THE COURT OF APPEAL

Ryan P.
Irvine J.
Hogan J.

Appeal No.: 2014/1372

[Article 64 Transfer]

Mary Dorgan

Appellant/Defendant

- and -

Susan Spillane

Respondent/Plaintiff

Judgment of Ms. Justice Irvine delivered on the 14th day of March 2016

1. This is an appeal from an order of the High Court (Charleton J.) dated 7th July, 2014, whereby he directed the appellant/defendant ("Ms. Dorgan"), a solicitor, to refer a bill of costs dated 12th November, 2007, to taxation. He further ordered that Ms. Dorgan pay the plaintiff/respondent ("Ms. Spillane"), her client, her costs in the proceedings which he measured in the sum of €2,000.

2. Insofar as the High Court judge referred the said bill of costs to taxation Ms. Dorgan submits that he erred in law in so doing. Insofar as he made the aforementioned order for costs in favour of Ms. Spillane, in her Notice of Appeal Ms. Dorgan sought to challenge the validity of that order based on a submission that the court had no jurisdiction to do so having regard to the fact that Ms. Spillane was, allegedly, not legally represented. However, that ground was not pursued in the course of the appeal.

3. Central to this appeal is the question as to when and in what circumstances a client may obtain an order for the taxation of a solicitor's bill of costs utilising s. 2 of the Attorneys and Solicitors (Ireland) Act 1849 ("the 1849 Act"). Core to that issue is the proper construction of the relevant statutory provisions namely the 1849 Act as amended, the Solicitors (Amendment) Act, 1994 ("the 1994 Act") and Order 99 of the Rules of the Superior Courts 1996 to which I will later return.

Background

4. It is not disputed that Ms. Dorgan was retained by Ms. Spillane to act as her solicitor in two sets of matrimonial proceedings instituted by her husband, Mr. Con Spillane, in the Circuit Court. The solicitor/client relationship commenced in late 2002. In the first set of proceedings (Record No. M185/2003) Mr. Spillane sought an order of judicial separation and in the latter (Record No. M260/2007), a decree of divorce.

5. It is also not in dispute that Ms. Dorgan furnished her client with fee estimates, or what are commonly referred to as "section 68" letters, on 18th July, 2005, and 29th May, 2007. In the latter fee note she anticipated her own fees would be approximately €45,000 plus VAT and outlay. These fees excluded other matters which were expected to generate further charges such as conveyancing, witnesses' expenses and barristers' fees.

6. The matrimonial proceedings were resolved in the Circuit Court in May 2007 when the parties entered into a written settlement agreement. It is of relevance to note that the court order which refers to the settlement, which itself was attached to the order, made "no order as to costs".

7. Having regard to certain observations made by the trial judge in the course of his judgment, it is also important to record that the settlement agreement provided for the transfer of substantial assets to Ms. Spillane. In particular, she was to become the full owner of the family home in Youghal Co. Cork, was to receive €1m. within five years and substantial monthly maintenance payments until payment of that capital sum. The settlement also provided for an additional sum €125,000 to be paid to Ms. Spillane within three months.

8. On 12th November, 2007, Ms. Dorgan furnished Ms. Spillane with what I will refer to as a Ms. Dorgan's bill of solicitor and client costs even though Ms. Spillane contends that the same is not a valid and proper bill of costs for the purposes of s. 2 of the 1849 Act. The total bill came to €120,855. The first item on the fee note was her own fee of €55,000 plus VAT of €11,550 which was stated to be in respect of "All work done in this connection to include client appointments, phone calls, all correspondence, consultations with counsel and attendances at court". Thereafter she set out fifteen items of outlay to a total value of €2,767.05 before furnishing an itemised list of fees paid to, *inter alia*, senior counsel, junior counsel, auctioneers, forensic accountants etc.. In her covering letter she explained that she had deducted the aforementioned fees from the sum of €125,000 which she held in her client account and which had been received from Mr. Spillane's solicitor on foot of the settlement. Thus she enclosed for Ms. Spillane's attention a cheque in the sum of €4,145.60, "to conclude".

9. In 2009 Ms. Spillane retained another solicitor to act on her behalf in relation to another matter and by authorisation dated 23rd September, 2009, Ms. Spillane authorised Ms. Dorgan to deliver all of her documents and files to Messrs. James A. Sheridan and Company, Solicitors, of Midleton, Co. Cork, a request that was complied with.

10. It is accepted by Ms. Spillane that she raised no query or objection to the aforementioned bill of costs and neither did she object to the fact that Ms. Dorgan had paid herself her fees from the funds otherwise payable to her by her husband under the settlement agreement.

11. Somewhat out of the blue, by letter dated 14th April, 2012, Ms. Spillane asked Ms. Dorgan to forward a copy of her earlier bill in connection with her divorce and by further letter of 2nd July, 2012, asked Ms. Dorgan to arrange for the same to taxed by the taxing master within four weeks.

