Neutral Citation Number: [2007] IEHC 61

THE HIGH COURT

[2001 No. 16829P]

BETWEEN

MARIE MAHONY

PLAINTIFF

AND

KCR HEATING SUPPLIES

DEFENDANT

Judgment of Mr. Justice Charleton delivered on the 22nd day of February, 2007

1. This is the defendant's motion to review the taxation of the plaintiff's costs arising out of a determination of the Taxing Master on 20th March, 2006. There is only one item which is in contention between the parties and that is the solicitor's instruction fee in the matter in the sum of €35,000. The case was settled for €50,000.

Background

2. I recite the facts which follow in a guarded way and in the context that the controversy between the plaintiff and the defendant was settled. The plaintiff worked for the defendant for about ten years, from 1991. She left and then initiated proceedings claiming personal injury due to the manner in which she had been treated by the defendant. This involved allegations of bullying which were particularised from the point of view of demeaning treatment both of a general kind and by reason of sexual innuendo. The plaintiff was the subject of seven different medical reports; two from her family doctor, three from psychiatrists and two from the practitioners in the Anti-bullying Research and Resource Centre at Trinity College, Dublin. It is clear from the papers submitted that her solicitor approached this case in a professional way and discharged her duty to the plaintiff with a high level of professional skill. In the result, the case was settled for €50,000, together with costs to be taxed in default of agreement. There is no issue as to the bulk of the items. There is no doubt that these were dealt with properly by the Taxing Master. There is particular focus in relation to one aspect of his procedures and an issue that relates to the solicitor's instruction fee.

Procedure

3. As is normal, the plaintiff submitted a bill of costs and the Taxing Master made a preliminary allowance. An objection was then lodged to the taxation of costs and submissions were then made by costs drawers on behalf of the plaintiff and the defendant. There is no doubt that the Taxing Master would have found these submissions helpful as they are expertly prepared and well set out. An oral hearing followed in respect of which a transcript, dated 11th November, 2005, has been made available.

4. In essence, on behalf of the defendant it was urged on the Taxing Master that the solicitor's €35,000 instruction fee could not be justified and that any argument that might be made in support thereof would require a diligent perusal by him of all the papers generated in the case in order that he might assess the work done on the plaintiff's behalf. Mr. Cannon, on behalf of the defendant, urged the following on the Taxing Master:-

> "Now, Master, for Mr. Sludds to suggest that I am relying solely on the comparable cases is not the situation. Actually, the opposite applies here. Mr. Sludds still has not produced sufficient evidence to show the extra work that would command an instruction fee for €50,000 – a personal injury claim which is a harassment claim, an instruction fee of €35,000. Without proper proof and evidence of work done and time spent, I cannot see how a fee of that level can be maintained."

5. Mr. Sludds fairly suggested on behalf of the plaintiff that he would have no difficulty in furnishing his full file if the Master wished to have regard to it. The Taxing Master suggested that a submission might be made on a later date. The parties exchanged letters: the defendant, on the one hand, suggesting that the matter should again go before the Taxing Master with a full file, and the plaintiff refusing same. That letter, as to its relevant part, read:-

> "Throughout this case, Ms. Mahony remained extremely upset about the circumstances and nature of her treatment by the defendants whilst in their employment. On virtually each occasion on which he met with her or discussed the matter on the phone, she became extremely distressed and, you will recall from the medical evidence, there was an element of her re-experiencing the abuse which she suffered, when the matter was raised with her again. In fact, it was very difficult to persuade her to see the necessary medical practitioners in the first instance as she was so reluctant to visit the instances of abuse, which continued to be very distressing for her. In order to disclose the file to another party it will be necessary for us to contact Ms. Mahony in relation to these proceedings again to obtain her consent to the file being released. We have no doubt that in doing so we would cause distress to our client. It is now 20 months since this matter was settled and the date which this matter was listed for hearing i.e. 20th July, 2004. We are concerned that to raise this matter now, when presumably our client has managed to effectively put the matter behind her, would be very disadvantageous to her. We believe that the pleadings and disclosed reports should be of assistance."

6. In the result, there was no further hearing. The Taxing Master gave a reasoned ruling on this issue on the 20th day of March, 2006. After a recital of case law and comparable precedents, he quoted the above letter and commented on it by stating:-

> "It is evident from the foregoing that the solicitor for the costs had quite a difficult and complicated case to manage and bring to fruition. The difficulties in this case have also been highlighted by the plaintiff's solicitors in a letter of 3rd March from Mr. John Sludds of Messrs. Behan and Associates, Legal Cost Accountants. The letter arose in the context of the disclosure of the solicitor's file to assist me in the assessment of costs herein.

7. It is evident on the plain wording of the foregoing that the Taxing Master regarded the letter explaining why the plaintiff's solicitor would not go back to her client to ask for the full file to be disclosed to the defendant as evidence that the case was difficult and complicated and therefore involved considerable work.

Law

8. Section 27 of the Courts and Court Officers Act, 1995, deals with the taxation of costs. Section 27(3) provides:-

> "(3) The High Court may review a decision of a Taxing Master of the High Court and the Circuit Court may review a decision of a County Registrar exercising the powers of a Taxing Master of the High Court made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the Taxing Master, or the Circuit Court is satisfied that the County Registrar, has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master or the County Registrar is unjust."

