THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 325

Record No. [406/2017]

Edwards J.
Whelan J.
McCarthy J.

BETWEEN/

MICHAEL DOYLE

APPELLANT/PLAINTIFF

- AND –

GUARDIAN GROUP LIMITED

AND THE REVENUE COMMISSIONERS

RESPONDENTS/DEFENDANTS

JUDGMENT of Mr. Justice McCarthy delivered on the 18th day of December 2019

1. This is an appeal by the appellant/plaintiff (hereinafter the plaintiff) against an Order of Mr. Justice Noonan of the 5th of July, 2017 made on foot of a judgment delivered on the 14th of June preceding dismissing his motion for an order pursuant to O.99 r. 38(3) reviewing the taxation of his bill of costs of the 30th April, 2015 in respect of the costs of a motion given in his favour against the second named respondent/second named defendant (hereinafter referred to as "the second defendant"). That motion sought an order to strike out the second defendant's defence for failure to comply with an order for discovery. It was first listed on the 17th of November, 2014 and was adjourned to the 16th of February, 2015 on the application of the second defendants. This was so that it could be heard with their motion to strike out the plaintiff's defence for an alleged failure by him to make discovery which had been listed for the 3rd of November but adjourned to the 16th of February. No order for costs was made on the second defendant's motion when both matters were ultimately dealt with on the 16th of February.

2. Ms. Hayes, solicitor for the plaintiff (who dealt with the motion herself), says that she was unaware before she appeared in court on the 17th of November that an application was to be made for an adjournment. In any event, the bill of costs drawn up by Mr. Doyle's solicitor's cost accountant was taxed: the Taxing Master gave his ruling on the 21st of October, 2015. That was subject to objections dated the 4th of November. Ms. Hayes describes the adjudication on the objections as having been completed on the 19th of February, 2016 when the Taxing Master took up her file, but subsequently, having regard to the decision in this court in *Sheehan (an Infant) v Corr* [2017] 3 IR 252 he heard the parties again on the 18th of July, 2016 and received from her what is, I think accurately, characterised as "*a retrospectively compiled rough estimate of time spent*" being an estimate that some twenty-six hours of work were involved.

3. Ms. Hayes claimed an instruction fee of €5,250, travelling expenses for two round trips from Limerick (on the 17th of November, 2014 and the 16th of February, 2015

respectively) in the amount of €224 per day and €20.47 for attendances in court. It seems that the original bill of costs was drawn up on the basis that the plaintiff was entitled to the costs of both motions or at least a substantial overlap between them but of course, only the costs of one motion were granted. Accordingly, on any view, the amount claimed by way of instruction fee could not stand.

4. The action was one for damages for personal injury suffered by the plaintiff whilst in the employment of the first named defendant on the second defendant's premises. He tripped and fell over cracked and raised flagstones. He has long since been compensated and indeed we were told at the hearing by Ms. Hayes that the costs of the action, with the exception of those in debate now, that is to say, the costs of one motion, have been discharged.

5. The two motions effectively have their origin in the fact that both parties were to make discovery of certain materials pertaining to, or for the purpose of identifying, the *locus* of the accident. The action was of an entirely straightforward kind, as were the motions. the latter represent the type of issue which is commonplace. I have no doubt that both the Taxing Master and trial judge were right in their characterisation. We cannot see that there was any particular urgency about issuing the motion when that occurred. I see that Ms. Hayes has explained that she was placed in difficulty about the issue of the motion because counsel briefed for the purpose of drafting the papers towards the end of the preceding July had not been in a position to deal with it as anticipated, due, apparently, to the intervention of the Long Vacation.

6. In any event, this Court is now concerned with that portion of the instruction fee of €5,200 which is recoverable on party and party taxation in circumstances where it cannot be in debate but that that figure relates directly or indirectly (as referred to above) to two motions, that the total allowed by the Taxing Master (by definition for one motion only) was €1,500, the amount of €448 in respect of travelling expenses by car (the latter can only be so allowed, obviously, if Ms. Hayes' attendance at the hearing of the motion was justified) and whether or not the attendance fees of €20.47 are recoverable. I might dispose of the latter first without further ado: if €20.47 was claimed in respect of two motions it seems obvious the reduction by half was right. The sum of €1,500 was based upon the Taxing Master's estimate as to the costs which would have been incurred had counsel been retained to draft the relevant papers and appear on the motion instructed by Town Agents, on the premise that attendance by Ms. Hayes was not an expense which could be imposed on a party and party taxation on the second defendant.

