THE HIGH COURT

[2017 No. 368 SP.]

BETWEEN

GERARD MCELHINNEY AND MARGARET MCELHINNEY

PLAINTIFFS

AND

PATRICK DELANEY

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 3rd day of May, 2019

Introduction

1. This is an application pursuant to the inherent jurisdiction of the court directing that the solicitor client bill, served on 12th July, 2013, be referred to taxation. There is a statutory power to refer a bill for taxation under the Attorneys and Solicitors (Ireland) Act 1849 ("*1849 Act*"). The ultimate question for determination is whether the circumstances in this case prompt this Court to exercise its inherent jurisdiction which runs parallel to the statutory jurisdiction but recognises the limits imposed by the 1849 Act.

Background

2. In 2003, the plaintiffs engaged the defendant to act as their solicitor in what transpired to be a complicated agreement and saga to enforce that agreement, which involved the sale of property situated in Stoneybatter, Dublin in exchange for money and development of apartments with car parking space ("*the property*").

3. On the 16th April, 2007, the defendant sent a two-page "*amended fee note*" referring to various items of work for a sum of €96,800, inclusive of VAT amounting to €16,800, to the plaintiffs.

4. A statement of account from the defendant, dated 23rd May, 2012, itemised the application of the sale proceeds of the property including the discharge of loans, a sum to another firm of solicitors, fees on account to a barrister and the payment to the defendant of the said sum of €96,800.

Breakdown of Trust

5. The first named plaintiff ("*Mr. McElhinney*") takes issue with the defendant's averment in para. 11 of his only replying affidavit sworn on 23rd February, 2018, that the plaintiffs never questioned "*the fees raised*" prior to their instruction of new solicitors in 2013, who are on record for them in these proceedings. At paras. 6-10 of his supplemental affidavit sworn on 3rd October, 2018, Mr. McElhinney outlines responses and conduct on the part of the defendant which led to a breakdown of trust between the plaintiffs and the defendant. He explained how the said statement of account was issued only after the second named plaintiff, his wife, had requested a bill.

6. In 2013, the plaintiffs' new solicitors addressed a letter to the defendant in his current practice which led to a reply from the defendant dated 26th July, 2013. It is worth summarising the numbered paragraphs of that reply:-

> (i) The defendant claimed that significant sums remained due by the plaintiffs for fees and outlays.
>
> (ii) The defendant stated that files would be released upon discharge and no objection would be taken to a new firm of solicitors negotiating the payment of outstanding fees due to counsel.
>
> (iii) The defendant attached a 61-page document dated 2nd July, 2013, bearing the name of his legal cost accountant, which was in draft form with few figures despite an impression from the letter that all sums due were clear.
>
> (iv) The defendant further stated: "*If your clients have any queries in relation to any bills for the various transactions, I am agreeable that same can be taxed and I will facilitate same in early course".*
>
> (v) The defendant claimed that he was entitled to deduct from his client account the €96,800 referred to in the fee note dated 16th April, 2007, and "*a further updated fee note on account in 2012".*

Conflicts in Affidavits

7. The Court cannot resolve any issues of relevant fact which are disputed in the affidavits filed for the purpose of this application now before the Court. However, the omission of enclosures with the exhibited defendant's letter dated 11th September, 2013, to the Complaints Department of the Law Society and more particularly "*the s. 68 letters*" which the plaintiffs deny receipt of at any stage, causes a concern with regard to para. 10 of the defendant's only affidavit which reads:-

> *"I say my office has been upfront and transparent as regards the fees which the plaintiffs would thereby incur in this matter and which they did in fact incur. As is recommended practice, I furnished the plaintiff with a fee estimate or 's. 68' letter. I beg to refer to the various s. 68 letters when produced."*

8. Counsel for the plaintiffs emphasises that the plaintiffs never received such an estimate and to date have not been furnished with copies of the alleged s. 68 letter.

Summons to Tax – April 2014

9. A summons to tax issued on 4th April, 2014, returnable for July 2014, and it was listed for hearing before then Taxing Master Mulcahy on 25th November, 2014. It was then agreed on behalf of the parties that a position paper would be prepared about conferring jurisdiction on the Taxing Master in order to proceed with the taxation process. The defendant's cost accountant drafted the position paper which ended at para. 3.11:-

> "*In the instant case*, the Taxing Master's jurisdiction is not being challenged per se, *it is a matter of ensuring that the*

taxation process commences on an appropriate and proper footing and ensure that any subsequent order of the Taxing Master (Certificate of Taxation) is capable of execution in the normal legal manner." (emphasis added).

Dispute about the Order of the Taxing Master
10. The parties relied on information given to them by their respective cost accountants about what happened before the Taxing Master. The defendant averred in his affidavit that *"the matter was then subsequently struck out in 2015 due to the of the* [sic] *Plaintiffs not engaging with the process"*. Mr. McElhinney, in para. 14 of his affidavit sworn on 17th August, 2017, referred to the advice available to him "*that the taxation of the solicitor client bill now stands adjourned generally with liberty to apply*." He stated that he had been "*advised that there appears to be some dispute in that insofar as the defendant through his representative has indicated that they understand that the taxation has been struck out".*

These Proceedings
11. By letter dated 12th May, 2017, the cost accountant engaged for the plaintiffs advised the plaintiffs' current solicitors that the taxation was adjourned generally with liberty to re-enter and urged the solicitor to "*move very quickly*" because of a perceived difficulty to obtain a direction for taxation of the bill of costs raised in 2007, and an additional bill raised in 2013. The bill in 2007 was for work on non-contentious matters.

