Neutral Citation: [2013] IEHC 410

THE HIGH COURT

[1998 No. 6076P]

BETWEEN/

ESTHER HARTE

PLAINTIFF

AND

BRIGID HORAN

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered the 30th day of July, 2013

1. The plaintiff in these proceedings was a minor when she was injured in a road traffic accident near Tullamore, Co. Offaly on 21st October, 1994. Proceedings were issued in 1998 whereby the plaintiff claimed damages for personal injuries. The proceedings were settled by means of a consent order made by Kearns J. on 11th July, 2001, just prior to the hearing. The order provided for the routine taxation of the plaintiff's costs as part of that settlement. A critical detail – which helps to explain subsequent events – was that this particular settlement was one of two settlements (involving different parties) arising from the same accident.

2. Following the making of the costs order, some desultory correspondence was exchanged in the present case between the respective solicitors for the plaintiff and the defendant in the course of the ensuing twelve months regarding this issue. The plaintiff's solicitor delivered a detailed bill of costs in each case on a without prejudice basis on 7th August, 2001, and 28th August, 2001, respectively. On 12th December, 2001, the defendant's solicitor raised queries regarding the bill of costs following correspondence with their loss adjusters.

3. The correspondence appears to have petered out at that point. Absent agreement, however, on 1st August, 2002, the defendant's solicitor forwarded a cheque to the plaintiff's solicitor in the sum of just under €13,000 by way of an endeavour to settle the costs issue. The plaintiff's solicitor maintains that he orally advised the defendant's solicitor of his dissatisfaction with the amount tendered, but this is emphatically denied by those who were then dealing with the matter on behalf of the defendant. No attendance or other record note of such a communication has ever been exhibited.

4. At all events, a similar cheque was sent on the same day in the related matter. The plaintiff's solicitor returned the cheque in the related matter on 4th March, 2003, saying in correspondence that the reductions proposed were unacceptable. At that point arrangements for the taxation of costs in the related matter were put in hand. The plaintiff's solicitor duly obtained 23rd July, 2003, as the date for the taxation of the costs in the related action. The costs of the related action were, however, settled following an improved offer on the part of the defendants and a cheque for the discharge of these was obtained on 1st August, 2003.

5. The plaintiff's solicitor avers that it was intended to pursue the same strategy with the present proceedings. Due, however, to an administrative oversight in his office no such steps were actually taken. The present proceedings and the related proceedings have a consecutive file numbers and, following the settlement of the latter proceedings, the file in the present proceedings was mistakenly included in the completed proceedings file when the latter file was being moved to storage.

6. The file in the present case next came to the attention of the plaintiff's solicitor in September 2010 when files in storage were being reviewed in his office prior to sending such files for shredding. It soon became apparent that, by reason of simple human error, these proceedings had not been sent for taxation. On 29th September, 2010, the cheque – which had been originally sent as far back as August, 2002 - was returned by the plaintiff's solicitor and he confirmed that he would be proceeding to have the costs taxed. On 2nd March, 2011, the defendant's solicitors wrote to the plaintiff's solicitor confirming that an application for taxation would be opposed on the grounds that the application was either statute barred on the one hand or by reason of undue delay on the other.

7. A summons to tax was issued on 20th January, 2012, and a fresh bill of costs was served claiming the sum of €27,900. When the matter first came before the Taxing Master on 12th March, 2012, the Taxing Master suggested that if the taxation were to proceed, the plaintiff would first have to make an application to renew the order on the basis that that order was over six years old. As it happens, no such application was ever made.

8. On 7th August, 2012, the plaintiff's solicitor lodged a notice of re-entry before the Taxing Master. The matter was then listed before the Taxing Master O'Neill on 30th November, 2012, and again on 8th January, 2013. The Taxing Master had sought written submission on the legal issues which arose with this belated application.

