Neutral Citation Number: [2008] IEHC 203

THE HIGH COURT

2007 No. 666 S

BETWEEN

PHILIP CLARKE PRACTISING UNDER THE STYLE AND TITLE OF LEDWIDGE SOLICITORS

PLAINTIFF

AND
GERALD STEVENS

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 19th day of June, 2008

1. Introduction
1.1 The plaintiff ("Mr. Clarke") is a solicitor. The defendant ("Dr. Stevens") is a retired physician who was formerly a client of Mr. Clarke. In these proceedings Mr. Clarke sues Dr. Stevens for fees which are said to be due principally to counsel but also, to a limited extent, to himself arising out of successful judicial review proceedings brought on behalf of Dr. Stevens. In those proceedings certain convictions under the Firearms Acts made in July of 1999 in the District Court against Dr. Stevens were quashed. It will be necessary to refer in more detail to the circumstances surrounding the representation of Dr. Stevens in those proceedings in due course. However, for present purposes it is sufficient to note that as a result of his success in those proceedings Dr. Stevens was awarded the costs of the relevant proceedings against the State and has, in somewhat unusual circumstances, recovered substantial sums from the State as a result of that costs order.

1.2 The application currently before me and to which this judgment is directed is an application on behalf of Mr. Clarke for summary judgment in these proceedings. In substance, therefore, the issue which I have to determine is as to whether Dr. Stevens has shown the sort of arguable defence required by the jurisprudence in this area so as to be given leave to defend. In those circumstances it is appropriate to refer, firstly, to the procedural history of this case.

2. Procedural History
2.1 These proceedings were commenced by summary summons issued on 23rd April, 2007, claiming a total of €51,534.27 being the sum described as "due and owing by (Dr. Stevens) to (Mr. Clarke) in respect of fees for legal services, VAT and outlays and for work done and services…" The sums are said to be as set out in a bill of costs served on Dr. Stevens on 21st March, 2007. There has been a variation in the sum now claimed. In substance, and in broad terms, the amounts now asserted to be due are the same as those set out in the original bill of costs to which I have referred and in the special endorsement of claim on the original summary summons but same are subject to the fact that a reduction is agreed to be properly made in respect of the sums which were due to counsel. I will refer to this further in due course. It is also appropriate to note that Mr. Clarke further claimed interest pursuant to statute.

2.2 In circumstances where it appeared that Dr. Stevens was seeking to obtain payment of the costs ordered in his favour arising out of the judicial review proceedings to which I have referred, directly to himself, Mr. Clarke sought to obtain a Mareva type injunction which would have the effect of preventing the payment of those costs to Dr. Stevens pending the resolution of these proceedings. As a result of that application I made an order which, in substance, permitted the costs concerned to be paid to Dr. Stevens provided that an appropriate proportion of the relevant costs was paid into a bank account and remained frozen there by order of the court pending these proceedings. However, nothing now turns on those facts.

2.3 In the ordinary way a motion for summary judgment was brought before the Master of this Court by Mr. Clarke. Judgment was resisted by Dr. Stevens and in the circumstances the Master considered it appropriate to put the case into the judges list to determine whether Dr. Stevens had established an arguable defence sufficient to justify giving him leave to defend. As the substantive Mareva injunction application had been heard by me, the Master directed that the motion for summary judgment should also be listed before me.

2.4 It should be noted that at the hearing before me Dr. Stevens represented himself. Various difficulties were encountered when the case first was heard which it is unnecessary to set out here. Suffice it to say that I considered it appropriate to adjourn further hearing and to allow the parties to put in further affidavits. As I have already indicated this judgment is, therefore, directed to the question of whether, on the one hand, Mr. Clarke is entitled to judgment or, on the other hand, Dr. Stevens should be given leave to defend. Before going on to the basis upon which Dr. Stevens claims to be entitled to defend these proceedings it is appropriate, by way of background, to deal briefly with the judicial review proceedings as it is the costs of those proceedings that are at the heart of this case.

