

THE HIGH COURT

2010 822 SP

BETWEEN

DAVID BROOKS, JENNIFER CALDWELL, LIAM CARNEY, PAUL DOBBYN, ANDREW DOYLE, BARRY MCGRATH, DAVID MAUGHAN,
EDWARD MILLER, NOLLAIG MURPHY,
COLM RAFFERTY, JULIAN REDDYHOUGH, ALASDAIR ROBERTSON, DUDLEY SOLAN AND PETER STAPLETON PRACTISING UNDER
THE STYLE AND TITLE OF
MAPLES AND CALDER SOLICITORS

PLAINTIFFS

AND

FRANK WOODS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 18th day of July, 2011.**1. The proceedings/jurisdiction**

1.1 In these proceedings, which were initiated by special summons which issued on 26th October, 2010, the plaintiffs, who are the partners in the firm of solicitors practising under the style and title of Maples and Calder, seek as against the defendant, a former client of theirs, an order pursuant to s. 2 of the Attorneys and Solicitors (Ireland) Act, 1849 (the Act of 1849), as amended, and pursuant to Order 99, rule 15 of the Rules of the Superior Courts (the Rules), directing the referral of the issue of costs as between the plaintiffs and the defendant to taxation.

1.2 The full text of the part of s. 2 of the Act of 1849 dealing with referral to taxation is helpfully set out in Ó Floinn on Practice and Procedure in the Superior Courts (2nd Ed.) at p. 1119. For present purposes the following truncated version of that part of s. 2 contains its essential elements:

"... no attorney or solicitor ... shall commence or maintain any action or suit for recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after the solicitor ... shall have delivered unto the party to be charged therewith ... a bill of such fees, charges and disbursements ... ; and upon the application of the party chargeable by such bill within such month it shall be lawful ... to refer such bill, and the demand of such attorney or solicitor ... to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor ... from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor ... whose bill may have been so as aforesaid delivered, ... or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such solicitor ... from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill ... after the expiration of twelve months after such bill shall have been delivered ... except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made."

(Emphasis added).

The combined effect of s. 2 and of s. 6 of the Act of 1849 (which provides that the payment of a bill shall in no case preclude the Court from referring the bill for taxation, if the special circumstances of the case shall require the same and provided the application for such reference is made within twelve calendar months after payment) is summarised in O'Callaghan on *The Law of Solicitors in Ireland* (at p. 158) as follows:

- (a) the solicitor cannot sue for payment until one month has elapsed since the delivery of the bill;
- (b) the client has a period of twelve months within which to demand and obtain taxation;
- (c) 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 require, refer the bill to taxation, provided the application is made to Court within twelve months after payment; and
- (d) after the expiry of the latter period, there is no statutory power to refer to taxation.

The author suggests that the Court may possess inherent jurisdiction to refer a bill to taxation at any time.

1.3 In fact, that summary is based on the *dictum* of McCarthy J. giving judgment in the Supreme Court in *State (Gallagher Shatter & Co.) v. de Valera* [1986] ILRM 3 (at p. 8). On the question of whether the Court has an inherent jurisdiction to refer a bill of costs to taxation, McCarthy J. made it clear that such jurisdiction exists and that it runs in parallel to the statutory jurisdiction derived from the Act of 1849. However, the inherent jurisdiction has not been invoked by the plaintiffs in these proceedings.

1.4 What is obvious from the words to which I have added emphasis in quoting s. 2 is that the summary of the effect of s. 2 set out above relates to the statutory entitlement of the client, rather than of the solicitor, to seek to have a bill referred to taxation. When considered from the perspective of the solicitor, there are two components in step (b) of the summary: first, the client can seek a referral to taxation within one month of the delivery of the bill; and, secondly, if the client does not seek a referral within one month, either the client or the solicitor may bring an application within twelve months. I am satisfied that, as invoked by the plaintiffs, the Court has jurisdiction under s. 2 to refer the bill of costs in issue in this case to taxation, with such directions and subject to such conditions as the Court thinks proper.

1.5 Rule 15 of Order 99, which has been invoked by the plaintiffs, prescribes the procedure for bringing an application under s. 2 of the Act of 1849, as amended, and provides that such application –

"... if made within twelve months after the bill of costs shall have been delivered ... , as in the said section provided, may be made if there be a pending proceeding, by motion on notice in such proceedings, and otherwise by special summons

and the Court may on such application refer the bill for taxation, with such directions and subject to such conditions as the Court may think proper.”

The plaintiffs properly elected to bring these proceedings by special summons.