9. Order 99 of the Rules of the Superior Courts deals with the mechanism whereby costs are taxed. To the extent to which he is not limited by the rules in O. 99, the Taxing Master is entitled to determine his own procedures. Those procedures must be fair and that involves the discharge by him of this function under the rules and the relevant statutes and evenness of treatment to both sides. This does not, however, mean that he is obliged to adopt the procedure of a civil or criminal trial. His basic obligation is to hear both sides in the same way and to give a reasoned decision; see *Flynn and Halpin - Taxation of Costs* (Blackhall Publishing, Dublin, 1999) chapter 7. Whereas the rules, on occasion, refer to evidence before the Taxing Master, that does not necessarily mean sworn evidence, and such evidence is certainly not subject to the rules of evidence that are applied in the courts. The Taxing Master is entitled, and indeed obliged, to have regard to the files and legal documents of the party whose costs are being taxed and the nature of these will be evident upon their face without the necessity for formal proof. The amount to be allowed in respect of an item is determined by O.99, r. 37(22) which, in part, provides:-

> "(ii) in exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances, and in particular to-
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> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client;
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> (f) where money or property is involved, its amount or value;
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> (g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question."

10. Many cases have been cited to me in argument. As a result of those authorities I am satisfied that there are two basic principles in exercising the function of this court in a review of taxation. Firstly, I have to ask whether the amount actually involved in respect of a disputed item was too much; and secondly, I have to ask whether that allowance was unjust. Here it is claimed that the amount was too much and that the injustice, the second test, centred around the failure to peruse the papers and that this error was compounded by the use of inter-parties correspondence as evidence in the absence of any real chance for the other side to deal with it. As well, it is also claimed that the amount involved was so excessive as to amount to an unjust allowance.

Excessive Awards

11. In *Superquinn v. Bray Urban District Council* [2001] 1 I.R.459, Kearns J. focused on s. 27(1) of the Courts and Court Officers Act, 1995, which establishes the touchstone for the manner in which costs are to be assessed. This provides:-

> "On taxation of costs as between party and party by a Taxing Master of the High Court… the Taxing Master… shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs."

12. Up to that time, the use of comparisons with the amounts awarded in such things as counsel's brief fees and refreshments, and solicitors' instruction fees, had been a paramount consideration. As Kearns J. explains, the Act of 1995 made a determination of the actual work done in any case the primary consideration. Of course, heedlessly pursuing work for its own sake, which is of no benefit to the case, or engaging expert witnesses who have nothing to offer the case, cannot add to the bill which the losing party is obliged to pay, as unnecessary work may be discounted. This process of examining the solicitor's files, however, is part of the process of examining the nature and extent of the work done in a case. Kearns J. asked himself the question as to when an error as to amount allowed in taxation becomes unjust within the meaning of s. 27(3), at p 477. His answer was:-

> "It seems to me that, in exercising its powers of review under s. 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge."

13. The variability in relation to an award of damages or allowance on taxation of €400,000, over 25% upwards and downwards from that point, supposing it to be the standard for non-interference, apparently gives poles of €300,000 and €500,000. In his judgment in *Luke Boyne v. Bus Atha Cliath and James McGrath* [2006] IEHC 209 at 34, Gilligan J. regarded "the yardstick of 25%" as not being "an unreasonable stance to adopt". But, he considered that it was one that had to be weighed in the context of the particular facts and circumstances of the individual case before the court. In *Quinn v. South Eastern Health Board* (Unreported, High Court, 30th November, 2005) Peart J. expressed reservations about this formula. He was of the view that what might be viewed as just or unjust must be viewed on a case by case basis as regard having the work done, as different factors may be at play, rather than by an arbitrary formula. I believe that the 25% referred to is the total sum of variability. Using round figures, anything below €350,000 and above €450,000 where the appropriate allowance or award is €400,000, will lead to an intervention to alter the amount appropriately. This is not the only factor. In that respect I agree with Peart J.'s observation.

Procedures

14. Particular importance must be attached to public confidence in the integrity of the hearing on taxation and the ability of each side to be fairly heard, *Dickenson v. Rushmer* Ch. D. Rymer, J., 21st December, 2001. The English courts have established procedures whereby costs judges may fairly deal with material of a sensitive nature in respect to which an objection can be raised. This can be done, for example, by blacking out items of particular sensitivity. This should be done by agreement of the parties. If there is a dispute, then the matter can be considered by the Taxing Master. In this jurisdiction the ultimate decision as to whether a redaction was or was not properly made would be that of the Master. He could examine the original document. The matter was raised in *South Coast Shipping Company Limited v. Havant Borough Council* [2002] 3 All E.R. 779, in the context of claims of privilege where, after reviewing a series of cases, Pumfrey J. stated at p. 785:-

"I draw the following conclusion from these cases -

1. While in many respects the assessment of cost resembles ordinary litigation it differs in important respects, among which are the lack of any provision for disclosure of documents to the opposing party. The ordinary rules of natural justice none the less apply.