3. The Judicial Review Proceedings
3.1 The relevant proceedings bore High Court record No. 1999 No. 387 J.R. Dr. Stevens was applicant and Judge Michael Connellan and the Director of Public Prosecutions were respondents. Those proceedings are the subject of a final order made on 21st December, 2001, by McKechnie J., in which orders of certiorari were made quashing various orders previously made by the learned District Judge against Dr. Stevens in proceedings brought under the Firearms Acts by the Director of Public Prosecutions. The order of McKechnie J. of 21st December, 2001, also awarded Dr. Stevens the costs of the proceedings (including the costs of written submissions and reserved costs) when taxed and ascertained.

3.2 It is clear that Dr. Stevens was initially represented by Frank MacGabhann, Solicitor, up and until January, 2002, at which time Mr. MacGabhann ceased to practise as a private solicitor and took up a position in the State sector. Therefore, up to and including the final order of McKechnie J. to which I have referred, Mr. MacGabhann was the solicitor acting on behalf of Dr. Stevens. Senior and junior counsel had been instructed in the proceedings and, as will be seen when looking at the content of the claim now made, the bulk of the sums now claimed to be due are in respect of the fees of those counsel. It is also clear that, on the retirement of Mr. MacGabhann from private practise, Mr. Clarke took over certain files of Mr. MacGabhann including the file in respect of the judicial review proceedings to which I have referred. On 6th March, 2002, a notice of change of solicitor was filed thus making Mr. Clarke the solicitor on record for Dr. Stevens. In substance, and on the evidence, it is clear that as of the time of Mr. Clarke taking over the file there still remained a possibility of the State defendants appealing the decision of McKechnie J. and, in any event, the question of the ascertainment and recovery of the costs which had been awarded to Dr. Stevens also arose. While the judicial review proceedings were completed, so far as this Court was concerned, there was, therefore, still work to be done.

3.3 It also appears to be common case that, arising out of differences between Mr. Clarke and Dr. Stevens unconnected with these proceedings or indeed the judicial review proceedings, Dr. Stevens withdrew Mr. Clarke's retainer on 14th October, 2004, and thereafter was, in one manner or another, represented by both Ken Smyth & Company and, thereafter, Messrs. Hackett Solicitors.

There does not, however, appear to be any evidence that a notice of change of solicitor was filed so that it would seem that Mr. Clarke remained solicitor on record at all material times even though his retainer was withdrawn. What followed in relation to the taxation of the costs awarded to Dr. Stevens in the judicial review proceedings is the subject of some controversy and undoubtedly discloses somewhat unusual facts and circumstances. It is, of course, the case that on a hearing such as that with which I am involved here, I cannot resolve any disputed questions of fact and must take Dr. Stevens case at its highest point. On that basis it is appropriate to turn, briefly, to the jurisprudence concerning leave to defend.

4. Leave to Defend

4.1 It is clear that in deciding whether to grant summary judgment to a plaintiff and to refuse leave to defend, a court must look at the whole situation to see whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence. This test is as stated by Murphy J. in the Supreme Court in *First Commercial Bank plc v. Anglin* [1996] 1 I.R. 75, adopting the principle laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep 21 and reaffirmed in *National Westminster Bank plc v. Daniel* [1993] 1 W.L.R. 1453. In *First Commercial Bank* Murphy J. refers to two questions identified by Glidewell L.J. in *National Westminster Bank*, which should be posed in determining whether leave to defend should be given. Glidewell L.J. expressed the matter as follows at p.1457:-

> *"I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible,' amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."*

4.2 These principles have been applied in a number of recent decisions including *ACC Bank plc v. Malocco* [2000] 3 I.R. 191, where Laffoy J. reiterated that in deciding whether to grant summary judgment, the court should look at the whole situation, including the cogency of the evidence adduced by the parties, to see whether there was a fair or reasonable probability of a real or *bona fide* defence. Laffoy J. concluded that in the case before her, having regard to the course of the summary summons proceedings and the totality of the evidence adduced by the plaintiff, the probability of a real or *bona fide* defence could not be excluded and refused to grant summary judgment but made an order adjourning the case for plenary hearing.

