

THE HIGH COURT

[1996/1099T]

BETWEEN

SEAN BYRNE (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND SEAN BYRNE

PLAINTIFF

AND

SEAN O'CONBHUI (OTHERWISE SEAN MacCONBHUI, OTHERWISE JOHN CONWAY) AND JAMES LEO CONWAY (OTHERWISE SEAN OR OTHERWISE SEAMUS O'CONBHUI OTHERWISE CONWAY)

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on 29th day of April, 2016.

1. This is an application brought by the first named defendant seeking a review of the taxation of costs awarded to the plaintiff in the above entitled proceedings.

2. These proceedings arose out of a personal injuries action in which the plaintiff (a minor) claimed damages for injuries sustained while playing on a container on land occupied by the defendant and his brother, the second named defendant. On 10th May, 2004 the High Court awarded damages to the plaintiff pursuant to the provisions of the Occupiers Liability Act, 1995 and held that the defendants were jointly and severely liable for the injuries sustained by the plaintiff. On 8th October, 2004 the first defendant applied to the Supreme Court for an extension of time for leave to appeal against the order and judgment of the High Court. This was granted on the basis that the defendant would lodge the entirety of the monetary award in court pending the outcome of the appeal. The first defendant failed to comply with this condition. Six years later in November 2010 the defendant applied once again to the Supreme Court for an extension of time for leave to appeal which was dismissed on 21st January, 2011.

3. A number of orders for costs in favour of the plaintiff were made against the defendant in the course of these proceedings. These included:-

(a) An order of the Supreme Court dated 8th October, 2004 granting the plaintiff the costs of the defendant's motion seeking an extension of time within which to lodge an appeal to the Supreme Court;

(b) An order of the Supreme Court dated 21st January, 2011 granting the plaintiff costs of the defendant's motion seeking a further extension of time to appeal the decision of the High Court dated 10th May, 2004;

(c) An order of the High Court dated 4th June, 2002 (as amended by the Supreme Court on 27th May, 2005) granting the plaintiff the costs of the expenses of witnesses for attending the High Court on 4th June, 2002 when the trial of the action was adjourned at the request of the defendant; and

(d) An order of the High Court dated 10th May, 2004 granting the plaintiff the costs of the substantial proceedings.

4. Order 99 Rule 38 provides for review of taxation of costs. Order 38(1) provides that any party who is dissatisfied with an allowance or disallowance by the Taxing Master in respect of any item of costs may, before a certificate is signed by the Taxing Master "carry in before the Taxing Master his objections in writing to such allowance or disallowance, specifying therein by a list in a short and concise form the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the Taxing Master to review the taxation in respect of the same". If objections are made, the Taxing Master is obliged to reconsider and review his/her taxation in respect of such objections and may receive further evidence concerning them. If required he/she should state in writing the grounds and reasons for the decision in respect of the objections.

5. Rule 38(3) provides:-

"Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof may within 21 days from the date of the determination of the hearing of the objections or such other time as the court ... may apply to the court for an order to review the taxation as to the same items and the court may thereupon make such order as may seem just"

6. Rule 38 Rule (4) provides:-

"The application to the court should be made by motion on notice to the other party concerned, such notice of motion to be filed in the Central Office and a copy thereof filed in the Office of the Taxing Master and the motion shall be heard and determined by the court upon the evidence which shall have been brought in before the Taxing Master, and no further evidence shall be received upon the hearing thereof, unless the court should otherwise direct."

7. Following the determination of the issues raised by the court, the matter shall be remitted to the Taxing Master under Order 99 Rule 38(6) to complete the taxation in accordance with the decision of the court and to issue a final certificate of taxation.

8. The history of the proceedings is set out in the Taxing Master's report dated 8th May, 2015. The taxation process is accurately described by the Taxing Master as having followed "a tortuous path". There were numerous adjournments before the Taxing Master

(initially Taxing Master Flynn) before Bills of Costs came before Taxing Master Mulcahy in June 2012. In the course of the taxation, Mr. McEvoy of Cyril O'Neill, Legal Costs Accountants appeared on behalf of the solicitors for the costs/plaintiff and the first named defendant represented himself.

