

THE HIGH COURT
CIRCUIT APPEAL FAMILY LAW

[2008 No. 265 C.A.]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND
IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

B.C.McM.

APPLICANT

AND

J.McM.

RESPONDENT

B.S.

NOTICE PARTY

JUDGMENT delivered by Mr. Justice Michael White on the 30th April, 2014.

1. This matter came before this Court by transfer from the trial judge on 12th July, 2013. The matter this Court has been asked to deal with is a dispute over the costs of the notice party, B.S., for preparing s. 47 reports, attending court as a witness, and all ancillary work required to prepare the reports.

2. By order of the High Court of 21st October, 2011, on appeal from the Circuit Family Court, it was directed that each party to the proceedings be liable for 50% of the fees due to B.S. on the following terms:-

"(a) Both the applicant and the respondent shall be jointly and severally liable for the fees due to [B.S.].

(b) Both the applicant and the respondent shall be entitled to an indemnity from each other in respect of 50% of the fees of [B.S.].

(c) The fees of [B.S.] shall be taxed by the applicant in default of agreement.

(d) That the said [B.S.] be at liberty to apply to this Court within a year of the date hereof for such relief as may be advised in the event of non-payment of the whole or any part of the amount due to each of them in respect of their respective fees herein.

(e) By order of 12th October, 2012, the said order of 21st October, 2011, was varied by consent by the inclusion of the following words "or the respondent in para. 2(c) after the word 'by the applicant'."

The following additional orders were added:-

"(f) That in default of the applicant or respondent herein proceeding to initiate the taxation of costs procedure in respect of the fees of the said [B.S.] within three weeks of the date hereof – the said [B.S.] do have liberty to initiate such procedure for the taxation by the taxing matter of such fees due to him herein.

(g) That the said [B.S.] be and he is hereby added as a party herein for the purpose of participating in the taxation of costs procedure from the outset in respect of the quantum of fees invoiced by him herein in respect of his work as s. 47 reporter herein.

(h) That the said [B.S.] to be the plaintiff and the applicant and respondent herein to be the defendants in such taxation of costs procedure.

(i) That following any such taxation of costs procedure, the said [B.S.] be entitled to recovery against the applicant and respondent herein being the defendants in the said taxation of costs procedure in the amounts certified to be due to him.

(j) That the said [B.S.] have liberty to apply to this Court on 48 hours notice to the parties if any difficulty arising in respect of the taxation of cost procedure herein referred to."

3. A further order was made on 24th April, 2013, as follows:-

"(i) That the parties herein do have a further period of four weeks from the date hereof in which pursuant to the said orders herein dated 21st October, 2011 and 12th October, 2012, to initiate the taxation of costs procedure (party and party basis) in respect of the fees incurred by the said [B.S.] in preparing reports herein for the court pursuant to s. 47 of the Family Law Act 1995.

(ii) That in default of either of the parties so proceeding to initiate the said taxation procedure in respect of the said fees of [B.S.] within such period then the said [B.S.] do have liberty to so initiate said procedure to have had said fees taxed

in default of agreement on a solicitor and client basis.

(iii) That the said [B.S.] does have liberty to apply to this Court in relation to any matter arising from his participation in the said taxation of costs procedure on his giving four clear working days notice herein.

(iv) That any necessary application by the said [B.S.] to be brought on Friday, 12th July, 2013, on which date the parties herein are scheduled to be before the court."

4. On the matter being transferred from the trial judge to this Court on 12th July, 2013, and having heard detailed submissions from the parties, the Court decided that it was appropriate to proceed to hear the application for costs and to measure same, if necessary, rather than to have the matter proceed to taxation. This arose because of the concern of the notice party that the financial cost of retaining a legal costs accountant and the costs of taxation were prohibitive and that substantial fees remained due and owing to him from invoices already furnished by him to the parties. No objection was tendered to the Court by the principal parties to the original proceedings to the adoption of the procedure of measuring the costs.

5. The matter was heard by this Court on 27th November, 2013, and 15th January, 2014, when judgment was reserved. The Court heard B.S. in evidence and also T.M., a Legal Costs Accountant called on behalf of the applicant.

6. The Court also heard submissions on the issue.

7. The family law proceedings between the applicant and the respondent are of long-standing and have been particularly contentious and involved numerous court hearings over a number of years.

8. Proceedings were commenced in the Circuit Family Court. There were ongoing proceedings over custody and access of the three children of the marriage, A, B, and C.

9. The case is unusual in that there were a number of different experts nominated at various times to carry out expert reports in respect of the custody and access dispute between the parties. The proceedings at all times remained private law proceedings.

10. By notice of appeal to the High Court of 24th October, 2008, the respondent appealed a number of orders of the Circuit Family Court.

11. By order of this Court on 5th November, 2009, the youngest child, C., a boy was transferred to the primary custody of his father from his mother which naturally led to a difficult situation. The order of transfer envisaged that the evolving situation of his welfare would be monitored by the then expert who had been ordered to prepare s. 47 reports and had been monitoring the difficulties between the parties over access for a period of time. This expert had to withdraw when serious allegations were made against him.

