THE HIGH COURT

[2013 No. 6960 P.]

BETWEEN

MICHAEL DOYLE

PLAINTIFF

AND

GUARDIAN GROUP LIMITED AND THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 14th day of June, 2017

1. This is an application brought by the plaintiff for an order pursuant to O.99 r.38 (3) reviewing the taxation of the plaintiff's bill of costs dated the 30th April, 2015.

Factual Background

2. The plaintiff's claim is a personal injuries action that arises out of a trip and fall accident that allegedly occurred on the 16th February, 2012, at or near the second defendant's premises, Sarsfield House, Francis Street, Limerick. The first defendant appears to be a security company who employed the plaintiff as a security officer on the second defendant's premises. He alleges that while walking on the grounds of the premises, he was caused to trip and fall over cracked and raised flagstones.

3. The relevant chronology of events is as follows. By order of this court made on the 3rd June, 2014, the second defendant was ordered to make discovery of certain documents within a period of eight weeks from the plaintiff identifying the locus of the accident. This was to be done by the plaintiff within three weeks of the date of the order. Subsequently, a dispute developed between the parties with the second defendant alleging that the plaintiff had failed to comply with the order requiring him to identify the locus. The plaintiff on the other hand alleged that he had identified the locus and the defendant had failed to comply with the discovery order.

4. On the 31st July, 2014, the second defendant issued a motion to dismiss the plaintiff's claim for failing to comply with the order. In response, the plaintiff's solicitors issued their own motion on the 10th October, 2014, seeking to strike out the second defendant's defence and also seeking an order of attachment for failing to comply with the discovery order.

5. The second defendant's motion came on for hearing on the 3rd November, 2014, when it was adjourned to the 16th February, 2015. The plaintiff's motion came on for hearing on the 17th November, 2014, being its first return date. On that date, the plaintiff's solicitor, who is based in Limerick, travelled to Dublin for the motion with the intention of dealing with it herself as counsel was not retained. When the matter was called, counsel for the second defendant applied to adjourn the plaintiff's motion to the hearing of the second defendant's motion so that both matters could be dealt with together on the 16th February, 2015. The court granted that application. The plaintiff's solicitor says that she was unaware that it was to be made in advance of it being mentioned in court.

6. On the 16th February, 2015, both motions came on for hearing before the court. Having heard them, the court struck out the plaintiff's motion with costs against the second defendant. The court further struck out the second defendant's motion with no order as to costs.

7. The bill of costs was drawn up on behalf of the plaintiff's solicitors by their cost accountants and the bill is dated the 30th April, 2015. The bill was disputed by the second defendant's solicitors and accordingly the matter proceeded to taxation. This application concerns four items on the plaintiff's bill of costs which I will set out by reference to their numbers in the bill:

> 19. This is a claim for the sum of €224 in respect of the plaintiff's solicitor's mileage travelling from Limerick to the High Court and back to Limerick on the 17th November, 2014, a round trip of 224 miles charged at €1 per mile.
>
> 33. This is an identical claim for €224 in respect of the plaintiff's solicitor's attendance at the High Court on the 16th February, 2015.
>
> 34. This is a claim for €20.47 for attending at the High Court for the hearing of both motions.
>
> 36. This is the plaintiff's solicitor's claim for an instruction fee in the sum of €5,250. Although this is now claimed as relating to the costs of the motion that were awarded to the plaintiff, it is clear from a perusal of the plaintiff's own bill of costs that the professional fee charged relates to both motions. Thus on p. 14 of the bill, the plaintiff's solicitor sets out details of the instruction fee which include the following:
>
> > "It proved necessary to fully consider the affidavit grounding the second named defendant's application to strike out the plaintiff's claim for alleged failure of the plaintiff to make discovery. Preparation for the hearing before the High Court on the original application and on the separate later hearing day following the matters being linked."