9. An application for a grant of legal advice and representation was made by the first defendant to the Legal Aid Board which was ultimately unsuccessful. It later emerged that legal aid was refused in October 2012. The first defendant was directed to furnish evidence of his application for legal aid and the matter had been listed for mention on three occasions for that purpose but he failed to do so. On 27th November, 2012, the Taxing Master advised that she would proceed with the taxation.

10. The Taxing Master did not consider that Mr. O'Conbhui would be prejudiced by appearing in person without representation since lay litigants regularly appear in taxations before her. Her practice is to outline the procedure followed in guiding them through the process. She takes care to ensure that a lay litigant is asked for his/her submissions and given an opportunity to comment upon all matters that arise. The Taxing Master states that she carried out a detailed examination of the nature and extent of the work done by the solicitor and counsel and other items irrespective of whether the party opposing a taxation is represented or not. She also considered that the first defendant had experience in appearing on his own behalf and making applications in the Superior Courts and was aware that he had acted as a McKenzie friend on behalf of other lay litigants in High Court proceedings. No issue is taken with the manner in which the taxation process or hearings were conducted by the Taxing Master.

11. The Taxing Master summarised her conclusions in respect of the substantive High Court action at pages 10 to 12 of the Report. She noted that the addition of a co-defendant in the proceedings necessitated the delivery of amended pleadings and additional work in preparation for trial. A number of matters were highlighted:-

"Liability was an issue throughout the proceedings with both defendants denying any liability for the accident and for the injuries sustained by the infant plaintiff. An engineer was engaged to inspect the locus and to advise on liability. Proof of whether there was reckless disregard for the plaintiff depended on various factors set out in s. 4(2) of the Occupiers Liability Act, 1995 and it was necessary for the solicitor for the costs to carry out investigations to establish whether the premises was an open space and had been used by children to play on for a significant period prior to the accident; whether children regularly used the container as a climbing frame and whether the container was grossly unsafe and unsuitable for that purpose.

The first named defendant denied that he was the owner or occupier of the land and the container and it was necessary for the solicitor to carry out investigations with a view to establishing the ownership of the property on which the accident had occurred. That task was made more difficult because the first named defendant had operated under a number of different aliases with two different addresses and it was necessary for the solicitor to carry out extensive investigations into the identity of the first named defendant. Difficulties were encountered serving papers on the first named defendant. Written statements were taken from several individuals ... setting out their dealings with the defendant and their knowledge of the lands upon which the accident had occurred. A handwriting expert was engaged to compare the first named defendant's handwriting on an executed deed with a view to proving his identity ..."

A further issue in respect of planning permission sought by the first defendant concerning the development of the lands arose and discovery was sought. The defendant declined to make submissions on the solicitor's general instruction fee and counsel's brief fees. Having heard submissions from Mr. McEvoy on behalf of the solicitor, the Taxing Master delivered an ex tempore ruling on the solicitor's general instruction fee on 16th December, 2013. She considered a sum of €10,000.00 to be a fair and reasonable fee for the work which had been carried out and was necessary in order to prosecute the plaintiff's claim. The total costs measured in respect of the order of 10th May, 2004 amounted to €22,871.58. Section 17(3) of the Courts Act, 1981, as amended by s. 14 of the Courts Act, 1991, resulted in an adjustment in accordance with the section. The total costs assessed against the first named defendant in respect of the substantive High Court action amounted to €10,868.00. The first defendant was then advised that he had a right to bring in objections to the allowance or disallowance of any items in the Bills of Costs.

12. Following an extension of time granted by the Taxing Master, the first defendant delivered the following "grounds of objection" on the 28th December, 2013:-

"1. Since my only involvement in this case is as an environmentalist, my ordinary right to financial assistance with securing profession advice and representation of the court of the taxing master is enforced by the provisions of the Aarhus Convention.

2. I have applied to the member state concerned for such assistance and have been informed by its agent, the Legal Aid Board, that I comply with the means requirements for such assistance, but a final decision on my application has not yet been made.

3. In deciding that I am competent to, inter alia, properly prepare my rebuttal of the costs claimed and then lay my case in rebuttal properly before the court, the taxing master has erred in law and misdirected herself by hearing and deciding the bills of costs which are before her court in this case.

4. I believe that proper advice from appropriate legal professionals which show that a question arises in respect of these taxations as to want of jurisdiction arising from lateness."

These objections were raised in respect of each Bills of Costs considered.

