendant's means are subject to possible variation. The Plaintiffs rendered their services to the Defendant on the basis of a legal aid certificate. Until the appeal is withdrawn or resolved it will not be possible to determine precisely what sum if any the Defendant should properly be expected to afford."

In addition to this Mr. Pinson alleges faults, errors, omissions, negligence and misconduct on the part of Le Masurier, Giffard & Poch and sets this up both by way of a defence to the claim and also by way of a counterclaim.

At the hearing on 17th March, 1992 I indicated that before looking into any other matters I would need to be addressed upon the issue as to whether a Judgment could be given in favour of the Plaintiffs without the matter of the reasonableness of the amount of the charges having been referred to the Bâtonnier. If I were to be satisfied that the Defendant had a reasonable defence upon this basis then the application for summary Judgment would fail.

As this is the first Rule 6A application in relation to which a reserved Judgment has been given, in order to assist the legal profession, I am going to set out some of the principles in relation to such applications.

Section 6A of the Royal Court Rules, 1982, as amended, is based upon Order 14 of the Rules of the Supreme Court 1965. Accordingly, Judgments and authoritative commentaries in

relation to Order 14 are authoritative in relation to Rule 6A/1 applications. I quote first from the second paragraph of section 14/3-4/1 on page 146 of the 1991 White Book as follows:-

> ***"In every summons under O.14 the first considerations are (a) whether the case comes within the Order, see "Dismissal where the case is not within the Order", para. 14/7/2 and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O.14, see "Preliminary requirements", para. 14/1/2. If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed; if, however, these considerations are satisfied, the plaintiff will have established a prima facie case, and he becomes entitled to judgement. The burden, as it were, then shifts to the defendant to satisfy the Court why judgment should not be given against him."***

Section 14/3-4/3 on page 147 of the 1991 White Book begins as follows:-

> ***"Defendant showing cause - The defendant may show cause against the plaintiff's application***
> ***(1) by a preliminary or technical objection, e.g. that the case is not within this Order or that the statement of claim or affidavit in support is defective, such as no due verification of the claim. No affidavit is required in support of such objection. Cf. Bradley v. Chamberlyn [1893] 1 Q.B. 439. If the objection is fatal, the Master will then dismiss the application under r.7 or give unconditional leave to defend; if the defect is capable of amendment, the Master may give leave to amend and proceed on the application as amended, subject to the questions of adjournment and costs;***
> ***(2) on the merits, e.g. that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which requires the taking of an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence."***

In passing I would mention that in this case the matter comes within section 6A and the plaintiffs have satisfied the

preliminary requirements for proceeding. No technical objections have been taken by the Defendant.

The test which needs to be satisfied by a Defendant in order to obtain leave to defend in relation to a question of fact is set out at section 14/3-4/10 on page 151 of the 1991 White Book and reads as follows:-

> ***"Question of fact - The following principles are laid down in cases decided under this Order. Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried; or there is a fair dispute to be tried as to the meaning of the document on which the claim is based; or uncertainty as to the amount actually due;"***

The words "substantial question of fact which ought to be tried" are further defined in section 14/3-4/8 and the first paragraph thereof reads as follows:-

> ***"The power to give summary judgment under O.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend."***

The test in relation to questions of law is set out in section 14/3-4/11 also on page 151 of the 1991 White Book and this commences as follows:-

> ***"Question of law - Leave to defend should be given where a difficult question of law is raised; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.***
>
> ***Nevertheless, if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused."***

In this case the Plaintiffs' advocate argued that the legal aid certificate had authorised the Plaintiffs to charge normal fees. Furthermore, he argued that the situation was akin to one in which there was an arbitration agreement. The Defendant had the right to refer the matter to arbitration but if he failed so to do then the matter fell to be dealt with by the Court. The Defendant accepted that he had made no attempt to refer the matter to the Bâtonnier.

In the recent case of the Representation of Simon Charles Ogden (3rd March, 1992) Jersey Unreported, the learned Deputy Bailiff at page 8 of his Judgment states as follows:-

> ***"Advocate Philip Le Maistre was the Bâtonnier in 1946 when he gave evidence before the Privy Council Committee on proposed reforms in the Channel Islands. At page 109 of the report he says:-***
> ***"The practice is for all undefended people, as soon as the fact is brought to my notice, I designate one of the junior members of the Bar to undertake the case gratuitously, so there is no question of fees or anything."***
> ***Again one sees the power of designation is vested not in the Court but in the Bâtonnier."***

In the representation of Simon Charles Ogden the learned Deputy Bailiff held that the allocation of advocates on the legal aid system was a matter for the Bâtonnier and not for the Royal Court.

It is clear that since 1946 a practice has evolved by which advocates acting on the legal aid scheme are permitted to charge for their services upon the basis of "a reasonable fee for their services depending upon the financial resources of the client." In cases of dispute the client certainly has the right to refer the matter to the Bâtonnier. The question which arises here is as to whether the determination of the

reasonableness of the quantum of any charge is a matter for the Court or for the Bâtonnier.

There is a further complication here in the form of the wording "normal fees". It is not unusual, in my experience, for such a wording to be added where the client is able to pay the lawyer on a normal paying basis but is unable otherwise to find anyone willing to act for him. Either this wording is an advanced adjudication upon the appropriate basis of charge or it is an indication of the current opinion of the Bâtonnier as to the basis upon which the client can currently afford to pay. The problem with the former view is that it does not allow for a change of financial circumstances. These must surely be assessed when the account is drawn up. Thus it appears to me that the effect of the words is no more than an indication of the current opinion of the Bâtonnier, and that the words do not oust any right of referral of the amount of the account to the Bâtonnier. My view would be no different if the form had been signed by the Defendant.

I asked both counsel for the parties as to whether the question as to whether the determination of the reasonableness of the quantum was for the Court or for the Bâtonnier was a matter of fact or a matter of law and they both replied that in their view it was a mixture of fact and law. I have set out the appropriate test, above, in each case. It appears to me there exists considerable doubt in this case as to whether a judgment can be obtained from the Royal Court without the Bâtonnier having first determined the issue of reasonableness of quantum of charge. I very much doubt whether the Royal Court would, in any event, be able to make any such determination without first hearing from the Bâtonnier as to the criteria which he applies in making such a judgment. Furthermore, I doubt even more

whether the Royal Court would want to become involved in determining such issues. It appears to me to be likely that such matters belong properly to the Bâtonnier and that in the event of any dispute on the quantum of a legal aid charge the dispute ought first to be referred to the Bâtonnier before proceedings are issued. I do not have to decide the point in this case as I only have to be satisfied that sufficient doubt exists either as to fact or as to law. I am so satisfied and accordingly I am granting the Defendant in the original action unconditional leave to defend.

I will need to be addressed in relation to the matter of costs.

AUTHORITIES

Royal Court Rules, 1982, as amended: Rule 6A.

R.S.C. (1965 Ed'n): O.14.

R.S.C. (1991 Ed'n): O.14/3-4/1-3,8,10,11.

Representation: Ogden (3rd March, 1992) Jersey Unreported.