



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 60

Record No. 2014 704

**Whelan J.
McGovern J.
Costello J.**

BETWEEN/

MICHAEL BREHONY

**PLAINTIFF /
RESPONDENT**

- AND -

LONGFORD WESTMEATH FARMERS MART LIMITED

**DEFENDANT /
APPELLANT**

JUDGMENT of the Court delivered on the 4th day of March 2019 by Mr. Justice McGovern

1. The appellant brings this appeal from the decision of Hanna J. delivered on the 1st May, 2012 wherein he ordered that the assessment of Item 188 in a bill of costs (the solicitor's instruction fee) be remitted back to the Taxing Master on the basis that he undertakes the taxation in accordance with the judgment of the High Court.

2. The appeal turns on the issue as to whether or not the Taxing Master was entitled to include in the instruction fee an additional attendance fee over and above what is provided for in Item 24, Appendix W of the Rules of the Superior Courts ("RSC").

Background

3. The respondent's claim in the High Court proceedings was for damages arising out of personal injuries sustained by him on the 1st November, 2001 in the course of his employment with the appellant at the appellant's mart at Ballymahon, County Longford. The proceedings entered the personal injuries list in the High Court and were listed for hearing on Thursday the 11th February, 2010. They were not reached on that date nor on the following day (Friday). On Tuesday the 16th February, 2010 the parties assembled at the Four Courts for a third day but again the matter was not reached and some time around 4.30 p.m., following discussions, the respondent's claim settled for €35,000 and High Court costs to include reserved costs to be taxed in default of agreement. A settlement was ruled on the 17th February, 2010.

4. A formal bill of costs with summons to tax was served on the appellant's solicitor. The taxation hearing took place before the Taxing Master (Charles A. Moran) on the 20th September, 2010. He allowed, as part of the instruction fee, a sum of €3,000 by way of attendance fees to the appellant's solicitor for each day the matter was listed for hearing (making in all a total of €9,000). It is important to note that he also allowed a sum of €20.47 (sum claimed €20.49) in respect of each day attending court when the action was in the list for hearing but not reached. This amount is provided for at Item 24, Appendix W, Part I of the RSC.

5. Objections to the allowance were filed and served on the 27th September, 2010 and submissions were exchanged. On the 11th March, 2011 Taxing Master, James Flynn, affirmed the taxation of Item 188 in respect of the instruction fee. He stated that this item related to the general instruction fee claimed at €28,000 and allowed on taxation in the sum of €21,000. He then went on to set out the objections raised by the appellant which included a complaint that "the Taxing Master erred in the making of an allowance in the instruction fee for three days that the case was in the list for hearing". In relation to the instruction fee he quoted from the decision of Barron J. in *Best v. Wellcome & Ors.* (No. 3) [1996] 3 I.R. 378 when he stated at p. 382 that the nature of the fee was:-

"To cover taking instructions for the trial or hearing and not merely instructions for the preparation of a brief . . . It was a fee to cover the overall care and attention which the case required, the difficulties in taking proofs of evidence and intended witnesses and generally organising the case, ensuring the availability of witnesses and indeed the availability of counsel. It had to cover living with the case. It covered a variety of consultations as well as the cost of assembling and preparing the brief itself."

6. Having referred to some other objections to the instruction fee (which he rejected) he then went on to state at p. 5:-

"With regard to days in the list and not reached where the solicitor attended for the full day attracts an allowance of €3,000 or thereabouts depending on the circumstance [sic]. This allowance is adjusted depending on the location of the solicitor's office to the court and the length of time the solicitor actually spends in court. The plaintiff's solicitors' offices are in Longford and the case was heard in Dublin. Such an allowance of €3,000 was appropriate at time of taxation. In such circumstance I see no reason to reduce the fee and correspondingly disallow the objection and affirm the taxation."

7. It is clear from these remarks of the Taxing Master that he was allowing a rate of €3,000 per day in respect of the respondent's solicitor's attendance in Dublin on each of the three days when the action was listed but not reached. It is also clear that he was dealing with this in the context of an appraisal of the instruction fee.

Relevant legislation and rules on taxation of instruction fee and attendance fee

8. The starting point for considering the powers of the Taxing Master is Part VI of the Courts and Courts Officers Act 1995. Section 27 sets out his powers generally and s. 27(2) provides that he "...shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master...considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

9. Section 27(3) provides that the High Court may review a decision of the Taxing Master:-

"...provided only that the High Court is satisfied that the Taxing Master...has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master...is unjust."