9. On this latter occasion on 8th January, 2013, the defendant sought and obtained an adjournment in order to allow the present application to be made to this Court. The defendant then issued the present motion seeking an order pursuant to the inherent jurisdiction of the Court striking out the taxation of the plaintiff's bill of costs. At the original hearing of this application I expressed concern that this application would amount in substance to an application for an order of prohibition directed towards the Taxing Master. Given that in such circumstances it was appropriate that the Taxing Master should have notice of any such application, I directed that he be put on notice of application. The Taxing Master has since confirmed by letter dated 10th July, 2013, that once his position has been properly outlined to the Court – namely, that before embarking on the taxation of costs, he wished to be fully addressed on the relevant law governing the application - he would abide by the decision of this Court.

Is the application statute-barred?

10. The first issue to be considered is whether the application is statute-barred. Section 11(6)(a) of the Statute of Limitations 1957 ("the 1957 Act") provides that:

> "An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable."

11. The term "action" is defined by s. 2 of the 1957 Act as including any proceeding (other than a criminal proceeding) in a court established by law, but the term "proceeding" is not defined.

12. There seems little doubt but that the term "judgment" in s. 11(6)(a) includes an order for costs. It is, after all, part of the court order and judgment. But when did the court's order for costs become enforceable in this sense? It is clear that a judgment for costs is not enforceable until the sum due is properly ascertained. If, for example, the judge measures costs and directs one of the parties to pay a specified sum from a specified date, then that order is enforceable from that date.

13. The measurement of costs is, of course, the exception rather than the rule. In the vast majority of cases the court will make what may be described as a general order for costs. A general order for costs in this sense is really a determination of the question of liability, with the amount to be paid to be ascertained – when not otherwise agreed - through the taxation process.

14. This is what has occurred here, since all that Kearns J. determined was that the defendant had a liability in costs to the plaintiff, the assessment of which fell ultimately to be determined through the taxation process. But there was no enforceable judgment for costs until the amount of those costs was actually ascertained. This, however, has yet to occur since the Taxing Master has yet to determine the sums actually payable by the defendant to the plaintiff. As it happens, there is little direct Irish authority on the point, but it may be observed that in *Clarke v. Garda Commissioner* [2001] IESC 201, [2002] 1 I.L.R.M. 450 the Supreme Court was required to consider whether interest on costs ran from the date of the judgment. Fennelly J. answered this question in the affirmative, stating:

> "I am of the view that costs constitute a liability of the unsuccessful party from the moment of the decree or judgment, *that they are not payable until quantified* but that, from that point the debt relates back to the date of the judgment, with interest running from that earlier date. These views are, I believe, consistent with the wording of sections 26 and 27 of the Debtors (Ireland) Act 1840. Section 26 gives the right to interest from the date of entering up of judgments." (Emphasis supplied)

15. The underlined words illustrate why a judgment for costs is not enforceable until the sum in question is ascertained. The English Court of Appeal took entirely the same view of this question in *Chohan v. Times Newspapers Ltd.* [2001] EWCA Civ 964, [2001] 1 W.L.R. 1859. As Aldous L.J. observed ([2001] 1 W.L.R. 1859, 1868), "payment cannot be enforced without knowledge of what should be paid", adding in relation to an order for costs that "no further proceedings could be brought on the judgment [for costs] prior to the sum payable being entertained".

16. It follows, therefore, that the taxation of the plaintiff's costs is not statute-barred. In fact, time has not yet even begun to run for the purposes of the statute, since the judgment for costs is not yet enforceable. It will only become enforceable when the precise amount of the liability for costs is actually ascertained and determined. It is only at that point that the twelve year time period specified by s. 11(6)(a) of the 1957 Act will commence to run.

Order 42, rr. 23 and 24 of the Rules of the Superior Courts

17. It is next necessary to consider the possible relevance of O. 42, rr. 23 and 24 which deal with the execution of judgments. Order 42, r. 23 provides that:

> "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order."