4.3 The credibility of the defence as an essential element in granting leave to defend was outlined in *Aer Rianta cpt v. Ryanair Ltd* (High Court, Kelly J, 5 December 2002) where, at page 12, in refusing leave to defend, Kelly J., stated that:

> *"a mere assertion in an affidavit of a given situation which is said to be the basis of a defence does not of itself constitute a ground for granting leave to defend. I have to look at the whole situation to see whether the Defendant has satisfied me that there is a fair or reasonable probability of it having a real or bona fide defence. I have to ask "is what the Defendant says credible"? In my view it is not."*

4.4 Against that background it is necessary to address the defence asserted by Dr. Stevens.

5. Dr. Stevens' Defence

5.1 Dr. Stevens does not contest but that he received legal services through Mr. MacGabhann from the counsel concerned and, at least for a brief period, from Mr. Clarke in relation to those proceedings after same had completed in this Court and when an appeal was still alive and the question of the recovery of costs needed to be attended to. Nor, it should be said, is there any complaint whatsoever about the manner in which the judicial review proceedings were conducted whether by solicitor or counsel. On that basis it is accepted by Dr. Stevens that some money is owing to both counsel and, perhaps to a lesser extent, Mr. Clarke directly. His complaint concerns the amount of the claim. I turn first to that aspect of the claim which is concerned with counsels fees.

5.2 In that context certain facts seem to be clear and undisputed. At an earlier stage in the process each of the counsel had submitted a fee note. I set out the amounts of the relevant fee notes in a table hereunder:-

TABLE A

Counsel	Fee Notes of 18 April 2003
Senior Counsel	€ 13,900.00 + VAT being €16,819.00
Junior Counsel	€ 10,377.18 + VAT being €12,556.39
Written Submissions	€ 1,500.00 + VAT being €1,815.00

5.3 However, prior to the time when the taxation of costs came before the Taxing Master, counsel had submitted new and increased fee notes in the following terms as set out in this table:-

TABLE B

Counsel	Fee Notes of 21 March 2007, inclusive of VAT
Senior Counsel	€ 22, 869.00
Junior Counsel	€ 19,662.50
Written Submissions	€ 4,537.50

5.4 While there is some controversy about precisely what happened during the taxation hearing before the Taxing Master, it is clear that the Taxing Master made a decision that the following fees in relation to counsel were to be allowed. In that regard there is clear evidence from Mr. Fitzpatrick the Cost Accountant who appeared before the Taxing Master for the State, which is not disputed. Therefore, there is no doubt but that the following fees were, in fact, allowed on a party on party basis by the Taxing Master. I set them out in the following table:

TABLE C

Counsel	Fee as determined by Taxing Master on 30 April 2007, inclusive of VAT
Senior Counsel	€ 19,541.50
Junior Counsel	€ 15,326.67
Written Submissions	€ 3,630.00

5.5 As is clear from the three tables which I have set out, the amounts ultimately allowed on party and party taxation by the Taxing Master exceeded the original fee notes submitted by counsel, but were less than the subsequent fee notes which were before the Taxing Master on the occasion of the taxation.

5.6 While not, directly, relevant to these proceedings it should also be noted that the fees claimed in respect of Mr. MacGabhann for the judicial review proceedings had undergone a similar evolution with €47,200 being claimed in an initial fee note, €91,221.50 being subsequently claimed and the Taxing Master allowing €60,500.

5.7 Dr. Stevens now maintains that the second set of fee notes in respect of both Mr. MacGabhann and counsel were improper by virtue of the fact that there were already in existence fee notes for the same services at a significantly lower rate. Secondly, Dr. Stevens argues that the process before the Taxing Master was tainted by the fact that the Taxing Master was not informed of the previous, and lower, fee notes which had been submitted by the relevant parties.