10. Costs are dealt with in O. 99 of the RSC. O. 99, r. 12(1) states:-

"The scale of costs contained in Appendix W, Parts I, II, and V, together with the notes and general provisions contained therein shall apply to the taxation of all costs incurred in relation to contentious business."

11. Within Part I of Appendix W there is a list of eighty-one items which may arise in relation to costs associated with litigation. For ten items in that list no fee is prescribed and they are stated to be "discretionary". Of the remaining items in the list some have specific fees prescribed and in other cases a range of fees is given.

12. Order 99, r. 37 sets out a list of general regulations that shall apply to all taxations. Order 99, r. 37(22)(i) states:-

"Where in Appendix W there is entered either a minimum and a maximum sum, or the word 'discretionary', the amount of costs to be allowed in respect of that item shall, subject to any order of the Court, be in the discretion of the Taxing Master, within the limits of the sums so entered (if any)."

13. Appendix W, Part I of the RSC, Items 23 and 24, provide a range of attendance fees for trial or hearing depending on whether the sitting is within twenty miles of the place where the solicitor practices or further afield. The relevant scale applicable to the respondent's solicitor was €13.65 to €20.47. In this case the higher figure was allowed by the Taxing Master.

14. In addition, the Taxing Master allowed a sum of €3,000 per day to the respondent's solicitor in respect of an attendance fee for each of the three days while the parties were waiting for the case to get on for hearing. But that figure was built into the instruction fee.

15. Items 16 and 17 in Appendix W, Part I deal with instruction fees. No specific sum or range of figures is prescribed. In each case they are stated to be "discretionary". In the notes to Items 16 and 17 it is stated:-

"These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matter in dispute..." [emphasis added].

The law

16. In *Sheehan v. Corr* [2017] IESC 44 the Supreme Court (Laffoy J.) set out the methodology which should be adopted by the Taxing Master in assessing the general instruction fee of a solicitor. In paras. 122-125 Laffoy J. outlined matters that should not be taken into account and those that should. It is clear that the Taxing Master has a wide degree of discretion. But the issue that arises in this appeal is not so much the extent of the Taxing Master's discretion but rather whether he was entitled to include in the solicitor's instruction fee, a figure for attending court while waiting for the case to get on and, in particular, uplifting that figure substantially beyond the range "otherwise provided for" in Items 23 and 24, Appendix W, Part I.

17. In *Sheehan v. Corr* [2017] IESC 44 at para. 78 Laffoy J. concluded that the proper approach to the taxation of the general instruction fee by the Taxing Master is as outlined by Herbert J. in *C.D. v. The Minister for Health* [2008] IEHC 299:-

"...it being in accordance with s. 27 of the Act of 1995, and Order 99, and with particular emphasis on the statement in the second passage quoted, that value does not have to be put on each of the individual items making up the general instructions fee."

18. The issue which this court has to consider did not arise in that case. But a somewhat similar situation arose and was considered by Barron J. in *Best v. Wellcome Foundation Ltd. (No. 3)* [1996] 3 I.R. 378. One of the issues in that case was whether a fee sought for the legal cost accountant at 10% of the solicitor's instruction fee should be allowed. The fee was allowed by the Taxing Master under the provisions of O. 99, r. 12(2)(a) and O. 99, r. 10(2). The latter provides:-

"Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are been taxed."

19. Barron J. observed that r. 12(2) provides:-

"On a taxation as between solicitor and client and in other special cases, a special allowance may at the discretion of the Taxing Master be allowed -

(a) in relation to items not mentioned in the said scale, or

(b) of an amount higher than that prescribed by the said scale."

20. At p. 398 Barron J. said:-

"Counsel for the defendant submits that the Taxing Master was wrong in principle to allow this fee. Since Appendix W to the Rules, item 30, provides for the drawing and engrossing of a bill of costs, it seems to me that the Taxing Master was wrong to allow this item under O. 99, r. 12, sub-r. 2 (a). If allowed at all, it should have been allowed under sub-para. (b) of the same rule. This gives rise to the question, what is a special case?"

In my view, there is nothing unusual in the employment of a cost accountant. Evidence has been given to the effect that this is now becoming the norm. But for a case to be special, it seems to me, that this means that there must be special circumstances in the particular case giving rise to the creation of the particular item or giving rise to additional work under the particular heading in Appendix W which could not have been anticipated. Neither situation exists here."