18. Perhaps the most straightforward answer to this point is that the taxation of costs is not in any true sense the execution of a judgment. The process of execution of a judgment is simply a process whereby that judgment is enforced and given effect to. This is reflected elsewhere in O. 42 itself. Thus, O. 42, r. 5 provides that a judgment for the recovery of land may be enforced by an order for possession. Likewise, O. 42, r. 3 provides that a money judgment "may be enforced by execution order or by any other mode authorised by these Rules or by law".

19. It is hardly necessary to state that the taxation of costs is not execution in this sense. It is rather the further completion of the judgment process itself in that it involves the ascertainment of the amount of a money sum due from one litigant to another in respect of costs. Accordingly, the six year rule in respect of execution does not apply to those cases where the court has made an order for costs but where the amount of those costs has yet to be ascertained.

20. It follows, therefore, that the provisions of O. 42, rr. 23 and 24 have no application to the case at hand.

Undue delay

21. There remains the question of undue delay. The taxation of costs is, of course, an adjunct - and, for that matter, a very important adjunct – to the administration of justice itself. It is, of course, necessarily implicit in Article 34.1 of the Constitution that justice will be administered in a timely, effective, fair and efficient fashion: see, e.g. the comments of Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd* [2004] IEHC 316, [2004] 3 I.R. 566, 568 and my own judgment to this effect in *Doyle v. Gibney* [2011] IEHC 10. These constitutional obligations are further underscored by the State's commitment to the right to a hearing within a reasonable time under Article 6 ECHR and the incorporation of the ECHR (admittedly at sub-constitutional level) by the European Convention of Human Rights Act 2003. Moreover, the Supreme Court has made it clear that an earlier culture of tolerance of and indulgence towards otherwise unacceptable delay in the conduct of litigation must come to an end: *cf* the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290.

22. For reasons which will presently become clear, it is not actually necessary so far as the present case is concerned to conduct any extensive analysis of the voluminous case-law dealing with delay. As I have elsewhere observed (see, *e.g.*, *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11), there are, in fact, two separate streams of jurisprudence on this topic emanating from the Supreme Court. As I noted in Donnellan, the conventional starting point in such cases is the three prong test articulated by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, namely:

> i. Whether the delay has been inordinate;
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> ii. If so, whether such delay is inexcusable;
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> iii. Even if the delay has been inordinate and inexcusable, the court must nonetheless consider the balance of justice.

23. But it also seems clear the *Primor* test is not, however, an all encompassing one, inasmuch as the Supreme Court confirmed in

McBreaty v. North Western Health Board [2010] IESC 27 that there exists a separate (albeit overlapping) jurisdiction to strike out for undue delay which, as Geoghegan J. put it, can be exercised "even in the absence of fault on the part of the plaintiff." While these two test overlap, they diverge somewhat insofar as the second limb of *Primor* - namely, whether the delay is inexcusable- may be thought to pre-suppose fault on the part of the plaintiff.

24. For the purposes of the present motion I propose to apply the standard *Primor* three prong test and, in the event, I have not found it necessary to address any further issues.

Whether there has been inordinate delay on the part of the plaintiff in advancing the taxation process
25. While I accept fully that the delay was the result of a routine and completely understandable human error and was caused entirely by the mis-filing of correspondence relating to the first case following the resolution of the costs issues in the related second case, nevertheless, viewed objectively, it seems impossible to gainsay the fact that the delay was inordinate. As matters stand, the accident occurred almost nineteen years ago and the proceedings themselves were issued almost fifteen years ago. The order for costs was itself made twelve years ago and the taxation process was re-activated only after an interval of eight years in which – by reason of an oversight – precisely nothing happened.

26. This delay speaks for itself and I am therefore coerced to conclude that the first limb of the *Primor* test is accordingly satisfied.

Whether the delay was inexcusable
27. As I have already indicated, the delay was entirely brought about by a routine filing error and the consequent failure on the part of the plaintiff's legal team to appreciate that the costs issue in these proceedings – as distinct from the related proceedings – had not been resolved. Naturally, no personal fault can be ascribed to the employee who misfiled the papers, as it was the type of fallibility and innocent error of which we are all guilty.

