

Neutral Citation No. [2006] NIQB 62

Ref: **WEAC5627**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **14/09/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**AN APPLICATION BY MARY GRAHAM
FOR JUDICIAL REVIEW**

WEATHERUP J

The Application.

[1] This is an application for judicial review of a decision of the Legal Services Commission not to pay the legal costs of the applicant as an assisted plaintiff in proceedings in the County Court, the legal costs having been taxed on foot of an Order of Londonderry Recorder's Court dated 29 May 2003. Mr Scofield appeared for the applicant, Mr Good for the Legal Services Commission and Mr Lewis for the Northern Ireland Court Service.

The Background.

[2] On 2 May 2003 the applicant's solicitor issued an Ordinary Civil Bill in Londonderry Recorder's Court claiming £5,500 damages and an injunction against four defendants who were neighbours of the applicant and in respect of whom she claimed harassment. The applicant was granted civil legal aid for the proceedings. The parties to the Civil Bill settled the proceedings by mutual undertakings and the terms of their agreement were attached to the Order of 29 May 2003. In addition the Order provided "that the costs for the plaintiff be taxed in accordance with the provisions of Schedule 2 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981".

[3] Further to that Order the applicant's costs were taxed by the District Judge who issued a certificate of taxation. The applicant's solicitors forwarded the papers to the Law Society of Northern Ireland Legal Aid Department on 1 October 2003 for payment of the taxed costs. The Legal Aid Department replied by requesting the applicant's solicitors to apply for a

certificate under Article 3 of the Legal Aid (Remuneration of Solicitors and Counsel in County Court Proceedings) Order (NI) 1981. By that request the Legal Aid Department appears to have been indicating the view that the fees were payable under articles 2 and 3 of the 1981 Remuneration Order, being fees assessed by the Legal Aid Committee, either up to the specified amount or, if the Judge in exceptional cases certified that the limit of assessment should not apply, the Legal Aid Committee would allow fair remuneration.

[4] There followed correspondence between the applicant's solicitors and the Legal Aid Department/Legal Services Commission as to the basis of the payment of fees for the applicant's solicitor and counsel. As summarised in the applicant's grounding affidavit her solicitors took the view that the case involved equity proceedings and was one for taxation under Order 55 rule 9 which provided that all costs in equity suits or proceedings be taxed by the District Judge. In this approach the applicant considered that she was supported by the Court office and the Judge's Order. On the other hand it appeared to the applicant that the Legal Aid Department/Legal Services Commission were of the view that the Civil Bill did not involve equity proceedings and that the costs should be assessed by the Legal Aid Committee under the 1981 Remuneration Order.

[5] It should be noted that initially the applicant considered that the case fell under Order 55 rule 9(1) which provided that "All costs in equity suits or proceedings shall in default of agreement ... be taxed by the district judge subject to revision of such taxation by the Judge." However Order 55 rule 9(1) was revoked with effect from 3 March 2003 and therefore did not apply to the applicant's proceedings in Londonderry Recorder's Court. Nevertheless the applicant maintains that the remaining legislative scheme provides for the payment of the applicant's costs as taxed under the Order of 29 May 2003.

Legal Aid in the County Court.

[6] Consideration of the statutory provisions has proved to be no easy task. The Legal Aid Advice and Assistance (Northern Ireland) Order 1981 at Article 13 provides for the remuneration of persons giving legal aid to be paid out of the legal fund and that -

"Subject to any rules of court made by virtue of Article 12(3)(g) of the Family Law (Northern Ireland) Order 1993 the sums payable to a solicitor or counsel shall not exceed those allowed under Schedule 2 ..." (Article 13(2)).

[7] Schedule 2 provides that the sums allowed to solicitor and counsel in connection with proceedings in the County Court shall -

“(a) where the costs are taxed, be the full amount allowed on taxation of the costs;

(b) where the costs are not taxed, be such amount as the Lord Chancellor, after consultation with the County Court Rules Committee, may by order determine” (paragraphs 1(2) and 2(2) of Schedule 2).

[8] So the trail divides at this point with one fork dealing with taxed costs and the other trail dealing with costs determined by the Order of the Lord Chancellor. If there was jurisdiction to tax the costs in the present case that is the end of the matter and the taxed costs are payable under paragraph (a) above. However the Legal Services Commission contend that there is no such jurisdiction to tax the costs in the applicant’s claim and that the costs are payable under paragraph (b) above. It is proposed to follow this trail before returning to the power to tax costs in the County Court.

