Neutral Citation: [2016] IEHC 260

THE HIGH COURT

Record No. 2015/1071S

BETWEEN

DONAL SPRING

PRACTISING UNDER THE STYLE AND TITLE OF

DANIEL SPRING & COMPANY SOLICITORS

PLAINTIFF

– AND –

JOHN JOYCE

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Overview

1 This is an application by a firm of solicitors for summary judgment in respect of fees claimed of a client.

Part 2

Background

2 At some stage in the past, Mr Joyce was dismissed from his employment with Bank of Ireland. He engaged a firm of solicitors to assist him in being restored to his employment. He subsequently discharged that firm of solicitors and engaged the firm of solicitors that is now suing him. Eventually, through an internal review process, Mr Joyce was reinstated to his employment with Bank of Ireland. However, he has since been demoted – he claims wrongfully – and he remains in a state of dispute with Bank of Ireland.

3 In the course of seeking to resolve his employment-related difficulties, Mr Joyce has somehow managed, or so it is claimed, to ratchet up an astonishing €135k of legal fees. This comes on top of a still outstanding €50k of fees owing to a previous firm of solicitors in respect of the same employment dispute.

4 Mr Joyce has raised some specific concerns regarding various matters mentioned on the fee note with which he has been presented by the applicant solicitors. He queries, for example, how a fee rate of €350 per hour could amount after 126 hours of work to €55k given that 126 x €350 = €44.1k. The firm of solicitors has indicated in reply that the disparity is due to *"instruction fees, the extreme urgency of the matter and the expertise required"* – albeit that it might not unreasonably be contended that a charge-out rate of €350 per hour was pitched at that level to cover the cost of expertise and entitled Mr Joyce to no little urgency in how his affairs were treated.

5 Mr Joyce has also queried the cost of counsel. He queries, in particular, why one consultation with one senior counsel cost him €7.5k plus VAT. He asks if there was some duplication between the two senior counsel who were brought into his case at different times. And he is troubled by how he could have run up €41k of fees with junior counsel at a time when he was running up €44-55k of fees with his solicitors – what exactly is it that has cost him €85–96k?

6 Proceeding from the above concerns, Mr Joyce has asked that, even at this late stage, his fee note be sent to taxation. The court turns below to the question of whether it is possible for the fees claimed of Mr Joyce to be sent to taxation at this time.

Part 3

Referring a Solicitor's Fee Note to Taxation

7 Sections 2 and 6 of the Solicitors (Ireland) Act 1849 make provision as regards billing and collecting solicitor fees. Section 2 reads like a stream of statutory draftsman's consciousness, comprising a single, densely-worded sentence that runs to two and a half sides of A4 paper. Section 6 is more concise.

8 So far as relevant to the within proceedings, the critical elements of ss.2 and 6can perhaps be summarised as follows:

> [1] No solicitor may commence an action for fees until one month after delivery of his bill of his fees, charges and disbursements.[i]
>
> *[i] "No solicitor, nor any executor, administrator, or assignee of any solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor until the expiration of one month after such solicitor, or executor, administrator, or assignee of such solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling*

house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such solicitor, (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or the executor, administrator, or assignee of such solicitor, or be enclosed in or accompanied by a letter, subscribed in like manner, referring to such bill". (s.2).

[2] Upon application of the party chargeable within the said one-month period, the court must refer the matter for taxation.[ii]

[ii] "[U]pon the application of the party chargeable by such bill within such month it shall be lawful…for [the court]…or any judge…and they are hereafter respectively required, to refer such bill, and the demand of such solicitor, executor, administrator, or assignee thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court". (s.2)

[3] The court making such reference must restrain the solicitor (or the executor, administrator or assignee of same) from taking commencing litigation in relation to the amount sought pending such taxation).[iii]

[iii] "[T]he court or judge making such reference shall restrain such solicitor, or executor, administrator or assignee of such solicitor, from commencing any action or suit touching such demand pending such reference". (s.2).

[4] If no application is made within the one-month period by the party chargeable, such reference may be sought by the solicitor (or the executor, administrator or assignee of same) or the party chargeable.[iv]

[iv] "[I]n case no such application as aforesaid shall be made within such month as aforesaid, it shall be lawful for such reference to be made as aforesaid, either upon the application of the solicitor, or the executor, administrator or assignee of the solicitor whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill". (s.2).

[5] This out-of-one month application may be made "with such directions, and subject to such conditions as the court or judge making such reference shall think proper".[v]

[v] "[I]t shall be lawful for such reference to be made…with such directions, and subject to such conditions as the court or judge making such reference shall think proper". (s.2).