5.8 No claim is made in these proceedings relating to Mr. MacGabhann's fees. It would, in those circumstances, not be appropriate to go into any matters connected with those fees in any detail. Likewise the fees claimed by Mr. Clarke on his own behalf in these proceedings were not the subject of the taxation process. The reason for this is obvious. Mr. Clarke was only instructed after the proceedings before McKechnie J. had been concluded and costs had been awarded. Therefore whatever sums may be due by Dr. Stevens to Mr. Clarke were not encompassed in the costs order because they post dated the time at which the cost order was made.

5.9 It is clear, of course, that what is now claimed by Mr. Clarke involves, in the main, an attempt to recover the fees of counsel who had undoubtedly rendered legal services to Dr. Stevens in his successful litigation and in circumstances where Mr. Clarke had taken over the file from the solicitor who had instructed those counsel on the basis of undertaking an obligation to recover those fees for the benefit of those counsel. It should be noted that Dr. Stevens had made a relatively small payment on account to counsel prior to the judicial review proceedings commencing, but the vast bulk of the fees which would, in the ordinary way, be due to those counsel were outstanding as of the date of completion of the proceedings and, in practice, it would appear that the likely source from which such fees were always going to be recovered was the payment of the costs awarded by McKechnie J. against the State.

5.10 It is also important to note that the fees now sought to be recovered on behalf of counsel are those as determined by the Taxing Master on the party and party taxation. It is not sought to recover on behalf of counsel the additional fees which were set out in the second set of fee notes to the extent that those fees were not allowed on taxation. It is for that reason that it is accepted that the claim can properly be reduced by the amounts not allowed on taxation. It is also clear that subject to some minor matters of calculation, proper credit has been given for the sums paid on account to counsel. Therefore, in substance, all that is claimed on behalf of counsel in these proceedings are the full sums allowed by the Taxing Master on a party and party basis less the amounts paid to counsel on account.

5.11 On Dr. Stevens case, it is said that arising out of his concern with the way in which the taxation had progressed and, in particular, the fact that increased fee notes had been submitted as part of the taxation process without, he says, drawing the attention of the Taxing Master to the fact that there were earlier and lower fee notes, he was not satisfied to recover the full sums awarded by the Taxing Master even though he was, obviously, legally entitled so to do. In those circumstances it appears, at least on the evidence currently available and on the basis of Dr. Stevens case, that what happened was that Dr. Stevens entered into an agreement with the Chief State Solicitors office to the effect that he would recover in respect of counsel the sums as originally set out in the first fee notes rather than the sums allowed by the Taxing Master. It appears to be common case that those sums have now been paid over to Dr. Stevens and are retained in the bank account to which I have referred. Precisely what the legal status of the balance of the fees allowed by the Taxing Master is, is by no means clear.

5.12 In substance, as I understand it, Dr. Stevens asserts that he is entitled to defend these proceedings, insofar as they relate to the claim in relation to counsel's fees, on the basis of what he asserts to be an improper process before the Taxing Master and in particular the fact that the fees sought to be recovered in respect of counsel exceed the sums originally specified in the counsels' fee notes set out in table A above. I now turn to the balance of the claim.

5.13 The position in respect of the fees sought to be recovered in relation to Mr. Clarke is very different. As I pointed out the services rendered directly by Mr. Clarke did not involve the substantive judicial review proceedings which were ultimately determined by McKechnie J. but rather involved the follow up to those proceedings which were not the subject of the costs order. Those fees did not, therefore, form any part of the taxation of costs process which was, of course, only directed to those costs which had been incurred up to and including the order of McKechnie J. to which I have referred. In the ordinary way Mr. Clarke served a bill of costs on Dr. Stevens and included with that bill of costs an appropriate notification to the effect that Dr. Stevens could, if he wished, refer the bill of costs to the Taxing Master so that same could be taxed on a solicitor and own client basis. Dr. Stevens did not take up that option.