[9] The Legal Aid (Remuneration of Solicitors and Counsel in County Court Proceedings) Order (Northern Ireland) 1981 was made in pursuance of Article 13(2) of and paragraphs 1(2)(b) and 2(2)(b) and 6 of Schedule 2 to the Legal Aid Advice and Assistance (Northern Ireland) Order 1981.

Article 2 provides -

“(1) The sums allowed for the solicitors or counsel acting for assisted persons in proceedings in the county court, *other than under its equity jurisdiction or those remitted to it by the High Court*, shall be such as are assessed by the Legal Aid Committee.

(2) The sums allowed to solicitors and counsel shall be such as are prescribed or regulated under any enactment relating to such proceedings and, subject to Article 3, where no amount is so prescribed or regulated, shall not exceed [a specified amount].”

Article 3 provides that the Judge may in exceptional cases certify that the limit of assessment shall not apply, in which case the Legal Aid Committee shall allow “such sums as appear to it to represent fair remuneration according to work reasonably undertaken and properly done.”

[10] Accordingly, where the costs are not taxed, and the case does not involve equity proceedings or remitted actions, there are three options for assessment of costs. First, fees prescribed or regulated under an enactment (the County Court Rules contain such fees), or secondly, the specified amount under Article 2(2) above, or thirdly, further to a Judge’s certificate of

exceptional case, the payment of “fair remuneration.” The Legal Aid Department’s initial response to the taxation of the costs seems to have reflected the view that the claim was to be treated as a claim for an injunction by way of Ordinary Civil Bill. Thus the second option applied so that the specified amount of fees was payable, subject to the third option of a Judge’s certificate of exceptional case leading to the assessment of fair remuneration.

Equity proceedings.

[11] On the applicant’s approach the above three options would not apply as the case involved equity proceedings. The Legal Aid (General) Regulations (Northern Ireland) 1965 at Regulation 22 deals with remuneration of counsel and solicitors in the County Court. Regulation 22(2) provides that the Legal Aid Committee shall authorise the payment of such amount as -

“(b) in relation to proceedings under the equity jurisdiction of the County Court or remitted to it by the High Court, is the amount as estimated by the Legal Aid Committee which would have been allowed to the solicitor or counsel had the costs been taxed under [Schedule 2 of the 1981 Order] after taking into account any actual taxation that may have taken place in the proceedings.”

If the Legal Aid Committee members are not unanimous as to the amount to be paid, the amount due to counsel or the solicitor for the assisted person shall be determined upon taxation in accordance with Schedule 2 of the 1981 Order (Regulation 22(3)). Accordingly, in equity proceedings there are two options for the assessment of costs, either they are estimated by the Legal Aid Committee (based on taxation) or they are taxed.

[12] Were the proceedings in Londonderry Recorder’s Court ordinary proceedings or equity proceedings? The Civil Bill claimed damages and an injunction arising out of alleged harassment by neighbours. The proceedings commenced in the form of an Ordinary Civil Bill. The proceedings were treated by the Court staff as equity proceedings because in reality this was a claim for an injunction. The County Courts (Northern Ireland) Order 1980 Article 13(1) provides that -

“Without prejudice to Article 14 a county court shall have the like jurisdiction as the High Court to grant an injunction with respect or in relation to any property (whether real or personal) or right with respect or in relation to which any proceedings might be brought in a county court.”

[13] A claim for an injunction is not a free standing claim and must be ancillary to a cause of action within the jurisdiction of the County Court. In Mahon v Sharma [1990] NI 106 Campbell J held that an injunction must be sought in relation to other proceedings, so that the statutory jurisdiction of the County Court does not include a claim for an injunction per se (page 108D).

[14] Jurisdiction in equity matters is provided for under Article 14 of the 1980 Order where the relevant proceedings are then listed, for example, administration, trusts, mortgages, charges on land. The applicant's proceedings in Londonderry Recorder's Court are not within Article 14 of the 1980 Order.

[15] In proceedings within the jurisdiction of the County Court a claim for an injunction under article 13 of the 1980 Order is not limited to equity proceedings. Thus, for example, the County Court Rules recognise that there may be a claim for an injunction in proceedings that are not equity proceedings. Order 55 rule 18 provides that -

“In proceedings where an injunction is claimed under Article 13 of the Order, *not being proceedings within the equity jurisdiction*, the costs in relation to the hearing of the claim for an injunction shall be in the discretion of the Judge, both as to incidence and amount.”

[16] At this point it is necessary to refer to Order 55 and Appendix 2 to the County Court Rules. Order 55 provides for costs, fees and expenses payable between party and party according to the scales set out in Appendix 2. Further Order 55 Rule 7 provides for the amount of costs to be in the discretion of the Judge in any proceedings for which no scale of costs is prescribed, and as set out above, Order 55 Rule 18 provides for costs to be in the discretion of the Judge in claims for an injunction not involving equity proceedings.

