

THE HIGH COURT

[2024] IEHC 253

[Record No. 2023/156 JR]

BETWEEN

KEVIN NOLAN

APPLICANT

AND

THE COUNTY REGISTRAR FOR THE COUNTY OF WATERFORD, THE DISTRICT COURT RULES COMMITTEE, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

WATERFORD CITY AND COUNTY COUNCIL, KC CABLE VISION LIMITED AND VIRGIN MEDIA LIMITED

NOTICE PARTIES

JUDGMENT of Mr Justice Barr delivered on the 25th day of April 2024.

Introduction.

1. The applicant instituted personal injury proceedings in the Circuit Court against the notice parties (hereinafter referred to as 'the defendants'), arising out of a fall on a public footpath on 3 April 2018.

2. The applicant recovered judgment in the sum of €8,000 in the Circuit Court against the second and third defendants. He was awarded costs against them, on the District Court scale.

3. The applicant presented a bill in respect of his legal costs in running the action in the Circuit Court, in the sum of €32,986.89. Of that, the applicant's solicitor's professional fee was charged at €19,414.44, exclusive of outlay and VAT. Counsel's fees were charged at €2,350, exclusive of VAT.

4. Following a taxation before the County Registrar, the professional fee allowed to the applicant's solicitor was €2,250, plus outlay, plus VAT; together with €800, plus VAT, in respect of counsel. This left a shortfall on the fees charged in the bill of costs of €24,231.11.

5. In this application, the applicant contends that the District Court Rules Committee and the County Registrar acted in breach of s.17(4) of the Courts Act 1981, as amended, which prohibits the imposition of scale fees by any rules of court.

Background.

6. On 3 April 2018, the applicant was walking along the footpath at The Causeway, Dungarvan, County Waterford, when it was alleged that he was caused to trip and fall, due

to a hole or defect in the surface of the footpath. As a result of this accident, the applicant suffered a soft tissue injury to his right ankle.

7. On 25 June 2019, the applicant obtained an authorisation from PIAB to institute proceedings in respect of his injuries. Proceedings were commenced against the defendants by personal injury summons issued in the Circuit Court on 20 October 2019. The defendants filed full defences to the action; denying that they were responsible for the alleged defect in the surface of the footpath and alleging contributory negligence on the part of the applicant.

8. On 15 December 2021, the action was heard in the Circuit Court. The applicant was successful in obtaining judgment for €8,000 against the second and third defendants. He was unsuccessful in his claim against Waterford City and County Council.

9. The applicant's action was dismissed against the first named defendant with costs, but the applicant was given an order over in respect of those costs, against the second and third defendants. The applicant was successful in obtaining judgment and costs against the second and third defendants. However, the order provided that his costs were to be on the District Court scale. As already noted, the applicant presented a bill of costs in the total sum of €32,986.89.

10. On 23 January 2023, the applicant's costs were taxed before the County Registrar for the County of Waterford. As previously noted, the first respondent allowed €2,250, plus outlay, plus VAT, in respect of the applicant's solicitor. He allowed €800, plus VAT, in respect of counsel's fees. The total shortfall in respect of the amount of fees recovered on taxation and the amount claimed in the bill of costs, came to €24,231.11.

11. On 6 March 2023, the applicant first applied for leave to proceed by way of judicial review. Leave was ultimately granted to bring the within proceedings on 8 May 2023.

Evidence at the Taxation.

12. The only evidence of what transpired at the taxation that was carried out by the first respondent on 23 January 2023, is the account set out in the affidavit sworn on 20 February 2023, by the applicant's solicitor, Mr David Burke. In that affidavit, he stated as follows at paras. 18 and 19: -

"18. The taxation of the bill of costs took place before Mr James Seymour, County Registrar, in Waterford Courthouse on 23 January 2023. I appeared at the taxation of the bill of costs. KC Cable Vision Limited and Virgin Media Limited were represented by Mr Tony McMahon, who is a cost accountant. I submitted to the

County Registrar that the applicant was entitled to recover all party and party costs itemised and claimed in the bill of costs. Mr McMahon on behalf of KC Cable Vision Limited and Virgin Media Limited made a preliminary objection to the County Registrar to the effect that the order of her honour Judge Alice Doyle made on 15 December 2021 had ordered that the applicant shall recover the costs of the Circuit Court proceedings from the second and third notice parties on the District Court scale with a certificate for counsel and that the County Registrar was bound by this and that the County Registrar was required to tax the applicant's party and party costs on the basis of the District Court scale of costs.