7. The statutory provisions and those of the rules governing the taxation of costs are appropriately summarised, in the present context, by Laffoy J. in the now leading judgment on taxation of costs in *Sheehan (an Infant) v. Corr*: –

> "*The essence of the Taxing Master's function and, in broad terms, the parameters of his or her jurisdiction are set out in sub-rule (18) which provides:*

'On every taxation the Taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses.'

Of particular relevance for present purposes is that sub-rule (22)(ii) provides that, in exercising his or her discretion in relation to any item, obviously including the solicitor's instructions fee, the Taxing Master –

'… shall have regard to all relevant circumstances, and in particular to:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
(c) the number and importance of the documents (however brief) prepared or perused;
(d) the place and circumstances in which the business involved is transacted;
(e) the importance of the cause or matter to the client;
(f) where money or property is involved, its amount or value;
(g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.'

Order 99 also deals with review of taxation in rule 38, which governs the carrying in or objections by the dissatisfied party before the Taxing Master at the reconsideration and review of his taxation by the Taxing Master sub-rules (1) and (2). The rule invoked by the plaintiff in initiating the application to the High Court in June 2014, rule 38(3), provides:

'Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may … apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just.'

The Court's jurisdiction, of course, is now subject to s. 27(3) of the Act of 1995. It will be necessary to refer to some other provisions of Order 99 which are referred to in the judgment of the Court of Appeal. However, it is more convenient to outline those provisions when outlining the relevant portions of the judgment of the Court

of Appeal or in the context of the analysis of the relevant submissions made by the parties.

Questions for hearing on this appeal

By further determination of this Court (Denham C.J., Dunne J. and Charleton J.) made on 11th November, 2016 and perfected on 14th November, 2016, the following questions were determined for the hearing of this appeal:

'(1) To what extent, if any, may considerations as to the amount of time actually spent on a case be elevated above the relevant criteria mandated by Order 99, rule 37(22) for the fixing of costs?

(2) If the amount of time spent is the central part of the analysis for the Taxing Master in assessing costs, should the Taxing Master allow a retrospective reconstruction of the time spent on a case and if so in what circumstances?

(3) Is it within the discretion of the Taxing Master to disallow the costs of two solicitors in dealing with part of a case, and if so how may that discretion be reviewed by a court?

(4) To what extent, if at all, are general economic conditions relevant to the instruction or brief fees, and if so relevant, how is that economic circumstance to be assessed?'

Liberty to appear as Amicus Curiae

On 17th November, 2016, the Chief Justice made two orders on foot of applications which had been made, one on behalf of the Incorporated Law Society of Ireland ('the Law Society') and the other on behalf of eh Council of the Bar of Ireland ('the Bar Council'). Each was granted liberty to appear as amicus curiae in this appeal and each was at liberty to file written submissions in the matter. Written submissions were filed on behalf of the Law Society and on behalf of the Bar Council and each was represented by counsel on the hearing of this appeal."

8. In the course of her judgment Laffoy J. quoted with approval from the judgment of Herbert J. in *C.D v. Minister for Health* (unreported, 23rd July 2008) where he said, in reference to the concept of a "*general instructions fee*" that: -

"*The Taxing Master should have objectively examined each of the separate items in the bill of costs which together make up the claim for a general instructions fee. He should have ascertained precisely what work was done by the solicitors for the costs, with particular reference to the documentation furnished in support, and by what level of fee earner it was done. The Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The Taxing Master should have indicated what*

amount of time he considered should reasonably been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a party and party taxation. In my judgement, this is the form of scrutinisation, measurement and evaluation which it is necessary for a Taxing Master to perform in the proper discharge of his or her statutory powers under the provisions of s.27(2) of [The 1995 Act]. Without such an analysis, his discretion to allow in whole or in part as fair and reasonable or, to disallow, any item in the general instructions fee would not be validly exercised". There immediately followed the passage from the judgment of Herbert J. just quoted, the following observations at p.33:- "In my judgment it is neither necessary nor desirable and, indeed in the absence of a time costing system, it would usually be impossible for the Taxing Master to value individual items making up a claim to a general instructions fee."

