

THE HIGH COURT

[2010 No. 11215 P.]

BETWEEN

KACPER ANTECKI

PLAINTIFF

AND

MOTOR INSURERS BUREAU OF IRELAND,

ANDREI DRAGANUTA AND ROBERT DELANEY

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 28th day of July, 2017

1. This is an application brought by the plaintiff's solicitor seeking to have the defendant make a payment on account in respect of the costs which are payable by the defendants to the plaintiff. The application is made pursuant to Practice Direction HC71, which was issued on 28th March, 2017, by the President of the High Court. It is in the following terms:-

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

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

This Practice Direction shall come into effect on Monday, 24th April, 2017."

2. The background to the plaintiff's action can be briefly stated as follows: the plaintiff was involved in a road traffic accident on 20th September, 2007. On 8th December, 2010, he issued a personal injury summons against the defendants claiming damages in respect of the injuries, loss and damage suffered by him as a result of the accident. A full defence was filed on behalf of the defendants. The action came into the list for hearing on 7th June, 2016. At that time, negotiations between the parties were successful and the plaintiff's action was compromised on the basis that he would be paid €175,000 as compensation for his injuries and other losses and would also be paid his legal costs, to include all reserved and discovery costs, which costs were to be taxed in default of agreement.

3. The plaintiff's solicitor has stated that on 1st July, 2016, she sent a list of the vouched disbursements which she had paid on behalf of the plaintiff in the course of the proceedings up to that time. She further stated that the defendants did not make any payment on account when they received this document.

4. A Bill of Costs was submitted by the plaintiff's solicitor to the defendants' solicitor on 27th April, 2017. A summons to tax was also issued in that month. The taxation was first listed before the Taxing Master for hearing on 7th July, 2017. It appears that on that date, the Taxing Master felt that there was some problem with the Bill of Costs and he adjourned the taxation hearing to 18th October, 2017.

5. In this application, the plaintiff's solicitor seeks an order directing that the defendants should make a payment on account in respect of the costs which it has agreed to pay to the plaintiff under the terms of the settlement. The plaintiff's solicitor submitted that while a second Taxing Master, Mr. Paul Behan, has recently been appointed to that position, there is still likely to be an appreciable delay between the present time and the time when she can reasonably anticipate that the costs will be received by her from the defendants following the taxation process. She states that following the taxation hearing, the Taxing Master is likely to take all of the plaintiff's files and examine them with a view to reaching his preliminary ruling on costs. The defendants will then have a period of time to consider that ruling and if so desired, to lodge objections against those parts of the Taxing Master's ruling with which they disagree. The Taxing Master will then go on to give a formal ruling in relation to the objections raised by the defendants. When that procedure has been completed, the plaintiff's solicitor will then be in a position to take up a certificate of taxation. Ms. Hayes, the plaintiff's solicitor, submitted to the court that allowing for all these procedural steps, she is not likely to receive any costs until in or about December 2018. However, she did concede that the defendants have already agreed the fees due to senior and junior counsel and have paid same.

6. In the Bill of Costs submitted on behalf of the plaintiff, the plaintiff's solicitor has claimed an overall instruction fee of €70,433.51, together with VAT thereon of €16,199.71. There are sundry other disbursements which amount to approximately €6,995. This gives an overall claim in respect of the plaintiff's outstanding costs of approximately €93,628 (inclusive of VAT). Ms. Hayes submitted that the court should direct a substantial payment on account at this stage in respect of the fees which will be ultimately borne by the defendants. She gave the required undertaking in respect of the repayment of any amount that may be overpaid by the defendants at this stage.

7. In response to the application, Ms. Berkery, B.L., submitted on behalf of the defendants, that while they did have an obligation to pay the plaintiff's costs pursuant to the terms of the settlement reached on 7th June, 2016, the court should not make any payment on account at this stage, due to the fact that at the present time, there was, in fact, no delay in the current taxation procedures. She pointed out that following the appointment of Mr. Behan as Taxing Master, matters were now proceeding through the taxation process with reasonable expedition. She referred to a letter dated 24th July, 2017, issued by Mr. Tony Quann, a legal costs accountant with the firm of Cyril O'Neill, who had advised the defendants in this matter. In that letter, he had stated clearly that there were no delays being incurred on taxation at the present time.

8. Counsel further pointed out that the circumstances of this case would appear to bear out the assertion made by Mr. Quann. In this case, the plaintiff's solicitor had issued a summons to tax in April 2017, and the matter had been given a return date of 7th July, 2017. On that occasion, the taxation did not proceed, due to the fact that the Taxing Master felt that the bill submitted by the plaintiff's solicitor was deficient having regard to the recent decision of the Supreme Court in *Sheehan (an infant) v. Corr* [2017] IESC 44, delivered on 15th June, 2017. It was for that reason that the matter had been adjourned until 18th October, 2017. She submitted

that in these circumstances, it could not be validly argued that there was any unreasonable delay in the taxation process at the present time. Accordingly, she submitted that there was no basis on which the court should direct that a payment on account should be made by the defendants in respect of the plaintiff's costs.

