

THE HIGH COURT

2006 1063 S

BETWEEN

GILES J. KENNEDY

PLAINTIFF

AND

THE LAW SOCIETY OF IRELAND

DEFENDANT

Judgment of Mr. Justice George Birmingham delivered on 10th day of March, 2008

1. In the Notice of Motion before the Court, the plaintiff seeks liberty to enter final judgment in the sum of €261,187.88 together with further interest thereon from the 6th June, 2007. The plaintiff claims to be entitled to this sum as representing the interest due on foot of an award of costs.

2. There is a long and complex background to the current application. It is necessary to refer briefly to that history in order to put the present proceedings in context. On the 5th October, 1999, after a very lengthy High Court hearing, the trial Judge (Kearns J.) delivered a written judgment refusing the reliefs sought by way of Judicial Review by Mr. Kennedy. Subsequently, on the 20th October, 1999, he made an Order for costs in favour of the Law Society of Ireland (hereafter referred to as "the Society").

3. The decision of the High Court was appealed successfully to the Supreme Court by the plaintiff. On the 11th January, 2002, an Order was made by that Court remitting the matter to the High Court for further hearing and to assess the damages (if any) to which the plaintiff in the proceedings was entitled.

4. The provisions of the Order of the Supreme Court dealing with the question of costs are of considerable significance in the context of the present application and should be set out in full:-

"IT IS ORDERED that the Applicant do recover from the Respondents the costs of the Appeal up to and including the date on which the Judgment of the Court herein was delivered by Mr. Justice Fennelly but no costs thereafter that the said High Court Order dated the 20th day of October 1999 regarding costs, be set aside and in lieu thereof, IT IS ORDERED that the High Court costs be reserved to the High Court as the issue in relation to damages is still outstanding and the entire matter of costs in the High Court to be dealt with by the learned Judge of the High Court who disposes of this case."

5. A further hearing before Kearns J. took place in July, 2003 which resulted in the plaintiff's claim for damages being dismissed. The question of costs was dealt with by Order of the 31st July, 2003 and again, given its importance to the present case, it is appropriate to quote the relevant sections of the Order:-

"IT IS ORDERED that the Applicant/Defendant [Mr. Kennedy] do recover from the Respondents/Plaintiff [The Society] the costs (including any reserved costs and any costs of discovery) of the High Court proceedings up to the 20th day of October 1999 and that the Respondents/Plaintiff [The Law Society] be granted the costs (including any reserved costs) of the herein Action for damages all such costs to be taxed in default of agreement.

And IT IS ORDERED that the said costs be offset one against the other."

6. Both sides appealed the judgment and Order of July, 2003 to the Supreme Court which, on the 21st June, 2005, dismissed the appeal and cross-appeal.

7. On the 24th November, 2006, the costs to which the plaintiff (Mr. Kennedy) was entitled were taxed at €1,121,763.99. Those to which the Defendant (the Society) was entitled were taxed at €352,275.49. On the same day the sum of €769,488.50 being the difference between the two sums certified, was paid by the Society.

8. In these circumstances, and having regard to the decided cases, it is not in dispute that the plaintiff has an entitlement to interest on the costs paid. However, what is in issue is the amount of that interest. In particular, there is a fundamental dispute between the parties as to the date from which interest is to be calculated. On behalf of the plaintiff in the present proceedings, it is contended that he is entitled to interest from the date of the original High Court Order of the 20th October, 1999, up to the 24th November, 2006, the date of payment. While, on behalf of the defendant, it is said that interest applies only in respect of the period between the 31st July, 2003 and the 24th November, 2006.

9. There is a subsidiary area of dispute between the parties. The plaintiff has prepared his claim on the basis of calculating the interest due on €1,121,736.99 the amount of his taxed costs, while the defendant has prepared its calculations on the basis of €769,488.50, the net sum actually paid after the set-off.

The contentions of the parties

10. On behalf of the plaintiff in these proceedings, Mr. Martin Hayden, S.C. submits that the core principle to be applied in this area is that interest should be payable from the earliest date the law permits. To deny his client interest from the date of the earlier High Court Order would be a negation of justice. He points out that had his client failed in this appeal to the Supreme Court, then he would have been obliged to pay interest from the 20th of October, 1999. He relies on the judgment of Fennelly J. in *Clarke v. Commissioner of an Garda Síochána* [2002] 1 I.R. 207 as well as the case of *Best v. Wellcome Foundation Limited* (No. 2) [1995] 2 I.R. 393 and the leading case in the area of *Cooke v. Walsh* [1989] I.L.R.M. 322. In *Best v. Wellcome Foundation Limited* (No. 2), Murphy J. very helpfully reviewed the case law in this jurisdiction and in England as he had done earlier in *Hickey v. Norwich Union Fire Insurance Limited* (Unreported, High Court, Murphy J., 23rd October, 1987, *ex tempore*).

