

Neutral Citation No: [2023] NIKB 115

Ref: McA12314

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

ICOS No:

Delivered: 08/11/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**ON APPEAL FROM THE COUNTY COURT OF NORTHERN IRELAND
SITTING AT NEWTOWNARDS**

BETWEEN:

CHRISTINA FALLS

Plaintiff/Appellant:

-and-

LIDL NORTHERN IRELAND LIMITED

Defendant/Respondent:

**Mr Frank O'Donoghue KC with Mr Michael Ward (instructed by JMK Solicitors)
for the Plaintiff/Appellant**

**Mr Paul McLaughlin KC with Mr Conleth Rooney (instructed by Kennedys Belfast LLP)
for the Defendant/Respondent**

McALINDEN J

[1] By civil bill served on 17 February 2021, the plaintiff/appellant claimed £10,000 damages for personal injuries suffered by her whilst present in the defendant/respondent's shop premises in Newtownards on 19 December 2019. The case came on for hearing on 14 February 2022 and was dismissed on the merits. Under Order 55 rule 1 of the County Court Rules (NI) 1981 ("the Rules"), the defendant/respondent is entitled to its costs from the plaintiff/appellant. A bill of costs dated 30 March 2022 was sent by Kennedys to JMK. This bill of costs claimed full county court costs for solicitor and counsel on the amount claimed on the civil bill.

[2] It transpired that the defendant/respondent's solicitors had entered into a contentious business agreement with the defendant/respondent, whereby the solicitors agreed to charge the defendant/respondent less than the scale fee set out in the Rules for defending the civil bill. In such circumstances, the decision of *Baranowski and another v Rice* [2016] NI 155 prevents the defendant/respondent from claiming full county court scale costs from the plaintiff/appellant. The defendant/respondent's solicitors, realising their error, served an amended bill of

costs dated 30 September 2022 in which the professional charges were reduced, presumably, to reflect the amount which the solicitors could have claimed from the defendant/respondent, on a solicitor/client basis under the contentious business agreement.

[3] The plaintiff/appellant's solicitors refused to recommend payment of this professional fees element of the bill of costs. As a result, the defendant/respondent's solicitors issued a certificate seeking an Interlocutory Order dated 11 November 2022 and following an objection being made by the plaintiff/appellant's solicitors on 23 November 2022, the defendant/respondent's solicitors made an application seeking an Interlocutory Order dated 7 December 2022.

[4] By the Certificate and Application, the defendant/respondent's solicitors sought an order pursuant to Order 33 rule 7(4) decreeing the amounts sought by the defendant/respondent in respect of costs; an order pursuant to Order 55 rule 6 certifying witness fees and expenses; in the alternative, an order pursuant to Order 55 rule 5A that the costs sought by the defendant/respondent be taxed by the District Judge; an order seeking interest pursuant to Article 45A at such rates and for such time as the court deems just; and the costs of the application.

[5] An amended Certificate and Application seeking an Interlocutory Order dated 23 February 2023 were brought before District Judge Collins on 13 March 2023. By the amended Certificate and Application, the defendant/respondent's solicitors sought an order certifying the solicitor's professional fee sought in the defendant/respondent's solicitors' bill of costs pursuant to Order 55 rule 2(a); in the alternative, an order for taxation of the solicitor's professional fee sought pursuant to Article 71F(12) of the Solicitors (Northern Ireland) Order 1976; an order pursuant to Order 55 rule 6 certifying witness fees and expenses; in the alternative, an order pursuant to Order 55 rule 5A(3) that the costs sought by the defendant/respondent be taxed by the District Judge; an order seeking interest pursuant to Article 45A at such rates and for such time as the court deems just; and the costs of the application.

[6] The order made by District Judge Collins on 13 March 2023 reads as follows:

“Upon hearing counsel for the defendant and solicitor for the plaintiff. It is Ordered that the Application for Costs is Granted on all the terms sought. It is Ordered that the plaintiff do pay the defendant its costs of the application.”

The plaintiff/appellant, by Notice of Appeal dated 21 March 2023, appealed this order to the High Court and the matter came on for hearing before me on 19 October 2023.

[7] The issue at the heart of this matter can be expressed in the following manner. In a case where a plaintiff's claim for damages against the defendant, brought by way of Ordinary Civil Bill, is dismissed on the merits, whether the county court has

power, on a party and party basis, to certify a lesser amount than the scale fee set out in the Rules in respect of the defendant's solicitor's costs, in circumstances where there exists a contentious business agreement between the defendant and the defendant's solicitor, under which the defendant's solicitor has agreed a professional fee less than the county court scale fee for defending the claim.