12. By letter in reply dated 18th July, 2012, Ms. Dorgan advised Ms. Spillane that her right to have the bill taxed had lapsed after a period of twelve months and further sought to persuade her as to the reasonableness of the fees which she had charged having regard to the work undertaken.

13. Not satisfied with this response Ms. Spillane, by letter dated 27th August, 2012, requested an itemised bill of costs within fourteen days. In her letter maintained that if the bill of costs were to be taxed she would be entitled to a refund of in or about €30,000.

14. Having failed to obtain satisfaction from Ms. Dorgan, Ms. Spillane then issued the within proceedings claiming that the invoice initially furnished was not a valid bill of costs. The relief claimed by her was an order "requiring the defendant to submit to taxation a solicitor and client bill of costs within the meaning of ss. 2 or 6 Solicitor (Ireland) Act 1849".

15. In response, Ms. Dorgan by notice of motion returnable before the court on 26th May, 2014, sought an order dismissing the plaintiff's claim on the grounds that it was frivolous and vexatious or alternatively on the basis that it was bound to fail. For the purposes of grounding that application and of resisting Ms. Spillane's claim under section 2 of the Act of 1849, she set out the facts already advised on affidavit.

16. I will not rehearse the arguments made in the High Court as the same were repeated and expanded upon in the course of the present hearing and the same are summarised later in the course of this judgment.

17. On the 7th July, 2014, Charleton J. refused Ms. Dorgan's application to have the proceedings dismissed and granted the plaintiff the relief sought in her special summons.

Judgment of Charleton J.
18. The following is the text of the *ex tempore* judgment of Charleton J. as taken from the transcript:-

> "The rules are there to guide everybody, and one of the most important things that lawyers do is to charge fees. There is a way in which bill of costs is to be prepared; it is clearly set out in order 99, rule 29, sub-rule 5, in relation to dates, the number of items, the particulars charged for, the disbursement involved, the professional charges and their justification, and other points in relation to deductions from disbursements and from professional charges. The bill involved here which is dated November 2007 doesn't accord with that at all. I don't make any comment about the fact that the settlement cheque was €125,000, and that in effect, the entire of that was taken up with fees in relation to a Circuit Court hearing where the Circuit Court used to be the court where reasonable value was provided to litigants. Given my second comment in that regard, I would exercise my discretion, as noted in the Gallagher, Shatter case, to send this matter to taxation, but I don't need to exercise that discretion because time did not begin to run in relation to this issue due to the inadequate nature of the fee note, and it seems to me that every single item in this should be reviewed by the taxing master, and I order accordingly."

19. Before moving to consider the submissions of the parties on this appeal, I regret to say that it is to be inferred from the judge's implied criticism of the size of Ms. Dorgans bill that he was not privy to the terms of the settlement. He appears to have been totally unaware of the nature and extent of the assets that had been in dispute between the parties and which, amongst others, included a number of properties as well as shares and bonds and neither was he appraised of the extent of the assets to be transferred to Ms. Spillane. As already stated, apart from the family home, she was to receive a lump sum payment of €1 m. and significant maintenance. It appears that the judge laboured under the mistaken impression that she had been involved in what I will describe as relatively routine matrimonial proceedings in the Circuit Court which were the subject matter of a settlement pursuant to which she was to receive, apart possibly from some interest in the family home, a modest lump sum of only €125,000 of which all but €4,145.60 had been absorbed by her solicitors bill of legal costs. This is presumably why he indicated in his judgment that if he had had to rely upon the court's inherent jurisdiction to refer the bill to taxation, he would have done so, a matter to which I will later return. Suffice for the moment to state that I am quite satisfied that the trial judge would have refrained from the type of criticism which is to be inferred from his judgment had he known the far from modest terms of settlement.

20. It is perhaps also relevant to note that within the exhibits were a number of letters which variably describes the family law file as "absolutely enormous" (see letter 2nd October 2009) and "huge" (see letter 29th June 2011).

Submissions:
21. Mr. Jerry Healy SC for the appellant submits that the trial judge erred in law in concluding that the 12 month period provided for in section 2 of the 1849 Act only starts to run against a client wishing to contest a bill of costs when they have taken delivery of a bill that is in conformity with order 99 rule 29 (5) of the Rules. While delivery of a bill of costs in compliance with Order 99 rule 29 (5) might, he conceded, be a pre-requisite for a solicitor seeking to institute proceedings to recover their fees, failure to deliver a bill in that format does not stop time running against a client who seeks to invoke S.2.