13. Further objections were set out in a two page memorandum. The memorandum challenged the need for the calling of a number of witnesses concerning the first named defendant's identity and ownership and/or occupation of the lands upon which the accident occurred.

14. The first defendant objected in page 2 of the memorandum "to being forced to represent myself by the State's failure/neglect/refusal to afford me appropriate financial assistance with the Access to Justice to which I am entitled, inter alia, by the provisions of the Aarhus Convention". He claims that he required the expert advice of Legal Costs Accountant and/or representation by a barrister in order to ensure a fair hearing on the taxation issues.

15. The Taxing Master's report describes how, having lodged objections on 28th December, 2012 the defendant failed to appear when they were listed for hearing on 5th February, 2013. The objections were then listed on 12th April, 2013 when leave was granted to him to amend the title to the objections. Directions were furnished to him to lodge written submissions in support of the objections.

The matter was listed for hearing on 30th July, 2013.

16. On 30th July, 2013, the first defendant sought an adjournment of the hearing of the objections pending the provision of appropriate assistance to him "in accordance with justice in environmental matters". The Taxing Master was advised that his application for legal aid had been refused and a new one had been submitted, though no evidence of this was produced. He was also invited to specify the provisions of the Aarhus Convention under which he claimed to be entitled to representation in the taxation of costs and on what basis he was involved in the proceedings as an environmentalist.

17. The matter was again listed for mention on 11th October, 2013 by which stage the first defendant had not complied with the directions to furnish copies of all applications made by him or on his behalf for legal aid and a copy of correspondence with the Board concerning same. On 14th October, the first defendant furnished a copy of his correspondence with the Legal Aid Board which included copies of applications made by him or on his behalf.

18. The defendant's objections were listed for hearing on 25th October, 2013 when the Taxing Master was advised that he had made a second application to the Legal Aid Board under the Aarhus Convention on 19th July, 2013 but had been notified the previous day that his application had been refused i.e. 24th October. Written submissions had not been filed in support of his objections and directions were furnished to the parties to lodge written submissions with a new date for hearing fixed for 27th January, 2014.

19. Two of Bills of Costs were taxed on 16th December and 27th December, 2013. Objections were brought in by the first named defendant in respect of allowances on the Bill taxed on 16th December but he did not specify the items to which objection was taken. It was not clear whether the objections related to both Bills. They were deemed to be in respect of both matters.

20. The taxation was then listed for hearing on 17th February, 2014, 10th March, 2014, 28th April, 2014 and 28th August, 2014. On each date the defendant failed to appear. On 28th August, 2014 the objections were listed on a peremptory basis for hearing on 7th October, 2014. The first defendant appeared on that date and made submissions but withdrew before the ruling on his objections was delivered.

21. The Taxing Master considered the objections advanced by the first defendant. She noted that the proceedings were instituted against the defendant in his capacity as the owner/occupier of the land/container on which the accident occurred. The defendant did not adduce any evidence during the taxation that he was involved in the proceedings as an environmentalist, nor did he offer any explanation as to how the provisions of the Aarhus Convention applied to him. He failed to furnish information which had been previously directed to address the issue at the hearing of objections on 7th October, 2014 from which he withdrew.

22. The Taxing Master states that there was no merit in the objection made by the defendant that he had applied to a member state for assistance by way of legal aid but a decision on his application had not been finalised. In fact, application for advice and representation was made to the Legal Aid Board but refused and the refusal was affirmed on appeal. Thereafter, the first defendant was informed that the decision of the Appeal Committee refusing legal aid was final and ultimately by letter dated 12th April, 2013 was informed that his file was closed.

23. The Taxing Master rejected the objection made concerning the costs claimed by the solicitor in seeking to establish that the first defendant owned the land in question. She concluded that the work carried out in that regard formed only a part of the work carried out by the solicitor on behalf of his client. She stated that it was incorrect to suggest that when it was established that the first defendant's brother owned the site, none of what followed, in 2002 or subsequently was necessary in terms of enquiries and investigations carried out with a view to establishing whether the first defendant was in fact the owner and occupier of the lands or container in question. The Taxing Master noted that it was not until the case came on for hearing on 4th June, 2004 that the solicitor for the costs became aware that the first defendant's brother and not the first defendant was the owner of the land in question. Therefore the work that was carried out by the solicitor prior to the hearing of the action on 4th June, 2002 for the purpose of establishing these matters was necessary for the purposes of prosecuting the plaintiff's claim for damages. She was satisfied that no such work was carried out following that date. Therefore, she rejected the submission that the solicitor continued "to rack up costs for the purpose of establishing that he was the owner of the locus" after his brother admitted in court that he was the owner of the land. In addition, the Taxing Master advised the first defendant that the order for costs in respect of these matters had been made by the High Court and that her function was to assess the nature and extent of the work carried out by the solicitor or expert witnesses retained in order to assess fair and reasonable fees for the work. It was not her function to determine whether any of these costs should be awarded against the first defendant.