[8] The defendant/respondent submits that the county court can certify solicitor's professional costs on a party and party basis at less than the set county court scale fee, when a purposive approach to statutory construction is adopted, particularly when one has regard to the fundamental principle in county court litigation that costs follow the event. The plaintiff/appellant submits that despite the general rule that costs follow the event, in respect of legal professional fees, where a scale fee is set out in the Rules for a particular piece of work, that is the only fee that can be certified by the county court. Where a scale fee for legal professional work is set out in the Rules, a legal professional fee cannot be the subject of taxation. It can only be the subject of certification in order to perfect the Decree. If, for some reason, a defendant cannot charge the scale fee set out in the Rules because of the existence of a contentious business agreement, then the defendant cannot recover its legal professional fees from an unsuccessful plaintiff because the county court has no power under the relevant Rules to certify anything other than the amount specified in the Rules.

[9] Order 25 rule 1 of the Rules clearly envisages that the hearing of any action or proceeding before a County Court Judge or a District Judge will result in some form of final decree being given. Under Order 33 rule 1, the "chief clerk shall enter in the books of the court a minute of every decree made by the court." Under Order 33 rule 4(1):

"It shall be the duty of the party in whose favour any order is made by the judge to forward the appropriate form of decree to the Office for signing and sealing, and, in the event of an appeal, such form of decree shall be lodged a reasonable time before the hearing."

[10] Order 33 rule 6(2) states as follows:

"For the purposes of enabling all parties in whose favour a decree is given, either wholly or in part to secure execution thereon, the chief clerk may issue to the parties so entitled such number of decrees as may appear to him requisite to implement the orders of the court; and where more than one decree is or is to be issued there shall be endorsed on the face of every decree issued the words "issued to enable AB to obtain the relief provided for him herein"."

[11] Order 33 rule 7(4) states that: "A dismiss of a civil bill for debt or damages shall be in Form 142." Form 142 is set out below:

"Ordinary dismiss

ORDER 33 RULE 7(4)

[Title as in Form 1]

IT APPEARING to the Court that the plaintiff caused the defendantto be served with a civil bill process to appear for the recovery of the sum of £... alleged to be due for [here insert the cause of action] and that the plaintiff failed to prove the said [debt] or any part thereof;

IT IS THEREFORE ORDERED AND DECREED by the Court that the plaintiff s bill be and the same is hereby dismissed without prejudice [or on the merits, as the case may be];

AND IT is FURTHER ORDERED AND DECREED that the defendant do recover against the plaintiff the sum of £... for costs and the sum of £... for witnesses' expenses.

Dated at this ... day of ... 20

Signed Chief Clerk.
(Seal)

Signed
Defendant/Solicitor for the Defendant."

It can be seen that the Decree must set out a sum for costs and a sum for witness expenses.

[12] Order 55 rule sets out a general rule applicable to litigation in the county court. It states:

"A decree granted by the county court shall, except as otherwise provided by any statute or rule, carry such costs as are provided by this Order."

This is important in two respects. Firstly, unless there is specific provision to the contrary, decrees carry costs and, secondly, the costs are such costs as are provided by Order 55.

[13] Order 55 rule 2 is also important in that it firmly embeds the principle and primacy of scale costs in county court proceedings. In all proceedings:

“there shall be payable- (a) to counsel and solicitors, costs according to the scales set out in Appendix 2 and subject to the provisions hereinafter in this Order specified.”

Witnesses’ fees and expenses are payable in accordance with the provisions of Order 55 rule 6. Under Order 55 rule 3(1):

“The above-mentioned costs, fees and expenses together with all court and service fees shall be payable between party and party.”

[14] Order 55 rule 6 states as follows:

“Without prejudice to any discretion exercisable by the Taxing Master of the Court of Judicature under the Solicitors (Northern Ireland) Order 1976 there may be allowed to or in respect of witnesses such fees and expenses as the judge or district judge (as the case may be) in his discretion think just.”

[15] Order 55 rule 7(1) states that:

“In any suit or proceedings for which no scale of costs is prescribed, the amount of costs shall be in the discretion of the judge or district judge (as the case may be).”

[16] Order 55 rule 5 makes provision for solicitor and client costs in the county court. As between solicitor and client:

“a solicitor shall be entitled to make such reasonable charges as are appropriate to work in the county court and in relation to remitted actions to work in both the High Court and county court having regard to the nature and importance of the case to his client, the time spent, and the amount of money of the property involved, after giving credit to the client for any party and party costs actually received by the solicitor.”

When preparing his bill of costs, the solicitor:

“shall take into account the relevant county court scales, both on amount awarded and on amount claimed, having

regard to the degree of responsibility necessarily assumed by him in the interest of his client.”

[17] Order 55 rules 5A, 5B and 9 make provision for the taxation of costs in the county court. Of importance are the provisions of Order 55 rule 5A which relates to the taxation of costs under Part V of the Solicitors (Northern Ireland) Order 1976 in respect of contentious and non-contentious business including cases where there exists a contentious business agreement. I shall return to examine the provisions of Order 55 rule 5 A in a subsequent section of this judgment.