2. The question is, what evidence may be adduced by the receiving party to establish a disputed fact

3. Where there is a disputed issue of fact to be decided, the receiving party may seek to rely upon a document otherwise privileged that has been filed in support of the bill.

4. Furthermore, the costs judge may require the receiving party to produce to the costs judge any document which the costs judge may specify which he considers is necessary for him to reach a decision

5. In either case, the costs judge has no power to order disclosure of a privileged document to the paying party, but he may put the receiving party to his election between (a) not relying upon the document and offering to prove the fact of which the document is evidence by some other means, and (b) showing it to the paying party.

6. The costs judge will exercise his discretion to put the receiving party to his election having regard to what the requirements of fairness and justice require. He may in particular consider whether the disclosure could be made to the party's legal representatives only; whether irrelevant privileged matter can be excised; and the importance of the document in establishing the disputed fact.

7. Disclosure in the context of assessment proceedings of a document otherwise privileged will not be viewed as a waiver of the privilege. Voluntary waiver or disclosure by a taxing officer on a taxation would not prevent the owner of the document from reasserting his privilege in any subsequent context. This fact is relevant to the exercise of a discretion to put the receiving party to his election, but it must be remembered that a voluntary disclosure made relying upon this principle is capable of giving rise to serious difficulties (see, for example, *Bourns Inc v Raychem Corp* [1999] 3 All ER 154).

15. The election therein referred to is as to whether to claim a privilege in respect of a document. The same could be said about instructions to a solicitor that are embarrassing or sensitive. It may be that pages might need to be blocked off where they contain sensitive or confidential instructions. The issue is not what is on the page, but the work that it represents. The decisions of the English courts make it clear that an alternative procedure may be followed which involves excision, and that in fairness it should be followed where there is a dispute on the work evidenced by the papers in a case. If the opposite party does not see a document, albeit in redacted form, how can a meaningful submission be made as to the amount of work required in a case?

16. In my view it was in error for the Taxing Master to decide that the plaintiff's solicitor had to deal with this matter as a difficult and complicated case by reason of an assertion in inter partes correspondence in respect of which the party seeking taxation had no opportunity to reply. In addition, it was in error for the Taxing Master not to seek to examine the documents in this case with a view to determining what work was actually done. As there was a sensitivity, some excision may have been appropriate but that was not considered. Those procedures are necessary as it is vital to control the costs of litigation. When litigation becomes too expensive it can operate as a fetter on the constitutional right of access to the courts. It is also difficult to see how an instruction fee of €35,000 on an award in a bullying case of €50,000 can be regarded as proper.

Quantum
17. Having heard submissions from counsel as to the correct approach to the use of comparative cases in taxation, my view is that the Taxing Master should approach his task by, firstly, assessing the work that was actually done, as he is obliged to do under s. 27 of the Courts and Courts Officers Act, and secondly, by seeking assistance from comparative cases where it might reasonably be thought that a similar amount of work was required.

18. The only evidence before me as to the value of the kind of work that is required in an ordinary personal injuries case which attracts damages, or a settlement, in the sum of €50,000, is the transcript in this case. There a figure was mentioned of €12,000. There is no doubt that this was somewhat more difficult than an ordinary case. Despite the fact that many cases of a similar kind would be heard before the Employment Appeals Tribunal, where an applicant would allege constructive dismissal due to bullying or sexual harassment, and where no costs can be awarded by the Tribunal, the disposal of these cases is difficult. The work calls for repeated consultations, the taking of exacting instructions and, something which is often ignored in respect of the work of the lawyers, a certain degree of emotional support by a solicitor towards his or her client.

Result
19. I am obliged to value this case on the basis of the evidence that was before the Taxing Master. I have noted the amount of work as displayed in the papers. While I wish that more information had been before the Taxing Master I must do my best to assess this case on the evidence that comes before me. I note that there are comparable cases cited in the transcript of the hearing before the Master. These include complex employment matters, medical negligence cases and serious personal injury cases. Some personal injury cases may attract more than an average fee. Some will attract less. The offer made on behalf of the defendant of €24,000 for the solicitor's instruction fee was a generous one, perhaps considered to represent a fee for the most work this kind of case might need, and it is one which I would not interfere with. This is what I would substitute for the Taxing Master's ruling in this case.

Costs
20. Finally, I have heard submissions as to costs prior to writing the judgment in this matter. I cannot regard it as right to visit the costs of this hearing on the plaintiff. The plaintiff has no expertise on the question of costs and would have left any issue as to the fees to be charged to her solicitor; necessarily, in capable professional hands. On the other hand there is a certain benefit to the defendant, who is represented by an insurance company, in obtaining a ruling that clarifies the law. Some defendants, in these cases, can be expected to possess a body of expertise by reason of repeated visits to litigation which no ordinary plaintiff could possibly match. In the result, I would make no order as to costs.

Appearances
James Connolly S.C. with Mr. Fitzsimons BL instructed by Kilroys for the defendant and moving party.

Finbarr Fox SC and Ms. Ruddy BL, instructed by Arthur Cox on behalf of the plaintiff and respondent to the motion.