22. Mr. Healy also submits that the plaintiff's claim was in any event statute barred by virtue of the Statute of Limitations Act 1957 (as amended). The bill of costs was delivered on the 12th November, 2007 and the proceedings only issued on the 22nd November 2013. The claim was one which stemmed from the contractual relationship between solicitor and client such that, regardless of the time limits provided for in ss. 2 and 6 of the Act of 1849, no claim could be advanced beyond six years from receipt by the client of the bill in question. If it were otherwise, a solicitor would remain forever at risk that a client might at any future time apply to have such a bill referred to taxation, regardless of the fact that it had been paid without protest, on the grounds that its format did not coincide with the requirements of O. 99 r. 29(5). There could never be finality. Indeed, Mr. Healy goes so far as to submit that the provisions of s.2 of the 1849 Act have been interpreted incorrectly by Charleton J., not only in the present case but also in his earlier decision in *Doyle v. Buckley* [2013] IEHC 292 and that Blaney J. may have done likewise in his decision in *Smyth v. Montgomery* (unreported, High Court, Blayney J., 7th July, 1986). He urges that this court should so decide.

23. Counsel further seeks to distinguish the facts of the present case from those in *Doyle v. Buckley* where the client had immediately disputed the amount of the Bill of costs and from those in *Smyth .v. Montgomery* where the client had immediately questioned the amount of the fees which her solicitor had deducted from her award of damages. Likewise he seeks to distinguish the *State (Gallagher Shatter & Co.) v. DeValera* [1986] ILRM 3 where, immediately the client had received the bill of costs from her solicitor she had demanded a more detailed itemised bill unhappy as she was with the level of the fees which she wanted to have taxed. While she had paid she had only done so in order to gain possession of her file.

24. Finally, Mr. Healey submits that the trial judge erred in finding as a fact that almost the entirety of the monies due to be paid to Ms. Spillane under the settlement agreement had been absorbed by her legal costs and as a consequence he erred in law in

concluding that the circumstances of the case would have warranted the exercise by the court of its inherent jurisdiction to refer the bill of costs to taxation in the event that it had otherwise concluded that the plaintiff's claim was time-barred under S. 2 and 6.

25. Mr. McNally B.L. on the respondent's behalf submits that the trial judge was correct in concluding as a matter of law that the bill of costs of 12th November, 2007, did not comply with the requirements of O. 99 r. 29(5). Thus, the trial judge had correctly interpreted the relevant statutory provisions when he decided that time for the purposes of a client application under s. 2 of the 1849 Act did not run until a bill of costs in conformity therewith had been delivered. This was so, he submitted, regardless of whether the client had protested as to the amount of the bill or had paid the sum so claimed to their solicitor. In this regard he relied upon the decision of Blayney J in Smyth v. Montgomery and that of Charleton J. in *Doyle v. Buckley*.

26. Mr. McNally further submits that if the bill of costs delivered was paid in circumstances where it did not comply with the requirements of section 2 of the 1849 Act and Order 99 r.27 (5) it could not be said that the client had given their informed consent to the payment of that bill and thus time could not have run so as to preclude a challenge to the bill under s.2 of the Act.

The relevant statutory provisions and rules of court

27. The starting point from which to assess the correctness or otherwise of the decision of the High Court must surely be a consideration of the nature and detail of the bill of costs, now disputed by Ms. Spillane and all relevant statutory provisions pertaining thereto.

28. The first matter which is worthy of note is that the costs the subject matter of Ms. Dorgan's bill, as already advised, were in respect of solicitor and client costs only. Ms. Spillane had not become entitled, as a result of the family law proceedings, to any party and party costs from her husband given that neither the order of the Circuit Court nor the settlement agreement made any provision for payment of such costs.

29. The next matter of importance is that the bill of costs would appear to have been issued in respect of what is considered to be "contentious business", a term defined in the following manner in s. 2 of the of the 1994 Act:-

> "Business done by a solicitor in or for the purposes of or in contemplation of proceedings before a court or tribunal or before an arbitrator appointed under the Arbitration Acts, 1954 and 1980."

30. The same Act defines a bill of costs in the following manner:-

> "A "bill of costs" includes any statement of account sent, or demand made, by a solicitor to a client for fees, charges, outlays, disbursements or expenses;"

31. Section 68(6) of the 1994 Act places the following obligations on a solicitor who has carried out litigation or other contentious business on behalf of a client:-

> "(6) "Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client:–
>
> (a) a summary of the legal services provided to the client in connection with such contentious business,
>
> (b) the total amount of damages or moneys recovered by the client arising out of such contentious business, and
>
> (c) details of all or any part of the charges which have been recovered by that solicitor on behalf of the client from any other party or parties (or any insurers of such party or parties),
>
> and that bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services."

32. It is the aforementioned statutory provisions that govern the obligations of Ms. Dorgan as to the type of bill of costs which she was mandated to provide to Ms. Spillane following the conclusion of the family law proceedings. In this regard it should be noted that the definition of what constitutes a "bill of costs" does not require the same to be in any particular format. The definition is wide enough to capture documents which might more accurately be described as fee notes or invoices wherein any charge is made. However, insofar as contentious business is concerned, greater particularity is required and whatever the format of the demand furnished to the client it must comply with the requirements of s. 68(6) (a) to (c) inclusive. I will return to these later.