19. I say that the County Registrar agreed with the preliminary objection made on behalf of the second and third notice parties. The County Registrar ruled that he was required to tax the applicant's party and party costs on the basis of the District Court scale of costs. The County Registrar ruled that the costs that the applicant could recover in respect of the professional fees for solicitor and counsel were limited to the costs for solicitor and counsel specified in the District Court scale of costs. The County Registrar said that his hands were tied and directed that the costs that the applicant shall recover in respect of the professional fees for solicitor and counsel were the costs specified in the District Court scale of costs."

Relevant Legal Provisions.

13. The key provision in this case is s.17 of the Courts Act 1981, as inserted by s.14 of the Courts Act 1991. That section is headed "Limitation on amount of applicant's costs in certain proceedings". In s.17(1) it is provided that where a person has obtained an order from a court that is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the applicant shall not be entitled to recover more costs than he would have been entitled to recover, if the proceedings had been commenced and determined in the lowest court having jurisdiction to deal with the matter.

14. Section 17(4) is the key provision in this case. It provides as follows:

(4) It shall not be lawful for rules of court to contain or impose any restriction on the amount of costs recoverable by any party from any other party in any action or other proceeding, but nothing in this subsection shall prevent the insertion in rules of court of a restriction on the amount of the costs recoverable which is identical with a restriction imposed by this section nor the fixing by rules of court of the

amount recoverable by any person as and for the costs and expenses incurred by him in the doing of any specified thing in any particular form of action or other proceeding.

15. There are a number of other statutory provisions which are of some relevance to the within application. However it is not necessary to quote them, a brief summary of their provisions will suffice. Section 91 of the Courts of Justice Act 1924, provides that the rule making authority for the District Court shall have jurisdiction to make rules, to be styled the 'District Court Rules', for the regulation of practices and procedures before the District Court generally, including on the question of costs.

16. Section 12 of the Courts of Justice Act 1936, was a forerunner of s.17 of the 1981 Act. It provided for a limitation on the amount of the applicant's costs in certain High Court actions, where the applicant had proceeded in that court, when his claim could have been accommodated within the jurisdiction of a lower court. The section provided that where the amount of the judgment recovered came within the jurisdiction of the Circuit Court, the applicant would only be entitled to recover such costs as would be recoverable if the action had been brought in the Circuit Court, unless the judge hearing the action granted a special certificate under the section allowing for recovery of High Court costs.

17. Section 141 of the Legal Services Regulation Act 2015 provides that a County Registrar, on a taxation of costs, shall have regard to the principles relating to legal costs specified in schedule 1 to that Act. Schedule 1 provides that in adjudicating on costs, a legal costs adjudicator shall apply the principles in adjudicating on the costs as to whether the costs had been reasonably incurred and whether the costs are reasonable in amount. In determining whether the costs are reasonable in amount, a legal costs adjudicator shall consider the matters set out in schedule 1, which include: the complexity and novelty of the issues involved in the legal work; the skill or specialised knowledge relevant to the matter which the legal practitioner has applied to the matter; the time and labour that the legal practitioner has reasonably expended on the matter; the urgency attached to the matter by the client and whether this requires or required the legal practitioner to give priority to that matter over other matters; the place and circumstances in which the matter was transacted; the number, importance and complexity of the documents that the legal practitioner was required to draft, prepare or examine; where money, property or an interest in property is

involved, the amount of the money, or the value of the property, or the interest in the property concerned; together with a number of other matters as specified therein.

18. Order 53 of the District Court Rules, as amended by SI 17/2014, provides that save as where otherwise provided, the costs specified in each scale in the schedule of costs to those rules, are the only lawful costs. The order further provides that the costs in the schedule of costs are exclusive of, and in addition to, any sum allowed as recovery of VAT and all actual and necessary outlay, as allowed. The order provides that the schedule of costs must be revised no less frequently than once every three years. It further provides that in any case where the court is of opinion that there is no appropriate scale of costs provided, it may measure the costs.

19. Order 53, r.13, provides that where counsel is allowed, the scale of counsel's fees in the schedule of costs shall apply. Order 53, r.14 provides for the manner in which the scale of fees set out in the rules is to be applied. Subrule 14(1)(e) provides that if in a proceeding or matter, the court considers that the application of the rules in the order which determine that a particular scale of costs applies, would be inappropriate or unjust, the court may, either at the hearing, or within a reasonable time after the hearing, fix the costs.