5.14 At the hearing before me Dr. Stevens made great play of the fact that he had terminated Mr. Clarke's retainer in October, 2004, and that, therefore, any services rendered by Mr. Clarke subsequent to that date could not properly be charged for. However, when Mr. Clarke's bill of costs was examined it was clear that no item of costs was sought to be recovered in respect of services rendered later than 2nd July, 2003. It is clear, therefore, that all of the services rendered were during a period prior to the termination of Mr. Clarke's retainer. In those circumstances it is difficult to see any basis for contesting Mr. Clarke's claim for those fees other than the possibility that the fees charged for the services rendered might be regarded as excessive. Of course it does have to be noted that the most appropriate way of dealing with questions concerning the level of fees charged is by getting the Taxing Master (who is after all the expert in this area) to make a decision. No real explanation was given by Dr. Stevens as to why he did not refer the matter to taxation. His stated reason (being his complaint that Mr. Clarke was seeking to charge him for work done after Mr. Clarke's retainer had been terminated), does not stand up to scrutiny and, indeed, could not have been made by Dr. Stevens if he had even taken the elementary trouble to read the bill of costs from which it is abundantly clear that the last service in respect of which fees were sought to be recovered was rendered in July, 2003. It does not require any special legal or costs expertise to glean that fact from the bill of costs. Anyone who had ever received an invoice for any service and was capable of reading a simple invoice would be able to decipher that fact from the bill of costs in this case. While there might, therefore, be other circumstances where it would be difficult to place blame on a client for not having interpreted a bill of costs in a proper way, this does not seem to me to be such a case. The bill is clear. It ends in July, 2003. If Dr. Stevens had taken the opportunity to read the bill he could not have made the assertions which he sought to make with some vigour in the proceedings before me to the effect that Mr. Clarke was seeking to charge for services rendered after his retainer was terminated. The only issue, therefore, which arises is as to what it is appropriate for me to do in circumstances where Dr. Stevens continues to complain about the amount of the costs sought to be charged by Mr. Clarke.

5.15 Finally, there is also a very small amount (€113.70) claimed in respect of outlays. I did not understand Dr. Stevens to put forward any particular basis upon which that sum should not be allowed.

5.16 As will have been seen from the above the basis of the defence sought to be put forward differs significantly as and between that portion of claim in respect of the costs which are sought to be recovered on behalf of counsel on the one hand and those sought by Mr. Clarke on his own behalf on the other hand. I, therefore, propose dealing with each of those items separately.

6. Counsels Fees

6.1 It is necessary to start by considering what seems to be the undoubted fact that counsel initially submitted fee notes at one level and subsequently submitted fees at a higher level. That practise, and it is fair to say that it is a practise which has been followed in at least some cases in the past, does need to be seen against the background of the fact that in a great many cases counsel accept instructions on what is sometimes called the "no foal no fee" basis. In other words counsel accept that their client will have no meaningful obligation to pay counsel but hope to be able to be paid out of costs which might be recovered in the event that the proceedings are successful and a costs order is obtained against a substantial entity such as, in this case, relevant state authorities. In the absence of legal aid in a great many areas of litigation the only means by which parties who do not have the resources to fund such litigation can hope to obtain the services of leading counsel is on such a basis. In some cases, and this is one of them, the client may make an initial contribution towards costs on the understanding that no further sums will be sought from the client unless the proceedings are successful. In substance the position in such cases is the same. Apart from the initial contribution, counsel have to depend on the successful conclusion of proceedings and a costs order against a substantial entity for proper payment.

6.2 The amount of counsels fees needs to be seen against that background. In substance, in such cases, an agreement between counsel and his own client (through the relevant instructing solicitor) as to the amount of counsels' fees is, in substance, whatever about theory, entirely irrelevant. The client is not going to pay those fees one way or the other. The person who will decide the amount of fees which will ultimately be paid to counsel in the event of the relevant proceedings being successfully concluded is either the party against whom costs are awarded (in the event that agreement can be reached) or the Taxing Master (in the absence of such agreement). It is inevitable, in those circumstances, that there will be a process of negotiation or, indeed, arbitration (before the Taxing Master) before the amount of fees to be ultimately paid to counsel can be determined. In practise those negotiations or that arbitration is unlikely to involve, in any significant way, the client who will not ultimately be paying the fees one way or the other. The only circumstances in which the clients position is materially affected as a matter of substance is if there is any practical reality to the possibility that the client might be asked to make up any shortfall between the fees sought by counsel and the amounts actually allowed by the Taxing Master.