33. Section 27 (1) of the Courts and Court Officers Act 1995 gives the taxing master power to tax, assess and determine the value of any work done, services rendered in connection with the measurement, allowance or disallowance of any costs, charges, fees and expenses which are included in a bill of costs whether that bill is in respect of party and party costs or solicitor and client costs.

34. Having regard to the conclusions of Charleton J. and to the case law to which I will later refer it may be helpful to set out a number of the rules contained in O. 99 of the Rules of the Superior Courts.

35. Order 99:

> Order 99 r. 11(1): On a taxation as between solicitor and client, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.
>
> Order 99 r. 14: The taxing master shall have power to tax:-
>
> (e) without any order for the purpose, costs as between solicitor and client, upon the application of the client and upon his written undertaking, to be lodged in the taxing masters office, to pay any balance which the taxing master may certify;
>
> Order 99 r. 15: An application to the court under the Attorneys and Solicitors (Ireland) Act 1849 s. 2 as amended by The

Legal Practitioners Ireland Act 1876, if made within 12 months after the bill of costs shall have been delivered, sent or left, 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 direction and subject to such conditions as the court may think proper.

Order 99 r. 27: Save in the case of *ex parte* taxations and in the cases mentioned in rule 49, a notice to tax shall be issued within one month from the date of lodgement of the bill of costs. The taxing master may permit the issue of such notice at a later date.

Order 99 r. 29:

(1) Every bill of cost which shall be lodged for taxation shall be indorsed with the name and registered place of business of the solicitor by or for whom it is so lodged….

(5) Bills of costs are to be prepared with seven separate columns:

(a) the first or left hand column for dates;

(b) the second for the numbers of the items;

(c) the third for the particulars of the services charged for;

(d) the fourth for disbursements;

(e) the fifth for the taxing masters' deductions from disbursements;

(f) the sixth for the professional charges;

(g) the seventh for the taxing masters deductions from professional charges.

Order 99 r. 33

(1) If a solicitor following a request by a client for the taxation of costs that may be payable by such client, fails to set down the bill of costs for taxation, the client may set down such bill for taxation and a notice to tax in accordance with rule 28 shall be served on the solicitor.

(2) The client shall not be required to have the bill of costs in the form provided by rule 29 but shall be at liberty to lodge the bill of costs, memorandum of costs, or account for costs, in whatever form it was received from the solicitor and in default of such the client may set down a written statement of the relevant facts *in lieu* thereof.

36. Finally, relevant to the court's consideration are Sections 2 and 6 of the 1849 Act. Regrettably the former section is of its time and in present day terms appears unnecessarily lengthy and somewhat convoluted. For this reason I have excised from the wording of S.2 all of the text that I consider superfluous to the matters under consideration and have highlighted a number of words which I consider material to my conclusions. Having done so this is how the section reads:

" S.2 After the passing of this act..no solicitor..shall commence..any suit for the recovery of fees..for any business done..until the expiration of one month after the solicitor shall have delivered unto the party to be charged 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 ..for..any judge..to refer *such bill* to be taxed by the proper Officer of the Court..and the court shall restrain such solicitor from commencing any suit touching upon the Demand pending such referece..and in case no such application be made within such month…it shall be lawful for such reference to be made as aforesaid either upon the application of the solicitor..whose bill may have been so delivered or upon the application of the party chargeable..subject to such conditions as the court..making such reference shall think proper..and such court may restrain any such solicitor from commencing any suit touching such demand pending such reference..Provided *always* that no such reference..shall be directed upon an application by the party chargable..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 judge.

37. S. 6 provides:

"…And it be enacted, that the payment of any such bill as aforesaid, shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the same circumstances of the case shall, in the opinion of the court or judge, appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months. "

38. The combined effect of these two sections has helpfully been summarised by McCarthy J. in *Gallagher* where he states at p. 8 as follows: –

"The combined effect of Sections 2 and 6 in respect of a Bill of costs for solicitor 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 12 months within which to demand and obtain taxation,

(3) after the expiry of 12 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 12 calendar months after payment,

(4) after the expiry of the latter period, there is no statutory power to refer for taxation.

39. Examples of what might be considered to amount to "special circumstances" for the purposes of s. 6 include payment of a bill of costs without the consent of the client (see *RE McLaughlin* [1908] 42 ILTR 153), in circumstances where the bill was paid by reason of undue pressure on the client or where the client on payment, expressly reserves the right to have the bill taxed at a later date (see *RE Walker v Carey and Oths* 65 LT 68). However, having regard to the approach of the trial judge, which was to confine himself to a consideration of the validity of the bill of costs as delivered, this section is not of any particular relevance.