9. In relation to the substance of the application, counsel stated that the defendants did not accept that the sums as claimed by the plaintiff's solicitor in her Bill of Costs were properly due and owing. The defendants had been advised by their own legal costs accountant, Mr. Quann, that in his opinion the plaintiff's solicitor's professional fee would probably tax at circa €35,000/€40,000 together with VAT thereon at 23%. If one were to allow an instruction fee at the midpoint of the figures suggested by the defendants' legal cost accountant, this would amount to €37,500, plus VAT of €8,625, giving a global fee of €46,125. Counsel suggested that if the court were minded to direct that any payment on account should be made, then having regard to the practice of the court in other similar applications, where the court had allowed a sum of in or about 33% of that claimed by the plaintiff's solicitor, this would appear to come out at approximately €15,360, based on the defendant's figures.

Conclusions

10. In its decision in *Heeney v. DePuy International Limited* [2017] IEHC 355, this Court set out the difficulties which the court faces in an application such as this. In particular, the court stated that where there was extremely limited information before the court on such an application, it would be inappropriate for the court to give any indication as to what might or might not be an appropriate instruction fee for the plaintiff's solicitor, or what an appropriate brief fee for counsel might be. The court stated as follows at paras. 22 and 23 of that judgment:-

"22. In these circumstances, where the court has very limited information before it and where there has been extremely limited argument as to why the level of fees marked by the plaintiff's legal advisers may or may not be justifiable, it would be inappropriate for the court to give any indication as to what level of fees should be properly payable to the plaintiff's legal advisers. Were the court to do so, it would risk doing a substantial injustice either to the legal advisers who have claimed the fees, or to the defendant, who must ultimately pay the fees. It is for the Taxing Master, having heard detailed evidence and submissions in relation to the items of cost which remain in dispute between the parties, to determine what the appropriate fees should be.

23. In these circumstances, I am satisfied that it would be wrong of this Court to indicate in any way what fee might be allowable to the plaintiff's legal advisers in this case. On this application, the court is not measuring what fees might be ultimately allowed to the plaintiff's solicitor and counsel. Nor is the court deciding whether it was reasonable for the plaintiff to engage the services of a second senior counsel and a second junior counsel. All the court can do, is try to come to a conclusion as to what sum would represent a reasonably substantial payment on account in respect of costs, while at the same time not exposing the defendant to the risk of a serious overpayment in respect of such costs. The court appreciates that the plaintiff's solicitor has given the necessary undertaking, but the court is of the view that it should avoid a situation arising, whereby the defendant would be left chasing the plaintiff's solicitor personally, in the event that there was a substantial overpayment of costs by the defendant at the pre-taxation stage."

11. The first question which the court must decide, is whether it is appropriate to direct that a payment on account should be made in this case, having regard to the submissions made by the defendants to the effect that there are no delays in the taxation process at the current time and, therefore, the underlying rationale for the Practice Direction as set out in the first sentence thereof, has not been met. I do not think that the Practice Direction requires that a plaintiff's solicitor should satisfy the court that there is a long delay in the taxation process in order to establish his right to seek a payment on account. It seems to me that wherever there is an agreement, or a finding by the court, that a defendant should pay the plaintiff's costs, the plaintiff's solicitor can come into court at any time and seek a payment on account, without having to put evidence before the court that there are, in fact, long delays in the taxation process at the time the application is made.

12. Even if I am wrong in that, I accept the evidence given by Ms. Hayes in her affidavit, to the effect, that even with the current taxation process, she is likely to experience some delay in receiving the fees due to her and that in all probability, she will not receive these costs until in or about December 2018. She states that having regard to the fact that the proceedings relate to an accident which occurred in 2007, which action was commenced by personal injury summons issued in December 2010, it is not unreasonable that she should receive some payment on account, in view of the fact that the defendants had agreed to pay the plaintiff's costs as far back as June 2016. In fairness to the defendants one must point out that, while the plaintiff's solicitor did furnish a schedule of vouched disbursements on 1st July, 2016, it would appear that the Bill of Costs was not actually furnished until 27th April, 2017. Nevertheless, I accept the argument that she may well have to wait another eighteen months before receiving payment of the costs due to the plaintiff, from the defendants. It seems to me that in such circumstances, it is appropriate for the court to give a direction pursuant to Practice Direction HC71.

13. As in the *Heeney* case, the court is deliberately not going to set out the basis on which it has reached the figure which it proposes to direct should be made as a payment on account. The reason for this is that the court does not wish to indicate in any way what the appropriate instruction fee might be. In this case, having regard to the nature of the cause of action, the complexity of the case in general and the level of fees paid to counsel, the court is of the view that it is appropriate to direct that the defendants should make a payment on account to the plaintiff in the sum of €45,000. I direct that such payment is to be made by the defendants within 28 days from today's date.