[18] Part V of the Solicitors (Northern Ireland) Order 1976 as inserted into the 1976 Order by Article 21(1) of the Solicitors (Amendment) (Northern Ireland) Order 1989, provides for the remuneration of solicitors. Under the provisions of Article 64, a solicitor can enter into an agreement with his client:

“as to his remuneration in respect of any contentious business done, or to be done, by him providing that he shall be remunerated by a gross sum, or a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.”

Having regard to the definition of “contentious business” set out in Article 3 of the 1976 Order, it is clear that Article 64 authorises solicitors to enter into contentious business agreements in relation to litigation brought and disposed of in the county court. However, under Article 64(2) so called success fees are excluded from the scope of contentious business agreements.

[19] Under Article 65(1) of the Solicitors (Northern Ireland) Order 1976, the general rule is that the costs of a solicitor in any case where a contentious business agreement has been made shall not be the subject of taxation. However, this general rule is subject to some express exceptions, some of which will be discussed below. Under Article 65(3):

“a client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to this solicitor in respect of those costs under the agreement.”

This provision would prevent a successful defendant in the county court claiming the county court scale fee for solicitor’s costs from an unsuccessful plaintiff in a case in which there existed a contentious business agreement under which the defendant and his solicitor had agreed a lesser fee for the solicitor’s work in the case.

[20] In addition to this specific prohibition, persons other than parties to the contentious business agreement are further protected by the provisions of Article 65(2) which provides that a contentious business agreement:

“shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the solicitor, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the Rules for their taxation for the time being in force.”

[21] The provisions of Article 66(1) and (2) of the 1976 Order are also relevant and are set out below:

“(1) No action shall be brought on any contentious business agreement, but on the application of any person who –

- (a) is a party to the agreement or the representative of such a party; or
- (b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under paragraph (1), the court –

- (a) if it is of the opinion that the agreement is in all respect fair and reasonable, may enforce it;
- (b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be taxed as if it had never been made;
- (c) in any case, may make such order as to the costs of the application as it thinks fit.”

[22] The right to make an application to the court under Article 66 is not limited to the parties to contentious business agreements. The right to make an application to the court under Article 66 expressly extends to a person who:

“is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates.”

Having regard to the definition of “contentious business” as set out of Article 3 of the 1976 Order, it would seem that a person who is liable to pay costs arising out of proceedings in respect of which a contentious business agreement exists can bring an application under Article 66(1)(b) and the court’s powers when dealing with such an application are set out in Articles 66(1) and (2). Article 66(6) and (7) make provision for the specific court and specific court officer to which applications brought under Article 66(1) should be brought. If the contentious business agreement relates to proceedings before the High Court or the Lands Tribunal then the High Court is the appropriate venue, and the Taxing Master is the appropriate taxing officer. In respect of contentious business agreements relating to other proceedings, if the amount payable under the agreement is more than £5,000, the appropriate venue is the High Court and if the amount payable is £5,000 or less the appropriate venue is the county court, and the district registrar is the appropriate taxing officer.

[23] Having regard to the powers of the court under Article 66(2)(b), it would appear that an order for taxation of costs can only be made upon an application under Article 66(1) if the contentious business agreement is set aside on account of it being judged to be unfair or unreasonable in any respect. However, under the general provisions of Article 66(1), the court is empowered not only to enforce or set aside the agreement, but it is also empowered to:

“determine every question as to its validity or effect.”

Having regard to who may bring applications under Article 66(1), it would appear that the court can determine every question as to the effect of the agreement on a person who:

“is or is alleged to be liable to pay... the costs due or alleged to be due in respect of the business to which the agreement relates.”

[24] The provisions of Article 65(2) and Article 66(1) contain two exceptions to the general rule set out in Article 65(1) that the costs of a solicitor in any case where a contentious business agreement has been made shall not be the subject of taxation. It can readily be seen that one of these exceptions (Article 66(1)) is not limited to disputes between parties to contentious business agreements and the other exception (Article 65(2)) is specifically aimed at disputes involving persons who are not parties to such agreements.

[25] Returning to the provisions of Order 55 rule 5A, it appears to be a common misconception that these provisions are limited to disputes between parties to a contentious business agreement. This misconception appears to arise from the placement of these provisions immediately after Order 55 rule 5 which specifically relates to solicitor client costs. Order 55 rule 5A was inserted in the Rules after the enactment of the Solicitors (Amendment) (Northern Ireland) Order 1989 in order to bring effect to the provisions of the new Part V of the Solicitors (Northern Ireland) Order 1976 in the county court. Order 55 rule 5A sets out the procedure to be followed in relation to taxation pursuant to an order under Part V of the Solicitors (Northern Ireland) Order 1976. This must include taxation ordered under Article 65(2) and under Article 66(2). This means that Order 55 rule 5A cannot be limited to disputes between solicitors and their clients. Strong support for this interpretation is gleaned from the provisions of Order 55 rule 5A itself.