28. If the original error was nonetheless excusable at the personal level, this does not mean that the ensuing delay can be overlooked. Viewed objectively, the failure to return the cheque and to arrange to have the taxation set down for hearing must all be regarded as inexcusable.

29. In these circumstances, I am coerced to conclude that the delay here was inexcusable.

Whether the balance of justice requires the taxation claim to be dismissed
30. So far as the balance of justice is concerned, I propose to apply here by analogy the tests enunciated by Finlay Geoghegan J. in *Manning* [2004] IEHC 316, [2004] 3 I.R. 556, 576 and ask:-

> "1. Is there, by reason of the lapse of time a real and serious risk of an unfair trial?
>
> 2. Is there by reason of the lapse of time a clear and patent unfairness in asking the defendant to defend the action?"

31. In the context of the proposed taxation, it is plain that these questions must be answered in the affirmative. Thus, for example, the defendant's solicitor, Ms. Lucey, has averred that while the original file was retrieved from storage, it is incomplete. Thus, for example, neither the full set of pleadings nor the expert reports exchanged between the parties are to hand. Ms. Lucey further points out that the claims management company which had been retained by the defendants in relation to costs have not retained any relevant papers in the matter. The papers in the related case have also been destroyed, thus prejudicing the ability of the defendants to cross-reference and bench mark the similar work carried out in that case. It is true that some of this prejudice could be mitigated by the fact that the plaintiff's solicitor has very fairly agreed to supply copies of such otherwise missing documents as might be identified. But this is not the same thing as having one's own file for taxation process.

32. Moreover, it is inevitable that an endeavour on the part of the defendant's legal team to reconstruct from memory the minutiae of a routine and otherwise long forgotten case would have to be regarded as inherently unsatisfactory. The solicitor who worked on the file is no longer employed by the defendant's solicitors and the principal in that firm is retired. The lapse of time and the dulling of memories will clearly make it more difficult to give appropriate instructions in relation to the nature and extent of the work carried on in this case.

33. The passage of time has also rendered it unfair to force the defendants to submit to taxation. Once the cheque was tendered in August, 2002 and nothing further was heard about the matter for a further eight years, the defendants were lulled into believing that the matter had been resolved. Nor can it be said that the defendants or their insurers would – or should – have realised that the cheque was uncashed. As Mr. Higgins, the head of technical claims at FBD Insurance (the defendant's insurers), averred, there was no system of reconciliation between the finance and claims departments within that company. He added that in a large insurance company such as FBD the operation of such a system would be unnecessary, but would also be onerous and impractical.

34. In these circumstances, I am driven to the conclusion that in view of this lapse of time it would be both unfair and unjust to require the defendants to submit to taxation in these circumstances.

Conclusions
35. Summing up, therefore, I would conclude as follows:

> A. The application to recover costs is not statute-barred, since time runs for the purposes of s. 11(6)(a) of the 1957 Act on the original judgment only from the date "on which the judgment became enforceable". Absent a quantification of the sum due on the order for costs – such as by judicial measurement, agreement or taxation - the costs judgment is not yet enforceable.
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> B. The provisions of O. 42, rr. 24 and 24 have no application to the taxation process, since the taxation of costs is not part of the process of execution of a judgment.
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> C. The constitutional duty implicit in Article 34.1 of ensuring that litigation is heard and determined within a timely fashion applies to the taxation process.
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> D. While the root cause of the delay in the present case is due to pardonable human error, nevertheless, viewed objectively, the ensuring eight year delay was inordinate and inexcusable. The delay was such that it would be prejudicial and unfair to the defendant to allow the taxation to proceed after such a lapse of time.

36. It is for these reasons that I propose to accede to the relief sought by the defendant in its motion dated 21st January, 2013.