12. Thus, these proceedings which had been issued by way of special summons on 29th August, 2016, were progressed and rest with the supplemental affidavit of Mr. McElhinney sworn in October 2018.

13. Counsel, when asked by this Court in March 2019, confirmed that the plaintiffs have written advice to the effect that the claim for fees and outlays in the sum of €80,000 plus VAT will tax at €50,000 plus VAT.

The Dispute
14. The plaintiffs are asking the Court to use its inherent jurisdiction to refer the solicitor client bill of costs to taxation.

15. The defendant argues that the Court should not use its inherent jurisdiction and that it should feel constrained by ss. 2 and 6 of the 1849 Act which requires:-

> (i) that a solicitor client bill of costs, if it is to be referred to taxation, be referred within a period of twelve months from the date of issue, or
>
> (ii) if the court considers that special circumstances arise, the court may refer the bill to taxation within a further period of twelve months.

The Law
16. The judgment of Irvine J. of the Court of Appeal in *Dorgan v. Spillane* [2016] IECA 84 (unreported, Court of Appeal, 14th March, 2016) ("*Dorgan*"), guides the determination of this application. Paragraphs 36 and 37 of that judgment set out the relevant wording of ss. 2 and 6 of the 1849 Act and Irvine J. cites McCarthy J.'s summary of the effect of those provisions from *State (Gallagher Shatter & Co.) v. De Valera* [1986] ILRM 3, at p. 8 ("*Gallagher*"):-

> *"The combined effect of ss. 2 and 6, in respect of a Bill of Costs for solicitors and client charges duly delivered, would appear to be that:-*
>
> *(1) The solicitor cannot lawfully sue for one month after delivery.*
>
> *(2) The client has a period of twelve months within which to demand and obtain taxation.*
>
> *(3) After the expiry of twelve months or after payment of the amount of the bill, then the court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the court is made within twelve calendar months after payment.*
>
> *(4) After the expiry of the latter period, there is no statutory power to refer for taxation*." (para. 38, at p. 8 of Gallagher).

17. Irvine J. also noted that it was apparent from McCarthy J.'s judgment that "[a]*llied to the aforementioned statutory regime the court also possesses an inherent jurisdiction to refer a bill for taxation at any time ….*" McCarthy J. stated:-

> *"It is well established law that the court has always retained its inherent jurisdiction to order taxation; it derives from the court's inherent jurisdiction to supervise its officers, including solicitors, all of whom are officers of the court. A fortiori, such jurisdiction requires that it be invoked; it has not, as yet, been invoked here. Such jurisdiction runs in parallel to the statutory jurisdiction that I have sought to detail as derived from the [1849 Act]; running in parallel does not mean that the court should likely disregard the restrictions or limitations imposed by the statutory code; …."* (para. 40, p. 8 of Gallagher).

Non-exhaustive considerations
18. Paragraph 74 of Dorgan includes a non-exhaustive list of matters for consideration when exercising the inherent jurisdiction of the Court:-

> *"Insofar as the court's inherent jurisdiction is concerned, any judge considering invoking that jurisdiction would firstly have to have regard to the extent of any delay and the reasons therefore having regard to the fact that the court's inherent jurisdiction runs in parallel to the statutory jurisdiction. For my part the following matters would sound against the exercise by the court of its inherent jurisdiction* on the facts of the present case *namely*:-
>
> *(i) The fee note was not disputed when it was delivered.*

(ii) Ms. Spillane made no complaint about the fact that Ms. Dorgan deducted her fees from the sum of €125,000 which would otherwise have been payable to her on foot of a settlement.

(iii) It was not until 2nd July 2012, almost five years after the delivery of the bill that Ms. Spillane first complained about the size of that bill.

(iv) Ms. Spillane was under no disability during any of the aforementioned period of delay.

(v) Ms. Spillane's entire file had been transferred by Ms. Dorgan to a new solicitor in 2009 thus affording her every opportunity to raise a query regarding the size of the bill, but none such was made.

(vi) There is a bald assertion in August 2012, that had the fee note been referred to taxation the same would entitle her to a rebate of €30,000. The same is unsupported by any evidence from a solicitor or a costs accountant, a somewhat surprising omission in light of the fact that she was in possession of her full file since 2009.

(vii) *The solicitor and client bill when considered separate from fees, outlays, disbursements and expenses is not blatantly or obviously excessive having regard to the s. 68 letters notified to Ms. Spillane at the commencement of the solicitor client relationship."* (emphasis added).

19. Irvine J. held that the solicitor and client bill of costs in that case was *"a valid bill of costs for the purpose of triggering the time limits attaching to s. 2 of the 1849 Act*." She concluded that she was *"satisfied that on the facts of the present case the same are not such as would support the exercise by the court of its inherent jurisdiction to refer that bill of costs to taxation."* (para. 75).