21. Barron J. went on to point out that the Taxing Master in that case was also prepared to allow the fee on the grounds that it was necessary to do justice between the parties. While the judge had sympathy with that argument he went on to state at p. 400:-

"In relation to the costs of the cost accountant, it seems to me that since the costs have already been given under the scheduled fees that it is not possible to give them again on a different basis. They can only be increased where there is a special case.

This present issue is effectively caused by the fact that the provisions of Appendix W are long since out of date and should have been brought up to date. That is a matter for the rules making committee. There is no ground for allowing this item. In the circumstances it must be deleted."

22. A similar complaint about how the provisions of Appendix W are out of date and wholly inadequate in today's world was made by Laffoy J. in *Sheehan*. At p. 314, para. 122 she stated:-

"In the context of the discussion on the undisputed lack of reality of the costs ascribed to the costed items in Appendix W, I observed that the amendment of Order 99 and, in particular, Appendix W, is long overdue."

23. This is not something which can be achieved by judicial intervention but is a matter for the Rules Committee.

Discussion

24. In the High Court Hanna J. concluded his judgment in the following terms:-

"Thus I see no error in principle in applying the 'great equaliser'. I find no injustice would flow from its application. But this is not something to be engaged in willy-nilly. It is not a 'rule of thumb' and must be evidence based as far as practicable and subject to sufficient analysis and explanation.

In the instant case, this did not happen in my view to a sufficient degree. I identify the errors of principle in the instant case as:

(i) insufficient inquiry, analysis and explanation of the amount allowed on a *per diem* basis;

(ii) the allowance of an amount which, taken together, seems wholly disproportionate to the overall instruction fee allowed.

Thus I identify both an error in principle and an injustice in the allowing the daily rate of €3,000.

I have no evidence upon which to readjust this figure or even if, in the circumstances, a readjustment is necessary. I must therefore remit the matter to the Taxing Master."

25. It is clear, therefore, that the High Court judge has sent the matter back to the Taxing Master on the basis that he is entitled to include in the instruction fee a figure for the solicitor's attendance for the three days when the case was not reached. In my view, the High Court judge was in error in reaching this conclusion and, in holding that because the instruction fee can be regarded as "the great equaliser" it followed that an attendance fee over and above what is already provided for in Appendix W, Part I could be included as part of the instruction fee. If the matter is sent back to the Taxing Master on that premise then, in my view, the Taxing Master will be acting in error.

26. Although O. 99, r. 12(2) allows the Taxing Master to make a special allowance of an amount higher than what is prescribed by the scale in Appendix W, there is nothing in the way of a "special case" arising on the facts of this case which would entitle him to do so. As Barron J. stated in *Best* at p. 398:-

"... there must be special circumstances in the particular case giving rise to the creation of the particular item or giving rise to additional work under the particular heading in Appendix W which could not have been anticipated."

27. The fact that the scale fees provided for in respect of Items 23 and 24, Appendix W, Part I of the RSC are wholly inadequate and long out of date would not entitle the Taxing Master to uplift the prescribed attendance fee by adding in another figure for attendance within the instruction fee. The notes to Items 16 and 17 (instruction fees) are quite clear in their terms and allow the Taxing Master to exercise his discretion in respect of the items averred to therein and "not otherwise provided for".

28. Section 27(3) of the Courts and Courts Officers Act 1995 allows the High Court to review a decision of the Taxing Master, but the court must be satisfied that he has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master is unjust. The general instruction fee claimed was €28,000 and the sum allowed on taxation was €21,000. As a proportion of that sum three days' attendance fee at €3,000 per day (€9,000) is, in my view, disproportionate and unjust on the party that will have to pay the costs. It should be remembered that this was a routine personal injury case where the settlement was for €35,000.

Conclusions

29. The Taxing Master was not entitled to include as part of the instruction fee a sum for the attendance of the solicitor on each of the days when the case was not reached as these matters are already provided for in Appendix W, Items 23 and 24 and had been allowed under that heading.

30. The High Court judge was in error in holding that there was no error in principle in the Taxing Master using the instruction fee as the "great equaliser" so as to uplift the Attendance Fee from the range provided for in Items 23 and 24, Appendix W, Part I.

31. I would therefore allow the appeal and remit the matter back to the Taxing Master to reconsider the proper amount to be allowed in respect of the instruction fee in a way which does not include any figure for the solicitor's attendance fee.