Laffoy J. further stated (at para 74) that: -

"*As a central feature of the function of the Taxing Master in the taxation of costs under s.27(1) is to examine the nature and extent of the work done, with a view to assessing the value of the work done, Herbert J. was correct in pointing to ascertaining precisely what work was done as the starting position for the exercise by the Taxing Master of his function. That task is to be done by reference not only to the bill of costs but also supporting documentation. Time is a factor to which the Taxing Master must have regard. If it is in issue, he should indicate the amount of time he or she considers should reasonably have been devoted to the work, but as Herbert J. stated, he or she should do so to the extent that the nature of the work and the information available to him or her permits. In relation to time, the availability of supporting documentation is clearly of significance. Supporting documentation may be in the form of a contemporaneous record of time spent or, perhaps, a document estimating the time spent based on other contemporaneous evidence, or, if allowed by the Taxing Master, it might be in the form of a retrospective reconstruction of the time spent on the work done. It is for the Taxing Master to assess the evidential value of the documentation available in support of costs claimed.*"

Going on to say (at para. 81) that: -

"*The amount of time actually spent on a case is only one element of the relevant circumstances by reference to which the nature and extent of the work done is assessed. Accordingly, the answer to Question (1) is that, as a general proposition, the amount of time actually spent on a case should not be elevated above the relevant criteria mandated in O.99 r.37(22) for fixing costs.*"

9. With respect to the issue of what one might describe "as a going rate" she had this to say (at para. 119): -

> "*… I think it is appropriate to observe obiter that, if used properly, the likelihood is that comparators are a valuable guide to the assessment of a fee. While the substance of the fee to be assessed in one case may be different from that in another, the comparison of the two is possible, and that can lead to adjustments for alterations which have occurred in practice and law and in the market as between the respective positions of the comparator and the parties in the case under consideration. At a minimum such an exercise is a useful 'sense check' and may be more easily and cheaply carried out then, say, an in depth analysis of time sheets and suchlike.*"

10. Laffoy J. (at para. 98) also referred with approval to *Superquinn Ltd. v. Bray UDC (No. 2)* [2001] 1 I.R. 459 where Kearns J. stated that the court should: -

> "*exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice.*"

11. This decision was quoted with approval by Noonan J. and he also endorsed McGovern J.'s description of the Taxing Master's status in *Lowe Taverns (Tallaght) Ltd. v. South Dublin County Council* [2006] IEHC 383 where the latter said that: -

> "*Section 27(3) of the Courts and Courts Officers Act, recognises that the Taxing Master is a person with special expertise in the area of costs and is, in effect, a specialist tribunal. The courts should be slow to interfere with the decisions of such a specialist tribunal and should operate on the basis of curial deference and judicial restraint.*"

12. In her submissions on this appeal Ms. Hayes has said that one of the issues which ought to be addressed is that of whether or not the taxation of costs here was conducted in accordance with s. 27 of the Courts and Court Officers Act, 1995 and O.99 of the Rules of the Superior Courts, 1996. In fact, the question is whether or not the learned High Court judge erred in law in deciding whether or not the taxation of costs were conducted in accordance with those provisions. This is the only question. The other issues referred to in the submissions (nine in number) are, whether well founded or not, in substance the grounds relied upon in support of the proposition that the taxation of costs was not so conducted.

