THE COURT OF APPEAL

Peart J.
Irvine J.
Hogan J.

Appeal No. 2014 No.79 CA

BETWEEN/

OLIVER LANDERS

PLAINTIFF/APPELLANT

AND

RAYMOND DIXON

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 15th day of July 2015

1. This appeal raises a net but important point in relation to costs. In what circumstances is it appropriate for the High Court to measure costs in accordance with Ord. 99, r.5(2)(a) of the Rule of the Superior Courts 1986? This issue arises directly for our consideration following the decision of the High Court (Barrett J.) made on 3rd November 2014 which measured the plaintiff's costs in the sum of €20,000. The plaintiff (Mr. Landers) now appeals against that decision in circumstances where he maintains that the judge erred in law in doing so and in failing to make an order for the taxation of his costs.

The background to the proceedings

2. These proceedings had their origin in a specific performance action commenced by the plaintiff arising from the sale of licenses premises. Those proceeding culminated in the defendant consenting to judgment on 16th June 2008 for the sum of €49,541. It is agreed that the costs of that application when taxed on 5th December 2009 came to €41,109, so that the total sum due and owing by Mr. Dixon to Mr. Landers was €90,650.

3. A judgment mortgage was registered against Mr. Dixon's interest in his family home which were the lands contained and described in Folio 2916F, on 2nd February 2011. Mr. Dixon had earlier paid some €38,000 in total in 2010 and 2012. The present proceedings were commenced by special summons on 17th May 2011, the plaintiff seeking, inter alia, a well charging order and an order for sale of the Kildare premises.

4. Mr. Landers certainly encountered difficulties with service of the proceedings. Ultimately, however, the High Court (Dunne J.) made a well charging order on 30th January 2012, which order was subsequently amended on 12th March 2012. The matter then appeared in the Examiner's List on five separate occasions between August 2012 and March 2013. On these occasions Mr. Dixon indicated that he sought time to address the outstanding debt because he wished to sell certain property.

5. The plaintiff then issued a motion for possession on 16th September 2013. This motion was itself adjourned on three occasions in total. The matter was ultimately heard by the High Court on 7th April 2014 (Finlay Geoghegan J.) and was adjourned to 12th May 2014 for mention. By this stage Mr. Dixon had managed to sell two sites and on 4th April 2014 he paid the sum of €75,655. There was a balance of €5,006 to be paid and this sum was ultimately paid on 3rd November 2014. It is only fair to record that Mr. Dixon had fallen ill during the period between 2010 and 2011 and this appears to have been a factor in the delayed payment. He had also paid some €28,000 in total in interest payments.

6. When the matter came before the High Court on 3rd November 2014 the only issue which remained to be decided was that of the costs of the 2011 well charging proceedings and motion for possession. At this stage that motion was struck out and the judgment mortgages were about to be discharged. Counsel for Mr. Dixon urged that in the circumstances no order for costs be made and that in default of that submission finding favour with the Court that Barrett J. fix a sum of €8,000 by way of measured costs. Counsel for Mr. Landers mentioned that a bill of costs had just been prepared by the costs accountant retained by his solicitor which claimed a sum of €47,000 (including VAT, counsels' fees and outlay). He accordingly urged the judge to make the standard order awarding the plaintiff the costs of the proceedings, to be taxed in the usual fashion. It was in those circumstances that Barrett J. decided to measure costs in the sum of €20,000 (including VAT).

7. As already noted, Mr. Landers has appealed that decision to this Court. While not disputing the court's jurisdiction to measure costs, he submitted that Barrett J. had no appropriate basis by which he could have measured the costs at €20,000 and that he should not have taken it upon himself to adjudicate on what would amount to an appropriate sum in respect of costs. Counsel for Mr. Dixon contended that the trial judge was entitled to measure costs in this manner and that he was entitled to do so in order to avoid the additional transaction costs associated with the taxation process.

8. The actual jurisdiction to measure costs is not at all in doubt. Section 14 (2) of the Courts (Supplemental Provisions) Act 1961, provides that the jurisdiction of the High Court should be "exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by the Rules of Court". The costs rules themselves are set out in Ord. 99.

9. Order 99 now provides in relevant part:-

> "1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by the Rules:
>
> (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
>
> (2) …
>
> (3) Subject to sub-rule (4A) the costs of every action, question and issue tried by a jury shall follow the event unless the court, for special cause, to be mentioned I the order, shall otherwise direct.
>
> (4) Subject to sub-rule (4A) the costs of every issue of fact or law raised upon a claim or counterclaim shall unless otherwise ordered follow the event.

4(A) The High Court or the Supreme Court upon determining any interlocutory application shall make an award of costs save where it is not possibly justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(1) Notwithstanding sub-rules 3) and 4) of Rule 1

(a) The Supreme Court …

(b) The High Court, in considering the awarding the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgement or tender offer in lieu of lodgement may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other parties (or those other parties) claim, counterclaim or application.

(c) ...

2. In this rule, an "offer in writing" includes any offer in writing made without prejudice save as to the issue of costs.

....

5. (1) Subject to sub-rule (4A) of Rule 1, costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an order for the payment of costs may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded.

(2) In awarding costs, the Court may direct:

(a) that a sum in gross be paid in lieu of taxed costs, or

(b) that a specific portion of the taxed costs be paid, or

(c) that the taxed costs from or up to a specified stage of the proceedings be paid.

(3) At any stage of the proceedings, the Court may require the parties to produce to the Court and exchange with one another estimates of the costs respectively incurred by them, for such period as the Court may direct, and particularised in such manner as the Court may direct."