[26] It is worthwhile setting out the provisions of Order 55 rule 5A in their entirety to demonstrate this point:

“Taxation of costs pursuant to an order under Part V of the Solicitors (Northern Ireland) Order 1976

5A.-(1) Where the court or district judge has made an order for taxation under Part V of the Solicitors (Northern Ireland) Order 1976 the solicitor whose bill of costs, or who was a party to the contentious business agreement to which the order relates shall within two months of the service of the order lodge in the Office:

- (a) a copy of the order;
- (b) his bill of costs or the contentious business agreement as the case may be, together with copies for service;
- (c) all necessary papers and vouchers.

(2) On receipt of the documents mentioned in paragraph (1) the chief clerk shall send a copy of the bill or agreement as the case may be to any other party entitled to be heard on the taxation and shall give to all parties not less than 14 days’ notice in Form 321 of the day and time fixed for the taxation.

(3) The district judge shall tax the costs payable under the bill or agreement and at the conclusion of the taxation

proceedings shall issue a certificate in Form 322 of the costs allowed by him.

(4) In this rule "other party entitled to be heard on the taxation" means-

- (a) a person who was a party to the contentious business agreement or to whom the bill of costs was addressed;
- (b) a person, or the representative of a person, liable to pay or whose property will be chargeable with the amount due on taxation."

[27] In relation to the issue of the scope of Order 55 rule 5A and whether it is restricted to disputes between solicitors and their clients, the expansive definition of "other party entitled to be heard on the taxation" clearly includes the persons described in Article 65(2) and Article 66(1)(b) of the 1976 Order. The corollary of this is that the provisions of Order 55 rule 5A are the county court taxation rules for the time being in force referred to in Article 65(2) of the 1976 Order.

[28] In relation to the plaintiff/appellant's core argument that under Order 55 rule 2 it is scale costs or nothing because the Rules do not provide an alternative means of determining the appropriate level of party and party costs where a contentious business agreement is in operation, the simple answer is that the Rules do provide such a means.

[29] It must be remembered that the wording of Order 55 rule 2 mandates the use of the scales set out for solicitor and counsel in Appendix 2 "subject to the provisions hereinafter in this Order specified." This qualifying provision is very important, and the effect of this qualifying provision is that Order 55 rule 2 must be read in conjunction with Order 55 rule 5A.

[30] The effect of reading these two provisions together is that ordinarily solicitor's costs are as set out in the scales in Appendix 2 to the Rules. However, in county court proceedings where a contentious business agreement under Part V of the Solicitors (Northern Ireland) Order 1976 exists and an unsuccessful party in the proceedings is liable to pay the costs of a successful party in the proceedings who is also a party to a contentious business agreement, then the unsuccessful party can dispute the costs claimed and can seek taxation of the said costs and the taxation of the said costs will be carried out under the provisions of Order 55 rule 5A. This process involves the disclosure of the contentious business agreement to the court and any other party entitled to be heard on the taxation.

[31] One objection specifically raised by Mr O'Donoghue KC to this approach is the loss of certainty that is associated with Appendix 2 scale costs. The example he

gave during his oral submissions related to the decision making involved in considering a lodgement made by a defendant in county court proceedings. The decision whether to uplift the lodgement will clearly be influenced by the plaintiff's exposure to costs which will be incurred by the plaintiff if the lodgement is not uplifted, and the lodgement figure is not beaten at the hearing of the matter. Mr O'Donoghue KC asked the question: how can an informed decision be made in a case involving a contentious business agreement if the party tasked with making the decision does not know his exposure to costs because the existence or otherwise of a contentious business agreement and the terms of any such agreement that is in place are matters outside the knowledge of the plaintiff?

[32] Although this is very much obiter, it would seem that the concerns motivating this objection might be met by the recognition that in such cases an application to the court under Article 66(1)(b) of the Solicitors (Northern Ireland) Order 1976 could be made and the court could then determine every question as to the validity and effect of the contentious business agreement, thus restoring an element of predictability in the assessment of the exposure to costs.

[33] In summary, I dismiss the plaintiff/appellant's appeal and affirm the decision of the District Judge in all material respects apart from one and that relates to Article 71F of the Solicitors (Northern Ireland) Order 1976. This particular provision has no application in a case of this nature. Article 71F(1) makes it abundantly clear that this provision relates to taxation arising out of a dispute between a solicitor and his client. I, therefore, remit the matter to the District Judge for certification of the appropriate elements of the defendant/respondent and for taxation of the appropriate elements under Order 55 rule 5A and rule 6. I will hear the parties' representatives on the issue of costs.