12. As a result, the notice party was appointed by order of 11th December, 2009, pursuant to s. 47 of the Family Law Act 1995 ("the 1995 Act"), to provide a report to the High Court in respect of the case. Just prior to his appointment, the notice party sent a detailed joint letter on 10th December, 2009, to the solicitors on record for the parties to the proceedings setting out his terms of reference as indicated by the court but also setting out the cost of assessment and report. Section 47(4) of the 1995 Act, referring to costs, states:-

"The fees and expenses incurred in the preparation of a report under *subsection (1)* shall be paid by such parties to the proceedings concerned and in such proportions, or by such party to the proceedings, as the court may determine."

12A. Paragraph 11 of the letter set out the costs of assessment and report:-

"(i) Hourly rate €150 plus any additional costs incurred. Travel time is charged at 50%.

(ii) Typically such report costs approximately €3,000 - €3,500. It will need to be determined in advance who will be responsible for payment of the costs and in what proportions, and the respective solicitors are asked to confirm that they are in funds to this amount prior to commencement. It is stressed that this is an average estimate, and cases do vary a lot. If the final amount is likely to be more than this, it will be notified to the respective parties and likewise confirmation of the solicitors being in funds to that amount will be required in advance of the report being completed. Payment will be required within 30 days of invoice unless referred to taxation and if so, this will need to be done within the same 30 days.

(iii) Attendance in court is charged at €1,500 per day. Cancellation at least 72 hours in advance will incur no charge '48 - 72 hours in advance there will be a charge of €500', '24 - 48 hours a charge of €750'. On standby (for attendance within one hour) is charged at €600 per day, with summary proportion of the cancellation charges."

13. B.S. requested the parties to confirm agreement to the terms.

14. Solicitors on behalf of the respondent replied on 16th December, 2009. In that letter there was no objection to the terms as set out by the notice party but the letter stated:-

"Dear Sir

We refer to the above matter and enclose herewith for your attention our client account cheque in the sum of €1,500 in respect of the one half of the anticipated fees. We understand that [G.T.] Solicitors have also been put in funds in the sum of €1,500. We confirm that we have prepared the relevant documentation and will furnish same to you by post this evening.

Perhaps you might refer to us with appointment details at your earliest convenience.

We look forward to hearing from you."

15. The Court has not seen any letter of reply from G.T. Solicitors in reply to this initial letter of 10th December, 2009. In his evidence to this Court on 27th November, 2013, the notice party stated that at the date of his appointment, he had no idea of the complexity of this case and had not received any documents. The notice party sent a further letter to the solicitors for the parties on 23rd December, 2009, in which he acknowledged receipt of various documentation. He then went on to state:-

"Due to the volume of the case papers I should notify you that the section 47 report will take considerably longer than the 20 hours covered by the preliminary payment. I will notify you further regarding this in due course."

16. He went on to state:-

"Before deciding how to commence, I need to read into the case and this has taken an unforeseen amount of time so far over several days."

17. The first report prepared by the notice party was one of 27th January, 2010, which was a 20 page report. There was a court hearing on 27th January, 2010, and a further court hearing on 26th February, 2010.

18. On 22nd February, 2010, the notice party wrote to the solicitors for the parties enclosing an invoice statement for his work from 11th December, 2009, up to 19th February, 2010. The letter stated:-

"Dear Mr. [G.], Mr. [M.]

Please find enclosed invoice/statement from commencement of my work in the above case 11/12/09 to my update report 19/02/10 when the case was last mentioned before the High Court.

The amount due stands at €23,374.75. It is estimated that further costs up to and including 24th March, 2010, the date listed for hearing the case, will be €5,000 to €7,000 subject to account issuing after that date.

Please liaise with your respective clients to arrange payment on account within 30 days and to confirm that you are in funds of the estimated balance.

If there is any matter to be decided regarding the apportionment of the amount payable between your respective clients, please bring this to the attention of the court on Friday next, 26th February."

19. The Court has available to it the transcript of the hearing before Abbott J. on 26th February, 2010, when the issue of the notice party's costs were dealt with at pp. 25, 26 and 27 of the transcript.

20. This transcript reveals that Ms. O'N., on behalf of the respondent, did say that he did not have the funds to meet 50% of fees, but there was no objection made to the court about the work undertaken by the notice party, his *modus operandi* or the levels of fees being charged by him.

21. The trial judge did not interfere with the 50/50 apportionment of the costs of the s. 47 report between the parties, nor was he asked to adjudicate on the measure of costs.

22. He stated at p. 26 of the transcript:-

"Well I won't interfere with the private arrangements between the parties and Mr. [S.]. It is a matter for negotiation. If I have adjourned the case to 24th if there is no Mr. [S.] here for any reason, the court will have to deal with the case, it's for the parties themselves. It is a private law case. He went on to state 'I am not going to take issue with Mr. [S.] how he values his work'... 'the point is that if anyone else wants to retain Mr. [S.] he has put his flag up there and people can like it or lump it'."