20. Schedule 3 to the statutory instrument set out the scales of costs applicable at the time of the taxation. In relation to the solicitor's costs recoverable in actions for breach of contract and tort, and in claims for damages unconnected with contract, it made provision for the recovery of varying sums, which were split into bands depending on the amount of the judgment or decree, recovered. Where damages were recovered in the band exceeding €6,000, but not exceeding €9,000, the amount of recoverable solicitor's costs was €2,250. The same schedule provided that in respect of counsel's fees where the decree exceeded €7,000, but did not exceed €9,000, the amount recoverable in respect of counsel's fees was €800.

21. The scale of fees was updated by means of SI 418/2023, wherein the applicable solicitor's fee was increased to €2,725; with the applicable counsel's fee being raised to €840.

22. Finally, the Circuit Court Rules 2001, provided in O.66, r.11, that in defended proceedings in which the relief granted could have been obtained in the District Court, the costs to be allowed to the applicant, shall be those which would have been recoverable in that court, with the addition of such actual and necessary outlay, as may be allowed,

provided always that the judge may in such a case withhold costs if of opinion that the case was one proper to have been prosecuted in the District Court. Rule 13 provided that the judge may for special cause, order that the costs, as between party and party, of any proceedings be taxed on a special scale higher than that otherwise applicable. Such special cause shall be stated in the decree or order.

Key Issue in the Case.

23. The key issue in this case is whether, having regard to the provisions of s.17(4) of the 1981 Act, as amended, and s.141 of the 2015 Act, the District Court Rules Committee acted *ultra vires* in providing for a scale of recoverable fees in obtaining a decree in a defended matter, as provided for in SI 17/2014; and whether the County Registrar acted *ultra vires* in applying that scale, in the taxation of costs in this case.

Discussion.

24. The case advanced on behalf of the applicant is a simple one. It is submitted that the plain words of s.17(4) of the 1981 Act, prohibited any provision in the rules of court for scales of fees, save in the limited circumstances outlined therein; which, it is submitted did not apply in the present case. Accordingly, it was submitted that the District Court Rules Committee acted *ultra vires* when they introduced the scales of recoverable fees in respect of solicitors' instruction fees and counsels' fees, after the commencement of the 1991 amendment to the 1981 Act.

25. It was submitted that the present proceedings did not come within the two exceptions provided for in s.17(4) because the first exception dealt with the awarding of costs on the basis of costs recoverable in a lower court, where the applicant had commenced the action in a higher court where that was not necessary, as he had recovered damages within the jurisdiction of the lower court. The applicant submitted that he accepted that as a broad principle. He had not challenged the making of the order by the Circuit Court judge granting him costs at the District Court level against the second and third defendants.

26. It was submitted that insofar as the respondent had attempted to bring the scale of recoverable costs provided for in the District Court Rules within the second proviso to s.17(4), being the proviso in respect of "the doing of a specified thing"; it was submitted that that proviso could only relate to a discrete step in proceedings. It did not cover the instruction fee charged by a solicitor for work done in the carriage of the entire matter, from when he first obtained instructions from the client, through the PIAB application and through

the entire action, from commencement to trial. Similarly, the proviso could not relate to all the work done by counsel from initial drafting, through to the presentation of the client's case at the trial of the action.

27. It was submitted that insofar as the District Court Rules obliged the County Registrar when taxing the recoverable costs, to adhere to a scale which was solely predicated on the amount of damages recovered in the action, rather than on the work actually done by the legal representatives of the successful party; by so doing, the County Registrar had had to act in disregard of the obligation placed upon him by s.141 of the 2015 Act, to have regard to the matter set out in schedule 1 of that Act, when assessing the reasonableness of the fees charged by solicitor and counsel.

28. In the alternative, it was submitted that having regard to the shortfall of recoverable fees of €24,231.11, a shortfall of that magnitude, in respect of the fees reasonably incurred by the applicant in pursuing the action and the irrecoverability of same from the tortfeasor, constituted a breach of the applicant's right of access to the courts as provided for in Art. 40.3 of the Constitution.

29. In response, Ms O'Neill SC, on behalf of the respondents, submitted that the District Court Rules Committee clearly had jurisdiction to regulate the question of costs, as provided for under s.91 of the 1924 Act.

30. It was submitted that the setting of scales of recoverable fees in the District Court, came within the proviso to s.17(4) in the 1981 Act, because there is no official equivalent to a legal costs adjudicator in the Superior Courts, or to the County Registrar in the Circuit Court, who is charged with taxing costs in the District Court. Costs in the District Court can only be measured by the District Court judge.

31. It was submitted that having regard to the quick and relatively simple procedure provided for in the District Court Rules for the conduct of civil actions before that court, and having regard to the object of s.17 generally, which is to have legal costs kept at as a low a level as possible, it was permissible for the District Court Rules Committee to have a scale of recoverable fees, as such came within the proviso of the "doing of a specified thing", as provided for in s.17(4) of the 1981 Act, as amended.