[6] The court making such reference may restrain the solicitor (or the executor, administrator or assignee of same) from commencing or prosecuting litigation in relation to the amount sought pending such taxation).[vi]

[vi] "[S]uch court or judge may restrain such solicitor, or the executor, administrator or assignee of such solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper". (s.2).

[7] No reference to taxation shall be made, inter alia, after the expiration of twelve months after the bill has been delivered, sent or left "except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made".[vii]

[vii] "[N]o such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such solicitor, or executor, administrator, or assignee of such solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made". (s.2).

[8] Payment of a bill does not preclude it being referred to taxation, if the special circumstances of the case, in the opinion of the relevant court or judge, appear to require same.[viii]

[viii] "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 special circumstances of the case shall in the opinion of such court or judge appear to require the same".(s.6).

[9] Reference of a bill post-payment shall be upon such terms and conditions and subject to such directions as to such court or judge seems right.[ix]

[ix] "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 special circumstances of the case shall in the opinion of such 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".(s.6).

[10] Application for reference to taxation following payment of a bill must be made within twelve calendar months after payment.[x]

[x] "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 special circumstances of the case shall in the opinion of such 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 after payment". (s.6).

9 In his judgment in *State (Gallagher Shatter & Co.) v. DeValera* [1986] ILRM 3, 8, McCarthy J. summarises the combined effect of ss.2 and 6 in the following manner:

"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 twelve months within which to demand and obtain taxation,

(3) after [a] the expiry of 12 months or [b]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, [c] provided the application to the court is made within 12 calendar months after payment,

(4) [d] after the expiry of the latter period, there is no statutory power to refer for taxation."[1]

[1] Note: The proviso at [c] must refer to [b] as [a] is not linked to payment. The "latter period" referred to at [d] is a reference to [c]. Thus McCarthy J. indicates that [a], after the expiry of twelve months from delivery of the bill, the court may, if the special circumstances of the case appear to require same, refer the bill to taxation; [b] and [c], where a bill has been paid, and application is made within twelve months of payment, the court may, if the special circumstances of the case appear to require same, refer the bill to taxation; and [d], in the case of those instances referred to in [b] and [c], there is no statutory power to refer to taxation after the expiry of the twelve-month period referred to in [c].

10 McCarthy J. succinctly summarises the effect of ss. 2 and 6. However, he perhaps states the law in so concise a manner that, unless one has a copy of ss.2 and 6 lying open as one reads the above-quoted text, it is possible to miss the nuances of what he is saying. This Court would respectfully suggest that it may assist to set out matters in the following more comprehensive terms:

(a) the solicitor cannot lawfully sue for one month [i.e. until the expiration of one month] after delivery;

(b) the client has a period of twelve months within which to demand and obtain taxation as of right;

(c) after the expiry of twelve months from delivery of the bill, the court may, if the special circumstances of the case appear to require same, refer the bill to taxation;

(d) where a bill has been paid, and application is made within twelve months of payment, the court may, if the special circumstances of the case appear to require same, refer the bill to taxation; and

(e) only in the case of those instances referred to in (d), there is no statutory power to refer to taxation after the expiry of the twelve-month period referred to in (d); otherwise the power to refer continues extant.

11 When it comes to items (b)–(e), it seems clear what our Victorian forbears were thinking. They saw the need to bring finality to fee disputes, and their thinking was as follows (using this Court's numbering above): (b) give clients a right to demand and obtain taxation within the first twelve months after delivery; (c) allow referrals to taxation outside this twelve month period only if special circumstances present; (d) after payment, allow referrals to taxation within twelve months of payment if special circumstances present; and (e) only in those instances where payment has been made, end any right to refer to taxation after the expiry of the twelve-month period following payment.

12 Why would the Victorians allow a continuing right under (c) for an indefinite period, provided special circumstances present, but 'axe' the availability of (d) once twelve months expire after payment? It seems to this Court that the Victorians had a fairly clear logic for proceeding as they did (whether one agrees with that logic or not). That logic appears to be this: for so long as a bill is unpaid, there is less of a need for commercial certainty because the row over the bill is ongoing; once a bill is paid, however, there needs to be commercial certainty (people need to be able to part ways and move on with their lives) after a reasonable timeframe.