6.3 The fact that a practice has existed in the past, whereby different fee notes for different sums in respect of the same service may have been issued, needs to be seen against the background to which I have just referred. Fee notes can properly be seen, when they arise in those circumstances, as part of the negotiation or arbitration process in respect of which it is likely that there will be some reduction imposed either by negotiation or by the findings of the Taxing Master. That is not to say that counsel have a license to seek to charge what they like or to issue fee notes for wholly unreasonable fees in respect of the services rendered. At the end of the day it is the obligation of any counsel only to seek reasonable payment for the service which that counsel has rendered. However, what is a reasonable payment may be the subject of some legitimate debate and, no more than any other party about to enter into negotiations and/or an arbitration process, counsel are entitled, provided that they act reasonably, to put forward their best case as to the amount of fees to which they might be entitled in the knowledge that there is likely to be some bargaining or reduction by the Taxing Master.

6.4 Secondly, the question of the delay implicit in any such process is a further background factor that needs to be taken into account. It is frequently the case that unless an early agreement with the party against whom costs has been awarded can be achieved, counsel may well have to wait a significant period of time before costs are finally determined and the relevant sums paid. The taxation process in this case occurred in the middle of 2006. The High Court proceedings to which the fees concerned related were commenced in October, 1999, with the substantive hearing (which would have generated the greatest proportion of the costs) occurring in February, 2001. The fees of counsel were, therefore, outstanding for over five years when the taxation came on. The practise of counsel, on occasion, issuing new and increased fee notes needs to be seen against that background also.

6.5 However, it does seem to me that insofar as there may have been a practise amongst counsel in issuing fee notes for different sums against a background both of fee notes being a negotiating position in "no foal no fee" cases and against the very significant delays which can, in some cases, be encountered before counsel receives any payment, such a practise is no longer consistent with an appropriate and transparent way in which the costs of counsel should be dealt with. I should emphasise that there is not, in my view, anything wrong with counsel "putting their best foot forward" and nominating a fee which might go into a negotiation or taxation process which is at or towards the upper end of the range that might be considered reasonable on the understanding that there is likely to be some slippage whether by negotiation or deduction by the Taxing Master. Likewise there is nothing wrong with counsel seeking to protect themselves, in a "no foal no fee" case, against the potentiality of there being a significant delay in payment by imposing an appropriate charge as to interest or some other mechanism (agreed in advance) which would reflect that delay in an appropriate way. However, it seems to me that the undoubted problems that stem from the fact that the commercial substance of the fees to be recovered by counsel in "no foal no fee" cases can only be negotiated *ex post facto* (that is after there has been an order for costs) with the party against whom a cost order has been made and the fact that there may be a significant delay encountered in that process, should no longer properly be met by what might appear to be a somewhat arbitrary issuance of a new fee note increased on a basis which is not apparent.

6.6 In those circumstances I am satisfied that Dr. Stevens has made out an arguable case that any fees above and beyond those specified in the original fee notes submitted by counsel (i.e. those set out in table A above) are not properly due. However, I can see no basis for Dr. Stevens's contention that the fees as set out in Table A are not properly due. Dr. Stevens has, after all, actually recovered those sums from the State authorities as costs in the judicial review proceedings and by reference to the fact that those sums were reasonably due in respect of counsels fees. Against that background it is not, in my view, open to Dr. Stevens to be heard to say that fees of that level are unreasonable. Therefore, as he does not argue that the services rendered were in any way deficient, I can see no basis for allowing Dr. Stevens to defend that aspect of the claim. I, therefore, propose, under this heading, to give judgment in favour of Mr. Clarke in respect of those sums which are set out at Table A less credit for the payment on account made to counsel in the sum of €7,618.43 (IR£6,000) leaving a balance of €23,571.96 (€31,190.39 - €7,618.43). As the services by reference to which those fees became due were all rendered prior to 1st March, 2002, I also propose to allow interest on that sum at the relevant Courts Act rate for the time being in force from 1st March, 2002, to date.