Whether the jurisdiction to measure costs was properly exercised in this case

10. While the jurisdiction to measure costs is one of long standing, the basis by which such discretion might be judicially exercised has been rarely explored in any detail. The leading authority is the decision of Kearns P. in *Taaffe v. McMahon* [2011] IEHC 408, which contains a very helpful discussion of that jurisdiction and the circumstances by which it might properly be exercised.

11. In the course of his judgment Kearns P. stated:

> "…..there are many simple and uncomplicated cases which lend themselves to easy assessment of costs in terms of work done, time taken and effort expended. The kind of case under consideration here falls very much into that category. If the trial judge feels that he is capable of making an educated estimate of what is fair on a measurement of costs, why should he not proceed to measure a sum for costs if the alternative is a lengthy, protracted and costly taxation?"

12. It is probably fair to say that the decision in *Taaffe* suggests that the underlying purpose of the measured costs jurisdiction was to bring about finality in litigation if this can properly be done while avoiding what Kearns P. described as a "lengthy, protracted and costly taxation". These were doubtless the considerations which prompted Barrett J. to arrive at the decision which he did.

13. It is impossible not to share and sympathise with these objectives. The legal system has, regrettably, all too many in-built delays which doubtless frustrate and vex litigants. It cannot be just and right that after what in itself may have been a lengthy and protected process, all sides are then confronted with a further set of delays while the taxation of costs proceeds to finality.

14. Faced with such an unwelcome prospect, many judges may well be tempted to slice through this Gordian knot in order to make an educated estimate as to what these costs should be through the exercise of the measured costs jurisdiction. It is in this context, however, the actual facts of *Taaffe* assume some importance. In that case the applicant's mother had agreed with the prosecuting Garda that it was not necessary for him to be physically present in the District Court on a particular date provided that he also agreed to have legal representation present in court on the day in question. On the appointed day, therefore, the applicant did not turn up in court although he was legally represented. The District Judge was evidently unhappy with this non-appearance and issued a bench warrant, the earlier commitment which had been given by a member of An Garda Síochána notwithstanding.

15. The applicant was subsequently arrested on foot of this bench warrant. He then sought a judicial review of that decision. Leave to apply for a judicial review was granted on 20th December 2015, but the State quickly elected not to show cause. A number of open offers regarding costs were made to the applicant's solicitors which culminated in an offer of €5,000 plus VAT.

16. This was the background to the decision of Kearns P.. He did not even actually measure the costs, but simply held that he had a jurisdiction to do so. The President then invited the parties to make appropriate submissions regarding the level of costs.

17. What is critical, however, is that in arriving at that conclusion Kearns P. stressed that he viewed this as a straightforward and relatively simple case:

> "The High Court has itself been prepared to measure costs in a number of straightforward judicial review and article 40 applications in recent times ….While no judge of the High Court would see himself or herself as possessing expertise in costs equivalent to that of a Taxing Master, I am of the view nonetheless that a judge of the High Court is certainly capable of having due regard to the matters set out at Ord. 99, r. 37 (22) (ii) of the Superior Court Rules which detail the relevant matters which must be considered by the Taxing Master when considering a sum to be allowed on any item of taxation….

> There will of course be cases where the sheer complexity of the issues arising on costs will discourage any judge from attempting to measure costs. This may arise where expert evidence is involved or where the issues are of a complex financial nature such as those which frequently arise in the Commercial Court. No such difficulties arise in the present case or in the kind of case of which this case is representative.
>
> As I am quite satisfied that Ord. 99, r.(5)(2)(a) confers the necessary jurisdiction for me to do so, I propose to measure costs in both the instant case and in a number of other cases of the same type presently pending before the Court for the same purpose."

18. I quite agree with the sentiments contained in that passage. It is, of course, implicit in this approach that the judge must have some evidential or other objectively defensible basis for the manner in which costs are measured. The power to measure costs must, of course, be exercised judicially. It would, after all, be unjudicial for a judge to clutch "a figure out of the air without having any indication as to the estimated costs": *Leary v. Leary* [1987] 1 All E.R. 261, 265 *per* Purchas L.J.. This is not to suggest that the judge must hear evidence regarding costs or even invite detailed submissions on this issue before electing to measure costs in any given case. It may be that a judge will have personal knowledge of the sums likely to be allowed in straightforward cases of the type presently before him or her. This would certainly have been the case in *Taaffe* where the President – with his vast knowledge and experience of judicial review practice and procedure – could readily have made an "educated estimate" of the level of costs in a straightforward uncontested judicial review case of this kind.

19. The present case, however, does not quite fall into this category. There had, after all, been some twenty applications to the Court over a three year period. This case could not, accordingly, be said to represent the type of simple and straightforward case which Kearns P. had in mind in *Taaffe.* Nor did the trial judge have available to him the material which would have enabled him to make the appropriate assessment of the appropriate gross sum in the manner which he did. In this regard, attention might be drawn to the provisions of Ord.99. r.5(3) which enables the court to require the parties "to produce to the court estimates of the costs respectively incurred by them".

Conclusions

20. As I have already stated, I completely understand the approach which Barrett J. sought to adopt in the present case. Nevertheless, having regard to the factors which I have just enunciated, I find myself compelled to acknowledge that the trial judge erred in seeking to measure costs in the manner and circumstances in which he did. At a minimum, Barrett J. should first have indicated his inclination to deal with costs by measuring them himself. He should then have afforded the parties, but particularly the party who would most likely be adversely affected by his intended departure from the normal order, (*i.e.* an order that costs follow the event and that the same be taxed in default of agreement), an opportunity to make brief submissions and place before the court any material relevant to the exercise of his discretion. I would therefore allow the appeal and substitute an order for the payment of the plaintiff's taxed costs in lieu of the High Court order for measured costs in the sum of €20,000.