40. Allied to the aforementioned statutory regime the court also possesses an inherent jurisdiction to refer a bill for taxation at any time, as is apparent from the judgment of McCarthy J. in *Gallagher*. This is what he stated concerning this jurisdiction at p. 8 of his judgment: –

> "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 offices of the court. A fortiori, such a jurisdiction requires that it be invoked; it has not, as yet, been invoked here. Such a jurisdiction runs in parallel to the statutory jurisdiction that I have sought to detail as derived from the Act of 1849; running in parallel does not mean that the court should lightly disregard the restrictions or limitations imposed by the statutory code; it is sufficient, however, in my judgement, to hold, as I do, that the jurisdiction relied upon by the respondent in the taxation of the prosecutors Bill of costs is not to be found on the statute rules relied upon and consequently, that in undertaking this taxation he acted without jurisdiction, that the cause shown should be disallowed and the conditional order made absolute."

Discussion.

41. The parties to the present proceedings are agreed on a number of matters. Firstly, Mr. Healy S.C. accepts that the bill of costs furnished by Ms. Dorgan to her client does not comply with O.99 r. 29(5) given that the bill is not prepared in the seven column format therein mandated.

42. It is also not disputed that the relevant case law, to which I will refer shortly, makes clear that time for the purposes of s. 2 can only run against a client following the delivery of what is described in those cases as a proper or valid bill of costs.

43. Given that the proceedings brought by Ms. Spillane seek to invoke the statutory jurisdiction of the court to be found in s. 2 of the 1849 Act and this precludes a client from relief under that section after the expiry of twelve months from the delivery of a bill of costs, the question for this court, in light of the findings of Charleton J., is whether or not the bill of costs of 12th November, 2007, is a valid bill for the purposes of triggering that time limit.

44. What is required of a solicitor in terms of the preparation of a bill of costs has become somewhat more demanding than it was at the time the 1849 Act was enacted. This is clear from the provisions of s. 68 of the 1994 Act. That fact notwithstanding, I am satisfied that the bill of costs forwarded to Ms. Spillane dated 12th November, 2007, meets the requirements of the 1994 Act insofar as it regulates the type of bill to be furnished following the conclusion of contentious business.

45. Admittedly, the summary of the legal services which Ms. Dorgan provided to her client, as referred to in her bill of costs of 12th November, 2007, was to say the least sparse. However, the use of the word "summary" in s. 68(6) (a) would suggest that the bill to be furnished did not need to be a detailed or formal one in order to comply with that sub section. Details are only required in relation to the other subsections. In this regard, in pursuance with her obligations under sub section (6) (b) Ms. Dorgan identified the monies that she had recovered on Ms. Spillane's behalf and which were then in her cash account. There were no details to be furnished pursuant to sub section 6 (c) as no party and party costs were involved and she fully complied with her other obligations under the section insofar as she showed separately the amounts claimed in respect of fees, outlays, disbursements and expenses.

46. In my view, the aforementioned statutory provisions are clear and I can find nothing in the sections to which I have referred from which it could be inferred that a bill of costs is not a proper or valid bill unless it is in the format specified in O. 99 r. 29(5) of the Rules. Interestingly, there is no definition in the 1849 Act or its English equivalent, The Solicitors Act 1843, of what should be deemed a valid bill of "fees, charges, and disbursements" for the purposes of s. 2 of the 1849 Act or the equivalent provision, s. 38 of the 1843 Act. While there are a number of decisions which pre-date the 1994 Act which address this issue none that I can find address what must be in a solicitor's bill of costs where no party and party costs are recovered. I will refer to two such decisions later in this judgment. However, what I believe can be stated with some force is that it is not open to any judge to interpret an Act of the Oireachtas by reference to what is provided for in a Statutory Instrument. In *Luby v. McMahon* [2003] 4 IR 133, Finlay Geoghegan J. in considering a conflict between s.150(4B) Companies Act 1990 and O.99, r.1 RSC, stated:-

> "The Rules of the Superior Courts 1986 are a statutory instrument made pursuant to the powers conferred on the Superior Courts Rules Committee by the relevant provisions of the Courts of Justice Acts 1924 to 1936 and the Courts Supplemental Provisions Acts 1961 to 1999. Such rules would always be subject to a legislative provision in the normal constitutional hierarchy of laws. Accordingly, the specific provisions of s. 150(4B) of the Act of 1990 will take precedence over the provisions of O. 99, r. 1 and may have the effect of expressly or implicitly limiting the powers and discretions conferred therein."

47. Had it been the intention of the legislature to require that a bill of costs be delivered in the format as advised in O. 99 r. 29(5) it could have so provided.

48. To my mind a number of my colleagues have fallen into error in engaging with O. 99 r. 29(5) in the context of arguments made as to when time runs against a client who wishes to challenge a bill of costs using s. 2 of the 1849 Act. From my part I am quite satisfied that time begins to run once a bill of costs, in compliance with the statutory requirements is delivered.