Conclusions

32. At first sight, the prohibition imposed by s.17(4) of the 1981 Act, is very stark. It prohibits any rules of court which contain or impose any restriction in the amount of costs

recoverable by any party in an action or other proceedings. If the section ended there, the scale of fees provided for in the District Court Rules as set out in SI 17/2014, would fall foul of that prohibition.

33. However, s.17(4) goes on to provide two exceptions to the general prohibition on the imposition of scales of fees. Firstly, it is possible to have in the rules of court, a provision that if damages are recovered by a successful party which are within the jurisdiction of a lower court, the successful party can only recover costs at the level applicable in the lower court in which he/she should properly have commenced his or her action. That is uncontroversial. It is not an issue in these proceedings, as the applicant does not challenge the fact that he was awarded costs against the second and third defendants on the District Court scale.

34. The key complaint arises in the taxation that was carried out by the County Registrar on foot of the order of Her Honour Judge Doyle made on 15 December 2021. The applicant submits that in applying the scale of fees provided for in the District Court Rules, the District Court Rules Committee acted contrary to s.17(4) in imposing that scale and the County Registrar did likewise, and also breached his duty to carry out the taxation of the solicitor's and counsel's fees having regard to the matters in schedule 1 of the 2015 Act, as he was required to do under s.141 of that Act.

35. In order to address those arguments, it is necessary to look at the powers of the District Court Rules Committee. As already noted s. 91 of the 1924 Act, gave the rule making authority, being the District Court Rules Committee, the power to make rules for the practices and procedures to be adopted in the District Court, including the power to make rules in relation to recoverable costs. I hold that the District Court Rules Committee have jurisdiction to make rules governing the recovery of costs in actions heard in the District Court.

36. The key question is whether their power to provide a scale of recoverable costs in such actions, survived the amendment of the 1981 Act, which was carried out in 1991 by the insertion of the new s.17.

37. The court is satisfied that on a proper construction of s.17(4) of the 1981 Act, as amended, it is permissible for the District Court Rules Committee to fix a scale for recoverable fees for actions heard in the District Court.

38. The principles of statutory interpretation were summarised by Murray J in *Heather Hill v An Bord Pleanála* [2022] IESC 43, where he adopted the principles as set down by McKechnie J in *People (DPP) v Brown* [2018] IESC 67, and summarised the essential points that had been made in the following way:

- (i) *The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).*
- (ii) *However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other reports; and perhaps ... the mischief which the Act sought to remedy' (at para. 94).*
- (iii) *In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).*
- (iv) *If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95)."*

39. The policy reasons underpinning s.17 of the 1981 Act, were articulated by Murray J, as he then was, in *O'Connor v Bus Atha Cliath* [2003] 4 IR 459, as follows at p.493/494: -

"The Courts Act 1991, which amended the 1981 by substituting the new Section 17, is in an Act which increased the jurisdiction of the Circuit Court from €15,000 to €30,000 and the amending section is a provision which is expressed to be "Limitation on amount of applicant's costs in certain proceedings."

The relevant provisions are part of a statutory scheme whereby claims may be brought in different courts according to the level of their jurisdiction to give the relief sought by a applicant. It is clear that among the policy reasons for such provisions is that they facilitate the efficient administration of justice, are of convenience to all the parties in bringing their cases, where appropriate, before courts of local and

limited jurisdiction. In particular, in the present context, it will usually mean that lower costs are incurred by both the applicant and the defendant than if the proceedings had been brought to the higher court.

It is clearly in the public interest that claims are in principle brought before the lowest court having jurisdiction to hear and determine the claim with a view to the proper and efficient administration of justice and for the purpose of minimising the cost of litigation generally and in particular for the parties. There is therefore an onus on an Applicant to bring the proceedings before the court having the appropriate jurisdiction.

In my view, when the order made by court in favour of an applicant falls well within the jurisdiction of a court lower than that making the award it is incumbent on the trial judge to have specific regard to the nature of the claim and all the reasons for which the applicants claim fell within the lower jurisdiction or as the section puts it, all the circumstances of the case. An unsuccessful defendant should not be wantonly burdened with the costs of defending a claim in the higher court when it could reasonably have been brought in the lower court."

40. It is clear from a reading of s.17 as a whole, that the section is designed to provide that only those costs that would be recoverable in the lowest court that had jurisdiction in the matter, are actually recovered by a successful party who has elected to proceed in a court of higher jurisdiction than was necessary.