13 At first glance, the balance settled on by the Victorians in the Act of 1849 appears to favour those who query their bills before payment, over those who pay their bills and then seek to query– it is the latter who suffer the 'axe' referred to above. But a closer analysis shows that the balance struck by the Victorians is rather more carefully calibrated. By introducing the requirement as to special circumstances in each of (c) and (d), the Victorians effectively empower the courts to distinguish between the two extremes (and all the variants in between) of (i) those who just do not want to pay what they owe in life, and (ii) those who are satisfied to pay what they owe but have reasonable concerns about what is being demanded of them by way of fees.

Part 4

The Principles in Dorgan

14 Earlier this year, in *Dorgan v. Spillane* [2016] IECA 84, the Court of Appeal had occasion to consider the law applicable to the referral of a solicitor's fee note to taxation. The Court of Appeal was bound, as this Court is bound, by the decision of the Supreme Court in Gallagher. Even so, Dorgan is of interest in offering a recent analysis of applicable principle.

15 Notably, *Dorgan* was a case in which there had been a payment of a bill by the client (albeit in the somewhat 'cart before horse', though nonetheless permissible, manner of a deduction from client monies held by the solicitor in her client account and the refund of the surplus in the account to the client along with the relevant fee note). Thus it was a case in which the 12-month time limit applicable under s.6 of the Act of 1849 applied. In the present case, by contrast, there has been no payment whatsoever by Mr Joyce. So there is no question of the 12-month limit applicable under s.6 being applicable in this case. The present case is therefore a case in which it is potentially open to the court to exercise the statutory discretion afforded it under s.2 or the inherent jurisdiction that it separately enjoys.

16 The precepts identified in *Dorgan*, and of relevance to the within proceedings, are as follows:

[1] McCarthy J.'s summary of applicable principle in *Gallagher*, as referred to above, was (as it had to be) followed. (para.38)

[2]Irvine J., in Dorgan, noted that such "*special circumstances*" as are referred to in s.6, include but are not limited to payment of a bill of costs without client consent, payment following undue pressure on a client, and payment subject to a express reservation as to later taxation.(para.39).

[3](following McCarthy J. in *Gallagher*), it is well established law that the court has always retained its inherent jurisdiction to order taxation. This power derives from the court's inherent jurisdiction to supervise its officers, including

solicitors, all of whom are officers of the court.(para.40).

[4](following McCarthy J. in *Gallagher*), such a jurisdiction runs parallel to the statutory jurisdiction existing under 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.

[5]What is required of a solicitor in terms of the preparation of a bill of costs has become more demanding since the enactment of the Solicitors (Amendment) Act 1994.(para.44).

[6]The client protections afforded by O.99, r.25 of the Rules of the Superior Courts 1986, as amended, are subservient to statute. (para.46).

[7]When it comes to s.2 of the Act of 1849, time runs against a client once a bill of costs, in compliance with statutory requirements, is delivered.(para.48).

[8] Any judge considering invoking the court's inherent jurisdiction first has to have regard to the extent of any client delay and the reasons therefor.(para.74).

[9]The following factors sound against the exercise by the court of its inherent jurisdiction:

(a) that a fee note was not disputed when delivered;

(b) that no complaint has been made about deduction of client fees from judgment sums paid;

(c) that there has been no disability during the period of delay;

(d) that upon transfer of the file to a solicitor, no query regarding the then size of a bill has been raised;

(e) whether the solicitor and client bill when considered separate from fees, outlays, disbursements and expenses is blatantly or obviously excessive, having regard to the s.68 letter sent (i.e. the initial letter outlining the fees payable). (para.74).

Part 5

Application of Principle

A. Statutory Discretion.

17 Here, the fee note in issue is a fee note of 12th August, 2014. The summary summons in relation to same issued on 24th June, 2015, well outside the one-month timeframe contemplated by the Act of 1849.

18 Mr Joyce claims that he was never told that he could demand and obtain taxation. This, with all respect, is not so. At the outset of his relationship with the plaintiff solicitors he was sent a Law Society booklet entitled "*Information in relation to Legal Charges*" which does mention the potential for matters to be sent to taxation.

19 Mr Joyce has never paid a cent of the fee note that is owing by him and has queried what is being sought of him from the outset. The court has therefore to decide whether there are *"special circumstances"* presenting that justify a referral to taxation.