Submissions for the Plaintiffs

20. The following is a summary of the principal submissions made on behalf of the plaintiffs:-

(i) This application can be distinguished from that considered in *Dorgan* because the plaintiff in *Dorgan* did not object to the fees whereas the plaintiffs here did query and were engaged with the defendant solicitor for their legal work until 2012, whereafter they were able to sort the chaff from the wheat, for want of a better description.

(ii) The dispute between the plaintiffs and the defendant really emerged after 2012, when matters became somewhat more transparent and when solicitors for the plaintiffs formally took issue with the bill issued by the defendant. At that stage in July, 2013, the defendant wrote:-

"(2) If your clients have any queries in relation to any bills for the various transactions, I am agreeable that same can be taxed and I will facilitate same in early course.

…

I now look forward to receipt of a cheque to discharge the balance fees due in relation to all transactions or alternatively arrangements can be made to have the various matters listed for taxation and as stated in this correspondence I will facilitate the early taxation of same…"

(iii) Counsel then identifies that the summons to tax was issued in April, 2014, and came before one of the then Taxing Masters to deal with the issue now before this Court. In effect, the taxing process required an order from this Court in order to proceed so that any certificate of taxation could be enforced.

(iv) Counsel then submits that the present stance of the defendant *"is regrettable, putting it mildly because it is inconsistent with his approach*" that he adopted in July, 2013. Counsel says that he is not aware of any case where there was an agreement to tax and subsequently the solicitor resiled from that agreement in order to oust the inherent jurisdiction of the court. Counsel relies also upon the supervisory role of the Court when urging it to exercise its inherent jurisdiction.

(v) As a result of my question, the Court is now aware that the cost accountants engaged for the plaintiffs estimate that the fees which the defendant may rightly claim are in the region of €50,000 plus VAT, whereas the defendant is seeking some €80,000 plus VAT.

Submissions on behalf of the Defendant

21. The following are the main submissions for the defendant:-

(i) The difference between that paid and that which the cost accountants for the plaintiffs advise as may have been due is rather insignificant given the large sums involved in the transactions. Counsel for the defendant does not suggest that the actual fees deducted were excessive but rather that the plaintiffs act with some disproportion given the deal and saga which ensued.

(ii) Counsel also points to the relevance of the definition of "*contentious business*" in s. 2 of the Solicitors (Amendment) Act 1994 when submitting that the relevant professional services afforded to the plaintiffs did not fall within that definition.

(iii) The plaintiffs delayed in instituting these proceedings until the 29th August, 2016, knowing of the imperative to act within the twelve month period referred to in ss. 2 and 6 of the 1849 Act.

(iv) No question can arise that the plaintiffs were ignorant of all relevant matters since the statement of account dated 23rd May, 2012, and particularly since July 2013. At that time they had instructed a new firm of solicitors which had advised them.

(v) Ultimately, the plaintiffs have failed to explain the delay in proceeding with the taxation and prosecution of these proceedings.

Decision

22. The Supreme Court recently discussed circumstances in which a court may use its inherent jurisdiction stating that "… *inherent jurisdiction must not be used as a first port of call, when, by legislation the Oireachtas has spoken on the matter*…" (*HSE v. A.M.* [2019] IESC 3 (unreported, Supreme Court, 29th January, 2019), judgment of MacMenamin J., para. 89).

23. It is clear from *Dorgan* that the inherent jurisdiction of the Court in this context runs parallel to the statutory jurisdiction and thus the latter should not be usurped lightly.

24. Clarke J., as he then was, in *Mavior v. Zerko Ltd*. [2013] 3 I.R. 268, at paras. 17 and 18, reiterated the caution of Murray J. in *G. McG. v. D.W. (No. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1, at pp. 26 and 27, against "*the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. … Sometimes, however, a relevant jurisdiction may not be the subject of any, or at least any complete, delineation by statute. …".*

25. Is this an exceptional application? Although the plaintiffs can be blamed for delay, there is still the principle that professionals should be honourable and true to their word. The 1849 Act does not address that issue.

26. The defendant admirably agreed in his letter of 26th July, 2013, to have his bill of costs taxed without any stipulation concerning the time limit within which to do so. The cost accountant in the draft position paper stated that "*the Taxing Master's jurisdiction is not being challenged per se".* Furthermore, there is a lack of clarity about what the then Taxing Master did in 2015. These proceedings were issued in August 2016.

27. All of those facts in the context of the jurisdiction to supervise standards for officers of the Court, leads this Court to conclude that it is in the interests of the parties and the solicitors' profession to direct that the solicitor client bill served on the 12th July, 2013, be referred for taxation. The integrity of the defendant as a solicitor, who ought to regard his word as his bond, should be fortified by this order. The dispute about whether a s. 68 letter was received by the plaintiffs prompts this Court to encourage, if not ensure, that the defendant is as transparent and professional as most of his colleagues are in the provision of legal services. Therefore, the exceptional circumstances of the instant case, as explained, persuades this Court to exercise its inherent jurisdiction to grant the order sought.