24. At the hearing of the objections on 7th October, 2014, it was noted by the Taxing Master that the first defendant confirmed that he had no objection to the allowance or disallowance of any item in the Bills of Costs. He accepted that the sums allowed were probably fair but did not have any expertise to assess them. He did not object to the manner in which the costs had been taxed and his objection was based on the fact that the Taxing Master had proceeded with taxation in the absence of his having professional advice, representation and assistance. The applicant has maintained this stance on this application for review of taxation. He does not express any dissatisfaction with the quantum of any of the allowances or disallowances that were made or the manner in which the taxation of the bills was conducted apart from the fact that the hearings continued without his being provided with legal aid.

25. The first defendant has not engaged with any particular item in the bills of costs considered by the Taxing Master or formulated any objection in the allowance or disallowance of any item or the amount thereof. The question of whether an order for costs in respect of particular aspects of the plaintiff's claim should have been granted or not is not a matter for the Taxing Master. Insofar as any allowance in respect of a witness expense was the subject of an objection, this did not extend to any expense claimed by or on behalf of a witness; rather, it extended to whether costs should have been allowed in respect of the proofs of the issue in respect of which the witness was called. Apart from the absence of form in relation to identifying any particular item of cost to which objection is taken, I am not satisfied that the first defendant has any grounds for objecting to the allowances made in respect of the witnesses referred to in the Bills of Costs.

26. The first defendant maintained that as an "environmentalist", he was entitled to the rights conferred on litigants under the Aarhus Convention. I am not satisfied that this is so. The substantive proceedings in this matter were determined in respect of a personal injuries action in the High Court brought on behalf of a child against the defendants. The issues in the case have absolutely nothing to do with the first defendant's lifestyle, politics, or activities as an environmentalist.

27. Ireland is a party to the Convention on Access to Information Public Participation and Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25th June, 1998. The European Union which is also a party to the Convention has introduced and promulgated a number of legal measures designed to implement its obligations under the Convention. Article 9(4) of the Convention, relied upon by the first defendant, requires that the procedure for challenging the validity of certain decisions

affecting the environment:-

“should provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely and not prohibitively expensive.”

28. The European Union has implemented this aspect of the Convention in a number of Directives e.g. the Environmental Impact Assessment Directive 2011/92EU (Article 11(1)). Following the decision in *Commission v. Ireland* (C-427/07), s. 50B was inserted in the Planning and Development (Amendment) Act, 2000 by s. 33 of the Planning and Development (Amendment) Act, 2010 as amended and extended by ss. 3, 4 and 21 of the Environment (Miscellaneous Provisions) Act, 2011. These provisions deal with the issue of costs in planning cases and environmental enforcement proceedings. They apply to cases concerning *inter alia* decisions in environmental assessment cases, development plans which alter the nature of a local environment and projects which require an integrated pollution prevention and control license. It is unnecessary in this case to analyse in any great depth the issues which have arisen on the case law concerning the application of this section and its amendments. However, it is clear, that it was intended that costs provisions relevant to any such remedies would comply with Article 9(4) in order to ensure that adequate and effective remedies should not be prohibitively expensive thereby enabling challenges to the validity of certain decisions affecting the environment. It has nothing to do with personal injury actions. Indeed in defining the extent to which the costs provisions of s. 3 of the Environment (Miscellaneous Provisions) Act, 2011 applied to civil proceedings, s. 4(3) of the Act provides that the provisions do not apply to proceedings “for which damages arising from damage to persons or property are sought”. The first defendant’s reliance upon the provisions of the Aarhus Convention and their implementation under European Union and domestic law is misconceived.

29. Accordingly, the relief claimed in the notice of motion is refused.