20 This is not a case to which s.6 applies; there has not been payment of the bill.

B. "Special Circumstances"?

21 The special circumstances which the court considers to present in this case concern the scale of the liabilities to which Mr Joyce stands exposed. They appear remarkably high. How can it be that a man engaged in an employment law dispute would end up owing €135k to his lawyers – an amount that is doubtless a multiple of his gross annual salary? How can it be that at a charge-out rate of €350 an hour, a client is still expected to pay extra for, to borrow from the phraseology of the applicant solicitors "*the expertise required*"? How can it be that a single consultation with Senior Counsel costs €7.5k? How can it be that a firm of solicitors would allow a client to run up €41k of fees with junior counsel only to see Senior Counsel come on board and say that an internal resolution mechanism, not the courts are the place for the resolution of the dispute arising? Maybe there is some good explanation for how the fees rose to the level they did – though it would want to be good to justify liabilities of the scale of €135k. As it is, no explanation leaps from the facts before the court. What jumps instead from the pages of the pleadings is that the fee note and fees presenting are patently a matter for taxation.

C. Inherent Jurisdiction

22 For the reasons stated above, the court is satisfied to exercise its statutory discretion in favour of referring the fee note and fees in this case to taxation. However, even if the court did not stand possessed of its statutory discretion, it would have exercised its inherent jurisdiction in like manner. If one looks to the constraints on the exercise of the statutory discretion identified by Irvine J. in Dorgan, Mr Joyce has queried the fee note from the outset. In fairness to the firm of solicitors, the fee note, so far as it relates to the solicitor and client bill roughly accords with the fee rate quoted in the initial fee letter. However, this Court does not consider, nor does it understand Irvine J. to suggest, that charging an advised fee rate is an assured avenue to summary judgment when the client taken on at such a rate is known to owe many thousands of euro at another firm, does not have a salary that will enable him to meet fees of many more thousands of euro and (on the applicant solicitors' own account) is unlikely to recover, via a costs order, some or all of the resultant professional fees for which he becomes liable.

Part 6

Granting Summary Judgment

23 The law that binds the court in deciding whether to grant summary judgment in an application such as that now presenting can be

shortly stated. As the late Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

24 In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised the relevant principles that apply when a court approaches the issue of whether to grant summary judgment:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
>
> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

25 It is clear that there is a real and legitimate dispute on valid grounds concerning the liabilities that have arisen between Mr Joyce and his solicitor and, via his solicitor, with other professionals.It is not clear that Mr Joyce has no defence to the sums now sought of him. Bringing that "*discernible caution"* to matters to which McKechnie J. refers in Harrisrange, it appears to the court that this application is not one suitable for summary judgment.

Part 6

Conclusion

26 How a client of moderate means engaged in what appears to be a not untypical employment dispute could have run up, ostensibly, a €55k bill with his solicitors, a €41k bill with junior counsel, a €21k bill with Senior Counsel, and a €5k bill with a court stenographeris perplexing. It was not even as if this was a case taken on in the anticipation that Mr Joyce had a complaint that would see an employer with 'deep pockets' discharge much or all of the costs arising. From the very outset, the applicant firm of solicitors were writing to Mr Joyce indicating that he should not hold out high hopes in this regard. Thus, in a letter of 26th August, 2009, they wrote:

> *"In employment disputes such as this, the costs rule often has little impact as there are no legislative provisions for successful Claimants in employment claims to be awarded their legal costs; either where the dispute remains an internal company matter which is the situation for the moment and/or it falls to be dealt with under the remit of one of the several Industrial Relations venues and in due course that it likely to be the Employment Appeals Tribunal, (EAT) and under the legislation that established the EAT, it is not permitted to award costs to either side save in exceptional circumstances. So, in the EAT the Claimant bear all their own costs whether or not they are ultimately successful in any claim they take. Equally (and to that extent unlike other civil claims) there is no exposure to bear the Respondent's costs where Claimants fail in their EAT litigation".*

27 Of course, Mr Joyce is not without fault. At a time when he went to the applicant solicitors he already owed many thousands of euro to another law firm. Eyes wide open, he engaged a solicitor at a fee rate of €350 an hour, and it has only been late in the day that he appears to have balked at the phenomenal cost of all that ensued. He must therefore brace himself for an end-result in which, even after taxation, he will be required to pay over what seems likely to be many thousands of euro for the services with which he has been provided and which he has freely sought as a competent adult. But the process of taxation may see some mitigation of the enormous liability to which he now stands exposed.

28 For all of the reasons stated in this judgment, the court does not consider that this is a case for summary judgment. It declines to grant the summary judgment sought and shall exercise its statutory discretion under the Act of 1849 (and were that discretion not available to it, the court would instead have exercised its inherent jurisdiction) to refer the fee note and fees at issue in this application to taxation.