6.7 I propose to consider what to do with the balance of the claim in respect of counsels fees which, in substance, amounts to the difference between that allowed on taxation on a party and party basis (being the sums claimed) and the sums initially included by counsel in their fee notes (being the sums in respect of which I have decided to give judgment), in conjunction with the fees due to Mr. Clarke personally.

7. Solicitors Fees
7.1 I have already emphasised that the proper way for Dr. Stevens to have dealt with Mr. Clarke's fees was to have referred same to taxation in circumstances where his only legitimate concern was as to the amount of the fees being charged. He did not do this. I have also indicated the reasons why any other basis put forward by Dr. Stevens for challenging Mr. Clarke's fees is unsustainable. The only remaining question is as to whether I should now exercise the discretion, which counsel on behalf of Mr. Clarke quite properly conceded I had, to nonetheless now refer the matter to taxation.

7.2 In all the circumstances I feel that that is the appropriate course of action to adopt. The only issue that remains for decision is as to the appropriate amount that Mr. Clarke is entitled to charge for the services which he undoubtedly rendered. The official with expertise to decide whether what is claimed is reasonable or not is the Taxing Master and it is better that that job be done by the Taxing Master rather than by the court. However I can see no basis on which the fees due to Mr. Clarke could conceivably fall below €4,000. In addition it seems to me that the question of whether it would be appropriate to allow that the balance of the sums claimed in respect of counsel should also be referred to the Taxing Master who can then decide the matter on a solicitor and own client basis. It is not for me to decide what, if any, account the Taxing Master should give to the earlier fee notes of counsel in the context of a solicitor and own client taxation.

7.3 I, therefore, propose referring the balance of Mr. Clarke's claim to taxation. However, there will now be judgment for €23,571.96 in respect of counsels fees on the basis which I have already indicated together with interest. Likewise, as I have indicate, it seems to me that there is undoubtedly some sums due to Mr. Clarke personally and I propose giving judgment for €4,000.00 plus VAT totalling €4,840.00 together with interest from 31st July, 2003 to date in respect of that aspect of the claim. Mr. Clarke will be entitled to recover whatever additional sums (if any) are ordered on taxation whether in respect of counsel or himself. The minor sum in respect of outlay of €113.70 must also be the subject of judgment at this stage. The total judgment at this stage is, therefore, for €28,421.66 with interest on €23,571.96 from 1st March, 2002 to date and interest on the balance from 31st July, 2003. I now turn to the costs of these proceedings.

8. Costs
8.1 It is clear, firstly, that Mr. Clarke has succeeded in respect of a very large proportion of the claim. Secondly the only reason why a significant portion of the balance is now going to taxation is because Dr. Stevens failed to take the opportunity to have it referred to taxation in the first place. In those circumstances it seems to me that it is appropriate that all of the costs of the proceedings to date be awarded in favour of Mr. Clarke and against Dr. Stevens.

8.2 If Dr. Stevens had taken the option given to him in writing by Mr. Clarke (as it was Mr. Clarke's duty to so offer) of taxation and if Dr. Stevens had taken the reasonable position (in the light of the findings which I have made in this judgment) of offering to pay at least those aspects of counsels fees which could not be in controversy (i.e. those amounts which were included in the initial fee notes) then the situation might be different. However, these protracted and difficult proceedings were, to a very large extent, necessitated by the fact that Dr. Stevens did not take those reasonable positions and the costs which flow from his failure to take those positions must, in my view, be borne by him.