8. Having heard submissions from both parties' cost drawers, the Taxing Master gave his ruling on the 21st October, 2015. It should be noted that up to that point in time, the plaintiff's solicitor was contending that she was entitled to the costs of both motions because they had been linked by the court and that was what was intended by the order of the court. The Taxing Master held that the terms of the order were perfectly clear and the plaintiff was only entitled to the costs of one motion. That appears now to be accepted. In his ruling, the Taxing Master essentially came to the conclusion that while the plaintiff was perfectly entitled to instruct his solicitor to personally move the motion before the High Court, without the assistance of counsel, insofar as that resulted in extra costs being incurred over the normal arrangement that one might expect where the solicitors' town agent would attend on counsel to move such an application, that the normal rule in relation to party on party costs required that the second defendant should not have to be responsible for the additional costs that would arise on a solicitor and own client basis.

9. Thus the Taxing Master said:

> "While the plaintiff was of course perfectly entitled to instruct the solicitor to carry out the work undertaken in this case, I am obliged to consider whether, as between party and party, the additional costs which in consequence arose, can reasonably be laid at the second named defendant's door."

10. The Taxing Master went on in his ruling to refer to the contentious nature of the correspondence that was apparently generated by the parties which might have been thought to add some element of urgency from the subjective perspective of the solicitors involved. However on this issue, he concluded:

> "I do not think that, viewed objectively, the matter was of such urgency that considerably higher costs than the norm should have been incurred, at the expense of the second named defendant. Had counsel been instructed the costs of drafting and advocacy would have remained at more usual levels. Typically barrister's fees for drafting a notice of motion would be €100/125, for affidavit €150/250 and for brief €200/300.
>
> The instructions fee is marked at €5,250. This includes the work relating to the second named defendant's motion which has to be disregarded.
>
> In my view the appropriate instructions fee to cover drafting of notice of motion and affidavit, issuing and serving documents, preparation for hearing and attendance at court on 17th November, 2014 and 16th February, 2015 is the sum of €1,500."

11. The Taxing Master went on to deal with the claim for travelling expenses as follows:

> "Given the terms of O.99 r.37 (18) I cannot reasonably allow the additional costs incurred by the plaintiff by reason of his instruction to his solicitor to personally pursue this application. Accordingly the travelling expenses of item 19 are disallowed, as are the professional fees associated with attendance at court, save those which would be commensurate with a brief fee and a town agent's attendance fee."

12. Dealing finally with the issue of item 34 being the solicitor's attendance fee, he said:

> "Item 34 is allowed at €10.24 given that the attendance related to two applications."

13. The plaintiff brought in objections to the Taxing Master's ruling and both sides furnished written submissions to the Taxing Master. Prior to delivering his ruling on the objections, the Court of Appeal delivered judgment in *Sheehan (a minor) v. Corr* [2016] IECA 168 raising fundamental issues as regards the manner in which taxation of costs should be conducted. As a result of that decision, the Taxing Master requested the parties to attend before him again on the 18th July, 2016, to invite further submissions by way of estimate of professional time expended by the plaintiff's solicitor.

14. In that regard, the plaintiff's solicitor submitted a document entitled "Memorandum of Hours carried out by Partner Solicitor" for consideration by the Taxing Master. During the course of the hearing of this application, I was informed by counsel for the second defendant, and it was not disputed, that the affidavit grounding the plaintiff's application which is the subject matter of taxation and was drafted by his solicitor ran to ten paragraphs covering three pages. The first five items in the plaintiff's solicitor's memorandum of hours all relate essentially to the drafting of this affidavit and claim that a total of ten hours was expended on that endeavour.

15. In addition, the plaintiff's solicitor claimed that on each day that the plaintiff's motion was listed being the 17th November, 2014, and the 16th February, 2015, a total of eight hours, time out of the office, was expended by the solicitor. Of course that does not include the travel expenses which were separately claimed. Therefore in total, the plaintiff's solicitor claimed to have expended 26 hours of professional time in dealing with the motion.

16. In his ruling on the plaintiff's objections delivered by the Taxing Master on the 3rd October, 2016, he analysed this memorandum in terms of the hours claimed to have been expended and substituted his own view of what level of hours ought reasonably to have been spent on the matter. His conclusion was that a time of seven hours and 45 minutes was appropriate. In order to arrive at an hourly rate, he divided the plaintiff's original instruction fee claimed at €5,250 by the number of hours claimed at 26, resulting in an hourly rate of €202. Multiplying that by 7.75 he arrived at a figure of €1,565.50 which he considered was broadly in line with the fee he had originally determined on the pre *Sheehan v. Corr* basis.