41. The key point to be decided on this application is whether the conducting of litigation in the District Court from inception, to obtaining a decree in a defended case, can be regarded as "the doing of a specified thing". When one considers that actions in the District Court are intended to be heard with the minimum of formality, so as to provide a fast and cheap method of dealing with relatively minor disputes, the court is satisfied that such a procedure can be seen as the doing of a specified thing, so as to come within the exception to the prohibition on the imposition of scale fees, as contained in the first part of the paragraph in s.17(4) of the 1981 Act.

42. While the applicant stated that in this case there had been a lapse of time of over two years between the giving of instructions to his solicitor and obtaining his judgment in the Circuit Court, that is not the barometer against which the action falls to be decided. The action may have taken that long in the Circuit Court, but the point is that the action could

have been brought in the District Court, where it is likely that it would have been heard with considerably less formality in terms of pleading and with less delay.

43. While the District Court Rules have provisions for the service of a notice for particulars and for the making of discovery in appropriate cases, it remains the case that actions heard in that court, generally proceed with less formality of pleading than in the Circuit Court.

44. The procedure in the District Court is designed to provide a fast and economic resolution of civil actions. I am satisfied that in these circumstances, the obtaining of a decree following a hearing in a defended case, comes within the description of "the doing of a specified thing", as provided for in the proviso, or exception to the general prohibition on having scales of fees, as provided for in s.17(4).

45. This interpretation is in accordance with the general purpose of the section, as identified in *O'Connor v BAC*. In addition, having regard to the absence of any official in the District Court with jurisdiction to tax costs and to avoid the mischief of having different levels of fees being allowed by different District Court judges, it is entirely sensible that there be a scale of recoverable fees, which is applied across the board. That enables people to know what level of legal costs they are likely to face if they are unsuccessful in a civil action heard in the District Court. Certainty of recoverable fees is a desirable thing, particularly when dealing with relatively modest claims.

46. Insofar as the applicant argued that the size of the shortfall between what had been charged in the bill of costs and the amount recoverable following the taxation carried out by the first respondent, constituted an infringement of his right of access to the courts guaranteed by Art. 40.3 of the Constitution; this has not been established in evidence, because the County Registrar did not state that the bill of costs furnished in the sum of €32,986.89 was reasonable in terms of the work done and the amount charged for such work.

47. It cannot be said that the County Registrar held that the bill of costs furnished was the appropriate level of fees for an action commenced and heard in the District Court. That being the case, one cannot say that there is in fact a shortfall of €24,231.11 in respect of the fees reasonably incurred, even if the action had been commenced in the District Court. In these circumstances, the applicant has not established that there has been any infringement of his right of access to the courts.

48. Insofar as it was argued that the first respondent had failed to have regard to the obligation cast upon him by s.141 of the 2015 Act, to have regard to the matters set out in schedule 1 to that Act, when taxing the costs; there is no evidence that in allowing the fees as per the scale provided for in the District Court Rules, the County Registrar did not have regard to the matters set out in schedule 1 to the 2015 Act. In the absence of any evidence to the contrary, one has to assume that in carrying out the taxation, the County Registrar applied the correct criteria to his assessment of the reasonableness of the fees charged by solicitor and counsel for the applicant and came to the conclusion that such reasonable fees, at least came to the maximum level for such fees, as recoverable under the scale in the District Court Rules.

49. Whether the County Registrar thought that such fees should be taxed at a higher level than provided for under the applicable scale in the District Court Rules, is not known. That was not stated in his ruling on the taxation.

50. While the applicant had sought an order of *mandamus*, obliging the Minister to revise the scale of fees recoverable every three years; that relief was not pursued in light of the fact that a new scale of fees had been introduced in 2023.

51. While the scale of recoverable fees ought to have been revised after 2014 and before the taxation of costs in this case; the increase provided for in the 2023 revision is so small, as not to require any further order in this regard.

52. At the end of the day, reality has to enter the equation. To proceed in a court which was higher than the one where the action should have been brought; where it would have been dealt with faster and cheaper; and then to present a bill for legal fees that was four times the amount of the damages recovered, was unrealistic. The amount of legal costs recoverable from a defendant, cannot in justice, be out of all proportion to the amount of damages actually obtained. To present a bill of costs for €32, 986.89, where effectively a District Court judgment for €8000 was obtained, has to be seen as unrealistic.

53. For the reasons set out herein, I refuse the reliefs sought by the applicant in these proceedings.

54. As this judgment has been delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

55. The matter will be listed for mention at 10.30 hours on 16 May 2024 for the purpose of making final orders.