

BETWEEN

MICHAEL BRENNAN

PLAINTIFF

AND

DEPUY INTERNATIONAL LIMITED AND

HEALTH SERVICE EXECUTIVE

DEFENDANTS

RULING ON COSTS delivered by Mr. Justice Barr on the 28th day of June, 2017**Background**

1. On 8th December, 2015, the plaintiff settled his action in negligence against the defendants for €235,000 and costs, to include all reserved and discovery costs and the costs of mediation. Such costs were to be taxed in default of agreement. This agreement was reached with the first named defendant.

2. On 2nd February, 2016, the plaintiff furnished a short form Bill of Costs, in which he claimed total costs of €442,585.52 (inclusive of VAT). The fees claimed as professional fees by the plaintiff solicitor amounted to €172,507.50 (inclusive of VAT), the fees due to counsel came to €176,566.50 (inclusive of VAT). Thus, of the overall bill submitted, the sum of €349,074.00 related to legal fees (inclusive of VAT). The initial Bill of Costs omitted to claim fees which were due to one of the plaintiff's experts and so a slightly amended Bill of Costs was submitted on 12th October, 2016. The figures cited above are taken from the updated Bill of Costs.

3. By letter dated 20th February, 2017, the legal costs accountant acting on behalf of the first named defendant, responded, setting out the amounts which the defendant was prepared to pay in respect of legal and other costs. There is a substantial difference between the parties as to what are the appropriate costs to be recovered by the plaintiff from the defendant. The main area of dispute relates to the amount of legal costs which are properly recoverable by the plaintiff.

4. In the Bill of Costs, the plaintiff's solicitor had claimed a professional fee (exclusive of VAT) of €140,250. The defendant was only prepared to offer the sum of €62,000 in respect of this item. The plaintiff had briefed two senior counsel, each of whom had marked a brief fee of €45,000. The defendant was only prepared to offer the lead senior counsel a brief fee of €17,500. They were not prepared to allow any fees at all to the second senior counsel. In the Bill of Costs the junior counsel had marked a brief fee of €30,000. The defendant was only prepared to offer him a brief fee of €11,666.

The Present Application

5. This application is brought by the legal advisors who acted on behalf of the plaintiff, seeking a direction from the court that the first named defendant should make a payment on account in respect of the legal costs which are owed to the plaintiff. The application is made pursuant to practise direction HC 71 "Payment on account of costs pending taxation", issued by the President of the High Court on 28th March, 2017, which was in the following terms:-

"In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, r. 1B (5).

I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.

This practice direction shall come into effect on Monday 24th April 2017."

6. In the course of his submissions, Mr. Treacy S.C. on behalf of the plaintiff, submitted that while there have been court cases run against the defendant in relation to the allegedly defective hips manufactured by them, in both the United States of America and in Australia, there had been no case actually run before the courts in Europe. As such, it was submitted that this case, which had opened before the court and was settled prior to any evidence being called, was in fact the first case of its type to actually run before a court in Europe. In these circumstances, it was submitted that the fees marked by the solicitor and counsel who acted for the plaintiff, should properly reflect the complexity of the case, and the fact that it was the first of its type to be opened before a court in Europe.

7. Counsel further submitted that as all matters were in issue between the parties, including the defence which had been raised by the defendant, that it was entitled to rely on s. 6(e) of the Liability for Defective Product Act, 1991, which was the so called "state of the art" defence, the brief fee marked by senior counsel was likely to be accepted as reasonable by the Taxing Master, due to the fact that counsel had had to review a very large range of literature from all around the world, which showed the level of scientific and medical knowledge which existed at the time that the defendant placed its product onto the market. In such circumstances, counsel submitted that the brief fee marked was reasonable and in addition, that the Taxing Master would find that it was reasonable for the plaintiff to retain the services of a second senior counsel for the trial of the action.