Legislative Provisions

17. The jurisdiction of the High Court to review a decision of the Taxing Master is provided for in s. 27(3) of the Courts and Courts Officers Act, 1995 which paraphrased reads as follows:

> "(3) The High Court may review a decision 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…has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master…is unjust."

18. Order 99 rule 38 (3) of the Rules of the Superior Courts provides:

> "(3) Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may within twenty-one days from the date of the determination of the hearing of the objections or such other time as the Court or the Taxing Master may allow, apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just…"

Order 99 rule 38 (4) provides:

> "(4) The application to the Court shall be made by motion on notice to the other party concerned, such notice of motion to be filed in the Central Office and a copy thereof filed in the Office of the Taxing Masters and the motion shall be heard and determined by the Court upon the evidence which shall have been brought in before the Taxing Master, and no further evidence shall be received upon the hearing thereof, unless the Court shall otherwise direct."

Relevant Case Law

19. In *Superquinn Ltd v. Bray UDC (No. 2)* [2001] 1 I.R. 459, Kearns J. (as he then was) characterised s. 27 as a provision which

confers on the Taxing Master, who has special expertise in the area of legal costs assessment, all the attributes of a specialist tribunal. To that extent, the court must approach a review with due deference to the expertise of the Taxing Master in the area in which he possesses such expertise. The changes introduced by the Act of 1995 were discussed by Kearns J. in *Superquinn* (at p. 475):

> "Under the old system, the court had a wide ranging remit and, in the context of a review under O.99, r.28, could 'make such order as may seem just'.
>
> Now under s. 27(3) of the Act of 1995 it can intervene 'provided only that the High Court is satisfied that the Taxing Master … has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master … is unjust'.
>
> This wording seems to represent a significant shift of emphasis and to impose a heavier burden on any party seeking to challenge a ruling of the Taxing Master. This interpretation is acknowledged at p. 350 of the *Minister for Finance v. Goodman (No. 2)* [1999] 3 I.R. 333 and can scarcely be a matter of doubt. It would suggest (when taken in conjunction with s. 27(1) and (2)), that the court should exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice."

20. In *Lowe Taverns (Tallaght) Limited v South Dublin County Council* [2006] IEHC 453, McGovern J. also noted the characteristic of the office of Taxing Master:

> "Section 27 (3) of the Courts and Court Officers Act, 1995 recognises that the Taxing Master is a person with special expertise in the area of costs and is, in effect, a specialist tribunal. The courts should be slow to interfere with the decisions of such a specialist tribunal and should operate on the basis of curial deference and judicial restraint."

These dicta were approved by the Court of Appeal in *Sheehan (a minor) v Corr* (op. cit.)

21. Clearly therefore, even where error and injustice is shown, the court should be slow to substitute its own view on a particular item for that of the Taxing Master, particularly where the court may be ill equipped to do so. As Kearns J. observed in *Superquinn* (at p. 476):

> "There may of course be instances where the court does not feel equipped to offer its own view, particularly in relation to solicitors' instruction fees, which have always been regarded as an area of considerable difficulty for judges."

22. The correct approach to be adopted by the Taxing Master was discussed by Cregan J. delivering the unanimous judgment of the Court of Appeal in *Sheehan* (at para. 57):

> "Thus the correct methodology to be followed by a Taxing Master in assessing Bills of Costs is as follows:
>
> (1) Firstly, at the beginning of the process, he should ascertain from the Bill of Costs (or other records of the Solicitor) what work was done, who in the firm did it and what was their seniority, how long did the work take, how much is being charged for each individual professional service and what was the appropriate hourly rate for that solicitor.
>
> (2) Secondly, he should conduct a root and branch examination of the Bill of Costs and other papers in the case, consider the time and labour expended by the solicitor, the skill, specialised knowledge and responsibility required of the solicitor in respect of each of the above items and assess whether the amount being charged for each professional service is fair and reasonable.
>
> (3) Thirdly, he should then assess the complexity of the cause or matter, the difficulty or novelty of the issues involved in the case, the other matters in O. 99 R. 37 (22) and consider whether this required an adjustment to the fee upward or downwards."