[17] Part VIII of Appendix 2 to the Rules deals with costs in “Equity and Title suits”. Paragraph 1 provides that “Subject to the Judge’s discretion the following rules shall be applicable to the costs of equity and title suits and proceedings under Articles 13 and 14 of the Order.” Tables are then set out dealing with solicitor’s costs and counsel’s fees. Here it can be seen that “proceedings” under Article 13 are brought into the regime for equity and title suits. This is relied on to support the approach that proceedings that are not within the equity jurisdiction under Article 14, but which claim an injunction as provided by Article 13, are “equity proceedings”. I am unable to accept this argument. Such proceedings may fall within Part VIII of Appendix 2 as equity and title suits for the purposes of party and party costs but they are not thereby “equity proceedings”.

[18] Equity proceedings arise under Order 14. A claim for an injunction will be ancillary to the substantive “proceedings”, and it is the nature of the substantive proceedings that will determine whether the claim involves equity proceedings. The claim in Londonderry Recorder’s Court did not involve equity proceedings.

Taxation.

[19] It is necessary to return to the issue of taxation and to determine the circumstances in which costs may be taxed in the County Court. Thompsons and McAllisters Application [2002] NIJB 236 concerned the power of the District Judge to tax the costs of an assisted person in proceedings under the Children (NI) Order 1995. Kerr J held that the District Judge had no such power. Various provisions allow for the taxation of costs in proceedings in the County Court but no such provision was made in relation to Children Order cases. There is no inherent jurisdiction on the matter of costs in the County Court.

[20] Taxation of costs will arise under a statutory power, such as, for example, the Matrimonial Causes (Costs) Rules (Northern Ireland) 1981, the Industrial Tribunals (Northern Ireland) Order 1996 or Article 71F of the Solicitors (Northern Ireland) Order 1976. There was no specific power to tax the costs in the applicant’s proceedings in Londonderry Recorder’s Court, whether they were ordinary proceedings or equity proceedings. However Mr Scofield for the applicant contends that consideration of all the relevant statutory provisions would indicate that Thompsons and McAllisters Application was wrongly decided and that there is a general power to order legal aid taxation in the County Court.

[21] First of all it is said that there is ample basis for the power to order legal aid taxation in the specific legislative provisions dealing with legal aid in the County Court. Paragraphs 1 and 2 of Schedule 2 of the 1981 Order do recognise that costs may be taxed in the County Court. Paragraph 3 of Schedule 2 provides that costs shall be taxed “for the purposes of this schedule” on the standard basis. Article 2(3) of the 1981 Remuneration Order provides that, if the Legal Aid Committee members are not unanimous, the costs for counsel and solicitor shall be determined upon taxation in accordance with Schedule 2. Regulation 22(2) (b) recognises taxation of costs under Schedule 2. Further it is contended that the provisions discussed above were not considered by Kerr J in Thompsons and McAllisters Application.

[22] Taxation of costs will be undertaken in accordance with Schedule 2 but the Schedule does not determine when such taxation may take place. I accept the contentions that there is no inherent jurisdiction on the matter of costs in the County Court, that the power of taxation arises expressly or by necessary

implication from the relevant provisions, that there is no express provision for taxation of costs in a case such as the applicant's, that there is no such implication arising under the legislative scheme as it applied to the applicant's claim in the County Court. Accordingly there was no power to order taxation of the applicant's legal aid costs.

Conclusion.

[23] The proceedings issued in Londonderry Recorder's Court involved an Ordinary Civil Bill and the payments to be made to the applicant's solicitor and counsel out of the legal aid fund fall to be assessed by the Legal Services Commission. The sums allowed to the solicitor and counsel shall be the specified amounts under article 2(2) of the 1981 Remuneration Order, subject to the issue of a Judge's certificate of an exceptional case under article 3 of the 1981 Remuneration Order, in which event the sums allowed shall be such as appear to represent fair remuneration.

[24] Accordingly an Order will be made quashing that part of the Order of 29 May 2003 that provided for the taxation of the applicant's costs, and such other part of the Order as may be required to give effect to a reference back to the Recorder as set out below. As no application was made to the Recorder under article 3 of the 1981 Remuneration Order to determine if the case warranted a certificate as an exceptional case, and as the applicant wishes to secure the payment of costs above the specified amount, I refer the matter back to Londonderry Recorders Court to enable the applicant to make an application under article 3 of the 1981 Remuneration Order. Of course it is entirely a matter for the Recorder as to whether she considers she is in a position to entertain such an application.