2. The factual background

2.1. The facts relied on by the plaintiffs as giving rise to an entitlement to the order they seek are set out in the grounding affidavit of Nollaig Murphy, a member of the firm, sworn on the 20th day of October 2010. The plaintiffs’ firm was retained by the defendant in October 2008 for the purpose of the provision of professional legal services. The plaintiffs rendered the professional legal services as agreed. Issues arose in relation to transactions in respect of which the plaintiffs advised the defendant and, on the instructions of the defendant, the plaintiffs initiated proceedings in this Court in which the defendant was plaintiff and Patrick Whelan and Patrick Chesser were defendants (Record No. 2009/2985P) on behalf of, and on the express instructions of, the defendant on 31st March, 2009. On 26th August, 2009 a notice of change of solicitor was filed by Adams, Solicitors, in those proceedings, so that Adams replaced the plaintiffs as the solicitors on record for the defendant as plaintiff in those proceedings.

2.2 Thereafter, the plaintiffs rely on the following chain of events:

(a) By letter dated 14th July, 2009 to the plaintiffs, the defendant, in the context of seeking the transfer by the plaintiffs of the relevant documentation in relation to his case to his new solicitors, requested the taxation of the costs incurred. In fact, what he stated was that, in relation to the fees which the plaintiffs had claimed, he wished to have those fees taxed and to reserve his rights in respect of any loss he may have suffered as a result of the plaintiffs’ advice to him up to that time.

(b) On 4th June, 2010 the plaintiffs sent a bill of costs prepared by their Legal Cost Accountants, Cyril O’Neill, to the defendant and stated that, unless they heard from the defendant within fourteen days, they would immediately proceed to have the matter set down for taxation.

(c) With a letter dated 30th June, 2010 to the defendant, the plaintiffs furnished a “Requisition to Tax” for completion and intimated that, if the completed requisition was not returned within thirty days, the plaintiffs would have no choice but to issue proceedings.

(d) By letter dated 30th July, 2010 to the plaintiffs, Adams, Solicitors, requested that the plaintiff defer taking any further action in the matter at that time, citing the impending long vacation as likely to delay the advice of counsel, which the defendant had sought.

(e) By letter dated 11th August, 2010 to Adams, the plaintiffs stated that they intended to issue a special summons to have the matter referred to the Taxing Master and they sought confirmation that Adams had authority to accept service of the proceedings.

(f) Adams did not agree to accept service. The proceedings were ultimately served directly on the defendant, who resides in the Isle of Man, after an order for service out of the jurisdiction was made by the Court (Peart J.) on 11th October, 2010 and an order for substituted service was made by the Court (Peart J.) on 17th January, 2011.

2.3 The defendant has sworn two affidavits in response to the plaintiffs’ application, one on 13th April, 2011 and the other, more recently, on 4th July, 2011. The basis on which the defendant objects to the referral of the costs claimed by the plaintiffs on a solicitor and client basis to taxation is that he contends that the plaintiffs “have been negligent in discharging their duties ... as solicitors and as a consequence that the costs claimed are not in any event validly due and owing”. The defendant’s current solicitors, Adams, have made a complaint on his behalf to the Law Society a copy of which, dated 24th March, 2011, has been exhibited. In making the complaint, and in requesting the Law Society to exercise its powers under ss. 7 and 8 of the Solicitors (Amendment) Act 1994 (the Act of 1994), the defendant contended that he should not have to pay any amount for further fees to the plaintiffs and that the fees already paid should be refunded. The Court has not been apprised on affidavit of the response of the Law Society to the complaint. However, the Court was informed that the defendant has recently, on 24th June, 2011, initiated proceedings for negligence in this Court against the plaintiffs (Record No. 2011/5750P).

2.4 In his affidavit of 4th July, 2011 the defendant has raised certain issues in relation to the billing. It would be inappropriate for the Court to express any view on those matters; taxation before the Taxing Master is the proper forum for raising such issues.

3. The position of the defendant

3.1 The position of the defendant is that, while he has no objection to the taxation of the costs claimed by the plaintiffs in principle, he contends that the referral to taxation should be deferred until such time as the Law Society has made a determination on the complaint.

3.2 In support of his contention that the Court should not grant the relief sought by the plaintiffs, counsel for the defendant referred to the decision of the Court of Appeal in *Heywood v. Wellers* (1976) 1 All ER 300. The decision in that case is not material to the single issue before the Court. The decision of the Court of Appeal concerned the assessment of damages in an action for negligence against a firm of solicitors. It is true that Lord Denning M.R. stated that, since the work the firm had done for the plaintiff was useless, because it did nothing to forward the object which the plaintiff/client had in view, they could recover nothing for it. However, all the plaintiffs are seeking in these proceedings is to have the bill of costs referred for taxation. The question of the defendant’s liability for costs claimed is not before the Court.