23. In considering the correct approach to identifying error and injustice, the Court of Appeal in *Sheehan* approved the remarks of Geoghegan J. in *Bloomer v. Incorporated Law Society of Ireland* [2001] 1 I.R. 383 where he said (at p. 387):

> "In considering whether the Taxing Master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the Taxing Master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in the consideration of the facts but of course the court must also consider whether the Taxing Master has fallen into error in either law or jurisdiction.
>
> If this court finds that the Taxing Master has erred in the sense described, this court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the Taxing Master in fact arrives at the correct figures or at figures within a range which it might have reasonable have been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision."

This approach was also endorsed by Kearns J. in *Superquinn.*

24. Before any consideration of injustice arises, the party seeking a review must demonstrate error. Even if error is demonstrated, that on its own is not enough, the error must lead to injustice. While the nature of the error envisaged by the section is not identified in the Act of 1995, Kearns J. suggested that in order to amount to error, the discrepancy would have to be at least 25%. Peart J. adopted a different approach in *Quinn v. South Eastern Health Board* [2005] IEHC 399 approved in *Sheehan.*

25. With regard to error, the court is somewhat at large, but applying the test identified by Geoghegan J. in *Bloomer*, it would appear that something trivial cannot suffice. To take an example from the present case, item 34 is challenged on the basis that the halving of the attendance fee because there was two motions involved from €20.47 to €10.24 was done in error and has resulted in injustice.

26. Even if there was an error, I cannot conceive how it could be said that the non recovery by the plaintiff's solicitor of the sum of €10.23 has led to injustice.

Conclusions
27. The reduction of the other three items, being the instruction fee and the travelling expenses, largely stem from the view taken by the Taxing Master that there is a norm or "going rate" for an application of this nature which would in the normal way be expected to be dealt with by counsel attended by a country solicitor's town agent.

28. From the information available from the papers, the only affidavit having been sworn by the plaintiff's solicitor, there is nothing remotely to suggest that there was some extreme complexity about this matter which required the personal attendance of the plaintiff's solicitor. This was a motion to strike out a defence for failing to make discovery based on a three page affidavit in a trip and fall case. Such motions are absolutely commonplace and it is not suggested, nor do I think it could be, that any reasonably competent counsel, properly instructed, could not deal with it.

29. The requirement for the plaintiff's solicitor to travel from Limerick and move the application personally has to my mind not been explained. I can see no obvious reason why the Taxing Master was not entitled to come to the view that such attendance was unnecessary and no good reason has been shown by the plaintiff why the second defendant should have to pay for it over and above what would be the norm in such a motion.

30. The assessment of a normal level of costs for such a motion is manifestly and clearly something within the particular remit of the Taxing Master. Although *Sheehan* suggests that the issue of comparators is only to be taken into account after all other matters, the notion of a "going rate" for routine items is recognised in several of the authorities. However, even apart from that, as noted above, the Taxing Master recalled the parties in the wake of *Sheehan* and sought further submissions arising from that judgment.

31. It seems to me that having received such submissions, the Taxing Master proceeded to assess the bill precisely in line with the criteria set out by the Court of Appeal. As the Taxing Master himself observed, the plaintiff was perfectly entitled to insist that his own solicitor travel to Dublin and move the application personally. However, his conclusion that the second defendant could not be expected to pay for that is to my mind unimpeachable.

32. It is also relevant to note, as the Taxing Master did, that the instruction fee claimed by the plaintiff's solicitor clearly relates to both motions, whereas the plaintiff is only entitled to the costs of one. No effort appears to have been made to date to differentiate between the two which appears to me to make the plaintiff's criticism of the Taxing Master's award even more untenable.

33. For these reasons therefore, I am satisfied that the applicant has demonstrated no error in the Taxing Master's decision, and less still that any injustice has arisen. I will accordingly dismiss this application.