49. Having reached this conclusion it is probably unnecessary to state that if s. 2 of the 1849 Act were to be interpreted by reference to the requirements of O. 99 r. 29(5) that would lead, in my view, to an absurd situation. Every solicitor, regardless of whether they had agreed their fees with their client and had been paid those fees would have to go to the expense in every case of themselves drawing or having a costs drawer prepare a detailed bill of costs in the format set out in O. 99 r. 29(5) lest decades later their client bring an application under s. 2 seeking to challenge those fees. In the absence of being in a position to prove they had delivered a bill strictly in accordance with O.99 r.29 (5) the solicitor concerned could advance no defence to the claim regardless that s. 2 only permits such a claim to be made "provided always that no such reference be directed after the expiration of 12 months".

50. To me, the wording of the section would suggest that the same was designed to bring to a head, within a reasonable period of the conclusion of dealings between a solicitor and client, any dispute regarding fees. To interpret the section by reference to the

requirements of O. 99 r. 29(5) would completely defeat that objection. Not only would it defeat potentially the intended statutory time limit but would also place a significant additional financial burden which might be sought to be recouped against the client, the very dispute which was at the heart of *Smyth v. Montgomery* to which I will later refer.

51. I believe that I am somewhat fortified in my judgment that the twelve month time limit provided for in s. 2 of the 1849 Act started to run against Ms. Spillane on receipt of Ms. Dorgan's bill of 12th November, 2007, by the fact that O. 99 r. 33(2) enables the disgruntled client to lodge that bill of costs for taxation regardless of whether or not the bill was drawn by the solicitor in accordance with O.99 r. 29(5). Indeed, the fact that the rule refers to a bill of costs being otherwise than in the format prescribed in O.99 r. 29(5) would suggest that a bill of costs is not invalid merely because it does not comply with that order. I read O.99, r. 29(5) as being a requirement which must be fulfilled by a solicitor when they lodge a bill of costs for taxation. In this regard O. 99, r. 29(1) provides:-

> "Every bill of costs which shall be lodged for taxation shall be indorsed with the name and registered place of business of the solicitor by or for whom it is so lodged."

52. Because I have come to the conclusion that the High Court judge incorrectly interpreted the provision of s. 2 of the 1849 Act I believe it is necessary to consider briefly the relevant Irish authorities on this section and where necessary refer to some of the earlier English case law insofar as the same have influenced those authorities.

53. In *Smyth v. Montgomery* (Unreported, Blaney. J., 7th July 1986) the plaintiff had brought a claim for damages for personal injuries. She had been advised that there would be certain solicitor and client costs which she would have to pay beyond the party and party costs which she would likely recover from the defendant. When the solicitor received the plaintiff's settlement cheque he deducted IR£1,500 in respect of his solicitor and client costs and sent on the balance to his client. On receiving the cheque, the client telephoned to complain and asked for particulars of the fees payable by her. He replied by letter explaining the difference between party and party costs and solicitor and client costs and further outlined the difficulties that had been involved in the case. He also claimed that she had agreed and accepted that her liability for solicitor and client costs would be £1,500.

54. Later, the client wrote seeking a detailed invoice of the deductions that had been made from her award. Her solicitor replied on 1st August 1984 stating that if she required a detailed bill of costs he would have this done by his legal cost accountant but he would only do this if she confirmed in writing she would be responsible for his fees for preparing such a bill.

55. Following a complaint to the Law Society, in September 1984 the solicitor sent his client a document described in the judgment as a "bill of professional fees, outlay and VAT Orla Smith in account with Thomas Montgomery and Son". It is not clear from the judgment just how detailed this bill was. Over a year later the client's father demanded an itemised bill of costs, a demand rejected by the solicitor who indicated that he would only comply with the request if the fees of a legal cost accountant retained to draw that bill would be discharged by the client.

56. On 28th April, 1986, the plaintiff issued special summons proceedings under s. 2 of the 1849 Act asking the court to refer the bill to taxation. She further sought an order for the delivery of a detailed bill of costs for taxation within such time as might be ordered by the court.

57. As to the facts, Blaney J. found that the plaintiff had agreed to pay such solicitor and client costs as might be due following the settlement of her action, up to a maximum of IR£1,500. Thus, he concluded that the defendant was not entitled to deduct, as he had done, £1,500 from the amount of the settlement.

58. As to the plaintiffs entitlement to an order under s. 2 of the 1849 act, Blaney J. considered the argument which had been advanced by counsel for the solicitor to the effect that since more than twelve months had elapsed following the delivery of the bill of costs in September 1984 that the client's claim to have the bill referred to taxation was time barred. In light of that submission the question that Blaney J. asked himself was "Did the bill furnished by the defendant answer the description in s. 2?". He referred to s. 2 wherein a bill of costs was described as a bill of "fee, charges or disbursements for any business done by such solicitor" and proceeded to conclude that the bill delivered in September of 1984 did not as a matter of certainty comply with the Rules of the Superior Courts (O. 99 r. 30(5)) and that it was "doubtful" as to whether it complied with the description of a bill as provided for in s. 2 of the 1849 Act.