13. Effectively, the Taxing Master decided both initially and when ruling on the objections that it would have been entirely possible and achievable to move the motion (having regard to the fact that it was only issued on the 13th October, 2014 and was returnable for the 17th November thereafter) by retaining counsel and that the urgency of issue of the motion did not necessitate that the work be carried out by Ms. Hayes herself to the extent that "*considerably higher costs than the norm should have been incurred, at the expense of the second named defendant*", that had the work been carried out by counsel the cost

of drafting and advocacy would have "*remained at more usual levels* [than the amount claimed], *that typically barristers fees for drafting a notice of motion would be €100/€125, for affidavit €150/250 and for brief €200/300*". He said that having regard to the terms of O.99 r.37(18) (quoted above) he could not "*reasonably allow the additional costs incurred by the plaintiff by reason of his instruction to his solicitor to personally pursue this application*", whereby he disallowed the travelling expenses and the professional fees associated with attendance at court "*save those which would be commensurate with a brief fee and a Town Agent's attendance fee*"; he allowed a total sum of €1,500 to the plaintiff, accordingly. It is plain, and there is no reason to doubt that this is so, that he based these estimates on his experience, as he was entitled to do. He repeated in ruling on the objections that "*the additional cost of the solicitor's attendance at court on any of the dates in question cannot be visited upon the second named defendant in the context of a taxation of costs as between party and party*". He rejected the proposition that the work involved in the motion was "*novel in nature*" and ruled that "*The most cost effective and reasonable method of representing the plaintiff would have been to instruct counsel in this matter*". He further stated that he did not consider that the matter could be considered to be "*complex in nature*".

14. Following the hearing of the objections he had regard to the estimate of time. He divided the instruction fee of €5,200 by twenty-six, arriving at the hourly rate of €202 (which he did not consider unreasonable) and he then formed certain judgments as to the costs which would have been incurred had the plaintiff been represented by counsel attended by a Town Agent, by reference to hours, and reached a figure of in or about €1,500. It is plain that he took the hourly rate as no more than a "*useful guide*".

15. In the first instance we think it right to emphasise that "n*o costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by paying special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses*"

16. Ms. Hayes has emphasised her view that it was necessary for her to attend and deal with these motions herself but we think that the Taxing Master was right in his conclusion that by virtue of the provisions of r.37(18) he could not have allowed recoupment of the higher costs involved because of her personal engagement (if we might summarise it as such); we think that the costs were increased through her over-caution (perfectly understandable though it was). There is no question, of course, of negligence, mistake or any other factor of that kind, I hasten to add. Ms. Hayes plainly had the best interest of her client at heart. In his ruling on the objections, I do not think that the Taxing Master's rulings in any way undermined the entitlement of Ms. Hayes to conduct all aspects of the case herself, without recourse to counsel, and to be properly remunerated there for: the end result of the Taxing Master's decision, as approved by the trial judge, was that she recovered the equivalent to counsel's fees and those of a solicitor (represented by Town Agents). By definition, if her personal attendance was not justified it automatically followed that the cost of travelling to and from Dublin could not be justified.

17. There cannot be any doubt but that Noonan J. was right in his view about this action: it could not by any stretch of the imagination be regarded as one of any complexity or difficulty or in any sense unusual. A similar view must arise in respect of the motion and related issues and hence he was right too about this. Disputation about say, discovery, may arise from time to time, but it does not necessarily, or perhaps at all, follow that this imports of complexity in an action of this kind. Obviously whether or not, as a fact, the matter was of such complexity or urgency as to warrant the manner in which it was dealt with by the plaintiff's solicitor is a question which cannot be impugned: we address this aspect for the avoidance of doubt.

18. There is no basis for suggesting that by reference to what has been characterised as the "*going rate*" for a motion of this type there has either been some failure to deal with the work actually done or, effectively, to use comparators in an illegitimate way. The work was straightforward and both the Taxing Master and the trial judge engaged in an analysis of it in as thorough a manner as was possible in the nature of it as required by *C.D.* and *Sheehan* without error. The Taxing Master applied his experience and expertise to deciding that the sum of €1,500 would ordinarily be recovered on such a motion. He was fortified in this conclusion by something which was again within his particular sphere of knowledge, namely, the relevant or appropriate hourly rate and the number of hours which were justified (being far less than twenty-six). The trial judge showed appropriate *curial* deference to the Taxing Master and it behoves us to do so also. Certainly there was no error in law by either.

19. Whether or not the Taxing Master or the judge was in error in allowing only half the amount of €20.47 prescribed in Schedule W to the Rules for attendance is open to question. However, there is no basis as a matter of reality for suggesting that the view taken by Noonan J. that no injustice could arise by virtue of that reduction constitutes an error in law.

20. I therefore would dismiss this appeal.