11. On behalf of the Society, it is argued that if the plaintiff is to succeed in obtaining judgment in the amount claimed, he must establish an entitlement to a judgment for costs in the sum of €1,121,763.99 from the 20th October, 1999. If he can identify an Order to that effect, or if a combination of a Court Order, together with statutory provisions, or the Rules of Court have this effect, then he can succeed, but not otherwise. Mr. O'Donnell, S.C. argues that it is clear that the plaintiff cannot identify such an Order. The only Order dealing with costs is the Order of the 31st July, 2003, with its provision for a set-off and it is said the arguments that the plaintiff now seeks to make are in clear conflict with that Order.

12. The Superior Courts here, and indeed, in England, have been much agitated by the question of whether interest on costs runs from the date of the Order awarding costs or from the date when the amount of costs payable is determined by the Certificate of The Taxing Master. Indeed, this is an issue which has also attracted the attention of the legislatures. However, it does not seem to me that the issues of principle which were at the centre of the Supreme Court's decision in *Clarke v. Commissioner of An Garda Síochána* [2002] 1 I.R. 207 and the other cases to which I have been referred are really in issue in the present case.

13. Instead, it seems to be a case that turns very much on the facts of this case. The plaintiff succeeded in his appeal to the Supreme Court in January, 2002. At that stage, the Supreme Court might well have set aside the Order of the High Court of the 20th October, 1999, in relation to costs and in lieu thereof substituted an Order awarding the plaintiff the costs of the High Court proceedings. Had the Court done that then on the basis of the decided cases, there is no doubt that he would have been entitled to have his interest calculated back to 20th October, 1999. However, the Supreme Court chose not to do so. The reasons for the course of action taken by the Supreme Court are to be found in the Order itself, in particular in the following phrase:-

"IT IS ORDERED that the High Court costs be reserved to the High Court as the issue in relation to damages *is still outstanding*" (my emphasis).

14. When Kearns J. came to adjudicate on the question of costs in July, 2003, there was no question of him hearing an appeal from the earlier Order of the High Court or in any way correcting that Order, rather, having disposed of the claim for damages so that for the first time there was now no outstanding issues, he was addressing the issue of costs. He was dealing with the issue of the entire costs incurred in the High Court after the conclusion of the case in the High Court de novo and did so in the way we have seen, awarding certain costs to the plaintiff and certain costs to the defendant and providing for a set-off. It was only when the issue of the entitlement to damages was decided, that the proceedings in the High Court concluded.

15. The only entitlement that the plaintiff in the present proceedings has to be paid costs in respect of the High Court hearing in 1999 stems from the judgment and Order of the 31st July, 2003. While there has been much debate as to whether interest on costs runs from the date of the award or from the date of taxation, it has never been suggested that the entitlement is to be backdated to a time before the award of costs was made. In effect, that is what the plaintiff in the present proceedings is seeking. In this case, the plaintiff was awarded his costs in July, 2003 and was paid the net amount due after the set-off on the 24th November, 2006. In these circumstances, he is clearly entitled to interest in respect of the period between the award of costs on the 31st July, 2003 and payment on the 24th November, 2006, but is not in my view entitled to interest in respect of the period prior to the 31st July, 2003.

16. There is a further issue which I can deal with briefly. The claim in the summary summons is calculated on the basis of costs certified in the sum of €1,121,763.99. However, there was never a period when there was an entitlement to costs in that amount. Mr. Kennedy was awarded the costs of the High Court proceedings of 1999 only on the 31st July, 2003, when Kearns J. made his Order. That Order itself provided for a set-off. If the plaintiff is to succeed in the claim as advanced, not only must he establish an entitlement to interest in respect of a period of four years, approximately, before the award of costs, but he must also persuade the Court to ignore the provisions of the Order of the 31st July, 2003, providing for a set-off. The approach taken to the question of set-off which I believe to be clearly wrong, confirms me in my view that the present claim is misconceived.

17. In summary, the plaintiff was entitled to be paid the costs, taxed and ascertained, referable to the High Court hearing of 1999 with a set-off against those costs of the costs awarded to the Law Society in respect of the 2003 hearing. That has happened. In addition, the plaintiff is entitled to interest for the period between the award of costs on 31st July, 2003 and payment. That too has been paid. Accordingly, no further sums are due by the defendant to the plaintiff and I will dismiss the plaintiff's claim.