23. The notice party had prepared an updated interim report of 19th February, 2010, presumably for the court on 26th February, 2010, and a further report of 25th February, 2010.

24. There was a further detailed report of 22nd March, 2010, for the court hearing on 24th March, 2010, which was 16 pages long including its appendix and schedules.

25. There was a further report of 3rd July, 2010, for a court hearing on 8th July, 2010. This was a 39 page report.

26. Court hearings took place on 24th March, 2010; 13th May, 2010; 3rd June, 2010; and 8th July, 2010.

27. The notice party gave extensive evidence to the court on 24th March, 2010, and attended court to give evidence again on 8th July, 2010.

28. Subsequent to the notice party's final attendance at court on 8th July, 2010, there were fees claimed for hours worked in finalising the file. The hours claimed are for the period from 20th July, 2010, to 7th September, 2010, amounting to 19 hours

29. The notice party prepared a final invoice on 29th October, 2010, for work carried out between 20th February, 2010, and 7th September, 2010.

30. I note from the detailed hours sheet meticulously prepared by the notice party that the respondent continued to engage actively with him by way of consultation, e-mail and telephone calls. This invoice totalled the sum of €53,499.61. The total fee sought including outlay by the notice party is the sum of €79,874.36.

31. Before I apply the legal principles I wish to deal with the submission of the respondent that he has no liability for the fees, apart from the initial payment as he never authorised the extent of the work undertaken by the notice party and the respondent has referred to letters sent to the notice party.

32. The letters produced by the respondent commenced on 21st December, 2010, subsequent to the receipt of both invoices by him.

33. There is no evidence before this Court of any letter or any reference in the court proceedings to a refusal by the respondent to partake in the process of s. 47 interviews.

34. The respondent was of the opinion that the applicant had obstructed access and had engaged in a type of behaviour which resulted in a number of s. 47 assessors being retained. He believed that the ultimate outcome of the proceedings would be an order for costs in his favour and no liability for the costs of the s. 47 reports.

That turned out not to be the case.

35. This Court has no jurisdiction to interfere with the order directing the payment of the assessor's costs or their apportionment. That matter was finalised by the trial judge.

36. The only issue before me is the measurement of fees due to the notice party.

37. The respondent continued to engage extensively with the notice party even after the receipt of the first invoice when it was obvious the process would be expensive.

38. The respondent's submission that he is not liable for the costs of the s. 47 assessor is incorrect.

39. Even though it is the court measuring the costs, it is appropriate that it applies principles which would apply to the taxation of costs.

40. The Taxing Master when taxing costs is not confined to measuring the costs only on hours charged.

41. The notice party was discharging a statutory function by providing reports pursuant to s. 47 of the 1995 Act, but would be regarded as an expert witness. The purpose of taxation on a party and party basis is to arrive at a fair and reasonable sum, which may or may not be as much as that which was actually incurred. The charges must be assessed in relation to the magnitude of the case and the magnitude of the case depends upon the viewpoint of both parties. (Flynn & Halpin, *Taxation of Costs* (Dublin: Blackhall Publishing, 1999) Chapter 13 Expert witnesses pp. 631- 647)

42. The submissions of the applicant and the evidence of T.M., the Legal Costs Accountant called on her behalf, are relevant.

43. The notice party did not have any secretarial assistance; he prepared and typed the reports himself and counsel for the applicant has pointed out that normally this type of work is charged out at a much lower rate, €20 per hour being suggested.

44. This Court has major concerns about this case because of the final cost of the s. 47 assessor's work. Objectively it would never be contemplated by a family court that s. 47 reports and attendance in court of the assessor would reach the level of €80,000.

45. The notice party when not paid by the parties when the first invoice was raised on 22nd February, 2010, should have made more strenuous efforts to clarify how his costs were going to be discharged and should not have undertaken any more work until those issues were clarified.

46. The respondent had a responsibility to disengage from the process after 22nd February, 2010, once he knew he could not discharge the costs. This Court notes that the notice party has prepared meticulous time sheets which are of an excellent standard and the Court is satisfied he did expend that amount of time on the case and made a huge effort to resolve the issues between the parties. The work undertaken by him was exceptional.

47. In analysing the time sheets, I have formed the opinion that the hours for writing reports and correspondence should be reduced considerably.

48. On the first invoice of 19th February, 2010, I am allowing eight hours for writing the court report of 27th January, 2010, one hour for writing the Lucena referral report and two hours for the interim court report of 19th February, 2010. This is a reduction of 26 hours.

49. In respect of the invoice of 29th October, 2010, I am allowing 30 hours for correspondence, 40 hours for writing court reports and 15 hours for writing referral reports and letter for consultations with various interests and letters to the High Court registrar. There is therefore a reduction of 112 hours on that invoice.

50. I am allowing 10 hours for the period from 8th July, 2010, to the close of the file on the 7th September, 2010, a reduction of 9 hours

51. I am reducing the total fees by 147 hours. They are therefore reduced by €22,050.