59. Insofar as non compliance with s. 2 was concerned he relied upon the decision in *RE Osborn & Osborn* [1913] 3 KB 862 where Buckley L.J. had concluded that for a bill to be valid in an action in which party and party costs were recoverable that the whole bill of fees, charges and disbursements and not merely a bill of the extra costs chargeable as between solicitor and client had to be provided. It had earlier been decided in *Cobbett v. Wood* [1908] 2 KB 420 that in order for a bill of costs under the equivalent provision to that referred to in s. 2 of the 1849 Act to be valid in a case where party and party costs were involved the whole bill had to be furnished to the client so that the client could see what sums had been allowed on taxation between party and party.

60. It is important to note the distinction between the bill of costs in the present case, which was a solicitor and client bill delivered in the context of contentious litigation and where no party and party costs were involved, and the bill of costs the subject matter of the judgments in *Osborn & Osborn* and *Smyth v. Montgomery*. Those cases both involved bills of costs concerning litigation where not only was there a solicitor and client element to the bill of costs but where party and party costs had been recovered.

61. In concluding his judgment Blaney J. stated as follows:-

> "I consider the right thing to do in this case is to exercise the jurisdiction conferred by this provision [s. 2] and accordingly I shall direct that the defendant furnish to the plaintiff a detailed bill of costs, such bill of costs to be on the lines indicated in the extract from the judgment of Buckley L.J., to which I referred earlier and to be delivered by the defendant to the plaintiff within two calendar months from the date of this judgment.
>
> On such a bill of costs being delivered, it will then be open to the plaintiff, if she so wishes, to have the bill referred to taxation. In that event the taxation will take place in the normal way in accordance with the Rules of the Superior Courts."

62. What is particularly important about this last pronouncement is the fact that Blaney J. rejected the validity of the bill of costs of September 1994 on the basis that it did not conform with the following requirements advised by Buckley L.J in *Osborn* and which he quoted in the course of his judgment namely:-

> "A solicitor's bill against his client for costs in an action in which party and party costs are recoverable against the opposite party ought to contain the whole bill of fees, charges, and disbursements in reference to the business to which it relates and not merely a bill of extra costs chargeable as between solicitor and client.
>
> As long ago as 1825 it was held in *Drew .v. Clifford* 2 C & P 69. that it was not sufficient to include the party and party costs in a lump sum, but that the bill must be delivered with items, and in 1840 in *Waller v Lacy* 1 Man and G 54, that the bill ought to give a history of the cause so as to enable the officer to judge of the propriety of the various items, and that the delivery of a bill containing merely the extra costs is not sufficient. The solicitor should deliver a bill of the whole costs, giving his client credit for the sum received for party and party costs. Accordingly in *Cobbett .v. Wood* [1908] 2 KB 420 it was decided in this court that a bill not containing the items allowed on taxation between party and party was not a sufficient bill within the solicitors act."

63. Thus in directing that a bill of costs be furnished to the plaintiff "on the lines indicated in the extract from the judgment of Buckley L.J." what Blaney J. appears to have ordered was that the plaintiff's solicitor submit a fresh bill of costs in relation the litigation which would include not only his own solicitor and client bill but also those costs which had been recovered on a party and party basis, the latter to be furnished on an itemised as opposed to a lump sum basis as per the decision in *Drew .v. Clifford*. What the court did not do was direct the delivery of a solicitor and client bill of costs in accordance with O. 99 r. 30(5), that rule being the equivalent to the current O.99 r. 29 (5).

64. For the aforementioned reasons it appears to me that the ratio of the decision of Blaney J. in *Smyth v. Montgomery* was that the bill of costs of September 1984 was defective by reason of the absence therefrom of details concerning the party and party costs and that accordingly the one year time limit that had been urged upon him could not defeat the plaintiff's right to seek relief under s. 2 of the Act.

65. Accordingly, in my view the decision in *Smyth v. Montgomery* is of no more than marginal relevance to the facts of the present case. It certainly is authority for the proposition that prior to the 1964 Act, for a solicitor's bill of costs to be valid where the client had an entitlement to recover party and party costs, the bill had to contain an itemised account of the party and party costs. It does not decide, even in respect of bills which pre-date the 1994 Act, what constitutes a proper or valid bill of solicitor and client costs where no party and party costs are payable. Further, while the court noted that the bill in *Smyth v. Montgomery* did not comply with the provision of order O. 99 r. 29(5) the court did not conclude that any bill of costs which failed to do so was invalid for the purposes of triggering the twelve month time limit provided for in s. 2. .

66. In *Doyle v. Buckley*, the plaintiff by plenary summons dated 5th July, 2011, sought an order for taxation pursuant to s. 2 of the 1849 Act of various bills of costs that had been delivered by the defendant, his solicitor, over the previous thirteen year period. He also sought damages for breach of contract and misrepresentation together with an order seeking accounts and enquiries.