3.3 However, the fact that there is pending before the Law Society a complaint by the defendant pursuant to s. 8 of the Act of 1994 is of relevance. That section empowers the Law Society to investigate a complaint by a client that the legal services provided or purported to have been provided by the solicitor instructed by the client were inadequate in any material respect and were not of the quality that could reasonably be expected. The Law Society is empowered to impose sanctions if it finds that the services provided were inadequate. For instance, the Law Society may direct the solicitor to refund any amount already paid by or on behalf of the client in respect of the solicitor’s costs or to waive, whether wholly or to any specified extent, the right to recover the costs to the extent that they have not already been paid by or on behalf of the client. Sub-section (4) of s. 8 defines the barrier between the power of the Law Society and the function of the Taxing Master in a situation where the Law Society makes such a direction under s. 8. Sub-section (4) provides as follows:

“Where the Society have made a determination or given a direction ... as to the costs of a solicitor in respect of any legal

services provided or purported to have been provided by him, then –

(a) for the purposes of any subsequent taxation of a bill of costs covering those costs, the amount charged by the bill of costs in respect of those costs shall be deemed to be limited to the amount specified in the Society's determination ... , and

(b) where a bill of costs covering those costs has not been taxed, the client shall, for the purposes of the recovery of those costs (by whatever means) and notwithstanding any statutory provision or agreement to the contrary, be deemed to be liable to pay in respect of those costs only the amount specified in the determination of the Society.”

However, sub-section (5) provides that where a bill of costs has been taxed in accordance with subs. (4)(a), the determination of the Law Society shall, so far as relating to those costs, cease to have effect, which I understand to mean that the Taxing Master's determination overrides the determination of the Law Society.

3.4 Also of significance, for present purposes is that, in determining whether it would be appropriate to give a direction under s. 8, the Law Society is entitled to have regard to a number of factors including whether there are civil proceedings in being or likely to be commenced in relation to the matter. Unfortunately, as I have stated, the evidence on affidavit before the Court does not disclose what the attitude of the Law Society is to the defendant's complaint, either in the context of these proceedings, which were initiated before the complaint was made, or in the context of the civil proceedings by the defendant against the plaintiffs, which were initiated after the complaint was made.

4. Conclusions

4.1 I am satisfied that this is a proper case in which to make an order under s. 2 of the Act of 1849 referring the bill of costs delivered by the plaintiffs to the defendant for taxation on the basis of the following reasoning. In the context of the transfer of the relevant documentation by the plaintiffs to the defendant's new solicitors, the defendant stated that he wished to have the fees being charged by the plaintiffs taxed. Subsequently, the plaintiffs retained their legal costs accountant to prepare the bill of costs, which the defendant received in early June 2010. The defendant did not exercise his right under s. 2 of the Act of 1849 to apply to Court for an order referring the bill to taxation within the time prescribed in that section, which has now elapsed, and he resisted the attempt by the plaintiffs to have the matter referred to taxation without an order of the Court. The plaintiffs, as they were entitled to do, then applied to Court under s. 2 within the time prescribed in that section. Given that it was the defendant who required that the costs be taxed, in my view, it would be unfair to the plaintiffs to allow the defendant to prevent or delay such taxation by refusing or staying the order sought, unless the defendant has established grounds which tilt the balance of justice against making an order under s. 2. In my view, neither the existence of the pending complaint to the Law Society nor the existence of the pending civil proceedings constitutes such grounds, because it is not possible to conclude that their existence renders taxation unnecessary. The only detriment to the defendant which could flow from the taxation process going ahead in circumstances where it subsequently transpires that taxation was unnecessary is that the defendant may have incurred personal and professional costs and expenses in connection with the process. Presumably, the defendant will be able to claim such costs and expenses as special damages in the civil proceedings. Insofar as the taxation process is necessary, the costs of taxation and court fees will be a matter to be dealt with by the Taxing Master in accordance with Order 99, rule 29(13) of the Rules.

4.2 The Court has a broad discretion under s. 2 of the Act of 1849 to give such directions and to impose such conditions as the Court thinks proper when referring a bill to taxation at the suit of the solicitor. As I understand it, the only direction or condition sought on behalf of the defendant was that the reference to taxation should be stayed. While I am satisfied that the Court has a discretion under s. 2 of the Act of 1849 to stay a reference to taxation, for the reasons I have outlined in the preceding paragraph, I do not consider the existence of either the complaint to the Law Society or the pending civil proceedings constitutes a reason for staying the reference in this case. Moreover, neither the age nor the state of health of the defendant, which was referred to in the defendant's affidavit, is a ground for staying the reference, as no doubt the defendant will be retaining a professional person, such as a legal costs accountant, to represent him in the taxation process.

5. Order

5.1 There will be an order that, pursuant to s. 2 of the Act of 1849, the bill of costs delivered to the defendant be referred to the Taxing Master to be taxed on a solicitor and client basis.