8. On this basis, counsel submitted that there was a reasonable case to be made in respect of the costs as claimed. It was submitted that the plaintiff would be successful on the taxation of costs and would recover a very large proportion of the bill submitted by him, if not the entirety thereof. In such circumstances, counsel submitted that the court should direct that a substantial payment on account be made by the defendant.

9. In response, Mr. Hurley, solicitor on behalf of the first named defendant, submitted that this case was merely one of a very large number that had been processed by the plaintiff's solicitor against the defendant. As such, they were very well versed in the documentation which was required to be examined in the course of preparing such a case. He further pointed out, that having regard

to the size of the compensation paid to the plaintiff under the settlement, the brief fee of €17,500 as suggested by the defendant, was likely to be seen by the Taxing Master as being an appropriate fee in all the circumstances.

10. Mr. Hurley stated that he was confident that his legal costs accountant would be able to satisfy the Taxing Master that the level of fees as set out in their letter dated 20th February, 2017, were the appropriate fees to be awarded to the plaintiff on taxation. Mr. Hurley further indicated that the defendant was prepared to offer the sum of €100,000 as a payment on account in respect of the plaintiff's costs.

Conclusions

11. In a ruling on costs given in the case of *John Heeney v. DePuy International Limited*, delivered on 28th June, 2017, this court set out extensively the limitations which it faced when considering an application of this kind. It is not necessary to repeat all of the relevant matters in this ruling. Suffice it to say, that the court cannot give any opinion as to what might be the appropriate professional fee payable to the plaintiff's solicitor, or in relation to the appropriate fees which should be paid to counsel, as the court has not heard evidence on these issues from either of the parties. Nor can the court determine whether the fees of the second senior counsel should be allowed. These are matters which are more properly within the jurisdiction of the Taxing Master, who will carry out a taxation in due course.

12. What the court must attempt to do is to decide upon a figure which will provide a substantial payment on account to the plaintiff's legal advisers, while at the same time being careful not to fix that figure at a level that would expose the defendant to a significant risk of making an overpayment in respect of the costs which may ultimately be found due and owing to the plaintiff on taxation. In fixing the appropriate figure, the court has also had regard to the fact that in August 2016, the defendant paid €500,000 to the plaintiff's solicitor to be credited against all the cases handled by that firm, in which their clients had obtained orders for the payment of their costs. This resulted in the sum of €23,750, plus VAT being applied to this case. The solicitor was given €20,000, plus VAT and counsel were given €3,750, plus VAT.

13. This case settled in December 2015. A point was made by Mr. Hurley, which seems to the court to be entirely reasonable. He stated that once the plaintiff had obtained an order for costs, it was only the plaintiff who could force the matter on to a taxation of costs, by submitting his formal or final Bill of Costs and if that was not agreed, then issuing a summons to tax. Until a formal or final Bill of Costs was delivered, the defendant was powerless to have the matter of costs determined by the Taxing Master. As that had not been done by the plaintiff's solicitor, it was not the fault of the defendant that the matter had not been referred to taxation.

14. Having considered the short form Bill of Costs submitted by the plaintiff and the response thereto by the defendants' legal costs accountant, I consider that an appropriate payment on account at this stage, is the sum of €150,000. I would stress that this is merely a payment on account. It is not an indication as to the level of costs which may ultimately be recovered by the plaintiff on taxation. These costs may be determined by the Taxing Master at a level either above, or below, the figure nominated herein.

15. Finally the court is concerned that while this case was settled in December 2015, a formal Bill of Costs has not yet been served on the defendant. It is incumbent on the plaintiff to pursue his order for costs in a reasonably expeditious manner. Accordingly, I give the following direction in relation to the time for the payment by the defendant of the payment on account as directed herein. I give the following direction in the matter:-

(a) the defendant is to make a payment on account to the plaintiff in respect of his costs in the sum of €150,000, within 21 days from receipt by the defendants' solicitor of a formal or final Bill of Costs from the plaintiff's solicitor.