67. The backdrop to the litigation was a lengthy solicitor/client relationship in the course of which many of the aforementioned bills of costs had been discharged by the plaintiff. Some of these had been made on foot of what were acknowledged to have been proper bills of costs and others paid on foot of less detailed bills. The plaintiff maintained that some of the bills had been paid willingly but that in respect of others fees had been deducted from monies due to him without his consent. Overall the plaintiff was convinced that he had been overcharged in respect of the defendant's charges.

68. One transaction, referred to in the judgment as the "Sandystream matter" led to the delivery of three bills of costs. The plaintiff issued a summons to tax and the Sandystream matter was before the taxing master at the time the plaintiff issued his proceedings seeking relief under s. 2 of the 1849 Act. The bills before the taxing master were also the subject matter of the High Court proceedings and Charleton J. came to the conclusion that it was "utterly pointless" to have plenary proceedings in being where one of the central issues to be decided was as to the extent of the monies that the solicitor was entitled to charge in respect of the Sandystream matter. Whilst not explicitly so stated by the High Court judge, it would appear that he exercised his inherent jurisdiction to refer the three bills in respect of the Sandystream matter to taxation.

69. Insofar as all of the other bills of costs were concerned, some of which ran back more than ten years or more, the trial judge concluded that where a proper bill of costs had been furnished by the solicitor and a voluntary payment made, taxation would be rejected given that "there is no warrant for exercising the inherent jurisdiction of the court to order taxation of costs at this stage". In respect of any matter where a proper bill of costs had not been furnished or where voluntary payment by the plaintiff was not apparent, he directed taxation of such bills. He did so because he was satisfied that, in order for a bill of costs to be valid, it had to comply with the exact strictures of O. 99 r. 29(5). Thus, time did not begin to run until a bill in accordance with that rule had been delivered.

70. I regret to say that for the reasons already referred to in this judgment, I believe that Charleton J. incorrectly interpreted s. 2 of the 1849 Act by reference to the provisions of the Rules of Court, which he was not entitled to do. As already stated, I am of the view that O. 99 r. 29(5) does no more than identify the format of the bill to be presented by a solicitor who submits a bill to taxation as provided for in O. 99. Further, in doing so he relied upon the decisions in *RE Osborn* and *Smyth v. Montgomery* neither of which are authority for the proposition that if the validity of a bill of costs for the purposes of s. 2 of the 1849 Act is to be interpreted by reference to the requirements of O. 99, r. 29(5). What both of those cases decide is where there is a solicitor and client bill of costs payable and there are also party and party costs recovered that in order for the bill to be valid the same must include details of the party and party bill alongside the summary of the solicitor and client bill.

71. Returning to the judgment under appeal in this case, I must reject Mr. McNally's submissions which are in effect based upon an argument that the legal issue in *Smyth v. Montgomery* was on all fours with that in the present case. The judgment does not go as far, as he appears to believe it did in stating that for time to start running against a client who wishes to challenge a bill of costs utilising the provisions of the 1849 Act that the same must be in compliance with O. 99 r. 29(5). Even if the judgment did go that far I would have to decline to agree with the results.

Residual issues

72. There are just two further matters to which I would wish to make reference. The first of these is Mr. Healy's submission that regardless of the twelve month time limit provided for in s. 2 of the 1849 Act, Ms. Spillane's claim must be statute barred by virtue of the fact that her action is, in effect, a claim for breach of contract arising out of the solicitor and client relationship to which a six year statutory period applies. This is a submission with which I do not agree insofar as the Act of 1849 itself contains its own time limit within which a client may challenge the validity of a bill of costs. It must be inferred from the statutory provision that the client's entitlement to engage s. 2 of the 1849 Act is lost once the time provided for therein expires.

73. The final matter to which I would wish to make reference is the statement made by the trial judge that were he not satisfied that time had not run in a manner such as to preclude Ms. Spillane seeking to have her bill taxed under s. 2 he would have exercised his inherent jurisdiction to refer to the bill of costs to taxation, I would do no more than make the following observations. Firstly, I am satisfied that in making the statement which he did I believe it is unlikely that he was fully appraised of the likely complexity of the matrimonial proceedings, the extent of the assets to be transferred to Ms. Spillane on foot of the settlement and the correspondence concerning the size of the solicitor's file.

74. 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.

Conclusion

75. I am satisfied that the solicitor and client bill of costs furnished by Ms. Dorgan to Ms. Spillane on 12th November, 2007, was a bill of costs in accordance with s. 68(6) of the Solicitors (Amendment) Act 1994. It was thus a valid bill of costs for the purposes of triggering the time limits attaching to s. 2 of the 1849 Act. Accordingly, I am satisfied that the trial judge erred in concluding that Ms. Spillane's claim to relief under s. 2 of the 1849 Act was not time barred. I am also 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.

76. For the aforementioned reasons I would allow the appeal.