

THE HIGH COURT

[2019 No 9645 P]

BETWEEN

AVRIL GOUGH AND DAVID GOUGH

PLAINTIFFS

AND

**HEALTH SERVICE EXECUTIVE AND
QUEST DIAGNOSTICS INCORPORATED AND
COOMBE WOMEN AND INFANTS UNIVERSITY HOSPITAL**

DEFENDANTS

AND

**BON SECOURS HEALTH SYSTEM COMPANY LIMITED BY GUARANTEE AND JOHN
O'DOWD**

THIRD PARTIES

JUDGMENT delivered electronically by Mr Justice Kevin Cross on the 25th day of May 2020

1. The Proceedings herein concern claims for damages as a result of the alleged negligent misreading of slides and histology by the Defendants which allegedly resulted in the First Named Plaintiff being in a critical condition that could have been avoided had the negligence not occurred.
2. Full Defences were pleaded and Third Parties were joined and the case was with the cooperation of the parties fast tracked for hearing but after the outbreak of the virus the case was successfully mediated and by agreement of the parties one issue was left to be determined namely the application by the Plaintiffs that the Court should certify for two Senior Counsel.
3. It was agreed that all parties should make written submissions to the Court and that I should make my determination electronically.
4. Order 99 r 1(5) provides:

"Where in any proceedings.....the costs of any party are ordered to be paid by another party...these costs shall , if the (Court) ..so directs, include in addition to the costs allowed on taxation....all or any other costs.....reasonably incurred for the purpose of the proceedings...."
5. The Legal Services Regulation Act 2015 sets out a similar procedure to what went before, namely a bill is forwarded by the party entitled to costs and in default of agreement it is referred to The Legal Cost Adjudicator for adjudication under S154 of The 2015 Act.
6. The Plaintiff submits that The Court has jurisdiction under Order 99 R 1 (5) to certify for a second Senior and has exercised that jurisdiction in a number of cases including Swift and another v HSE & Ors. The Court relied principally on the complexity of this type of case:

"..these cases are very complicated and will remain very complicated..."

7. The Plaintiff submitted that the instant case was very complex it alleged that no less than eight slides were negligently read and also that the HSE and its hospital were separately negligent in histology in 2009.
8. Also that the Plaintiffs had to structure the case to preserve if possible the future claims of the Second Named Defendants and the Statutory Dependents of the First Named Plaintiff, the case was urgent given the health of the First Named Plaintiff and there was a large range of experts on all sides so that the engagement of a Second Senior Counsel was justified.
9. The First Named Defendants submitted that while the case was clearly of great significance to the Plaintiff That there was nothing to distinguish it from the vast majority of Personal Injury cases involving Medical Negligence allegations where the Taxing Master only allows one Senior.
10. In Brennan v DePuy 2017 I E H 413 @ 11 Barr J stated:

“ ..nor can the Court determine whether the fees of the second Senior Counsel should be allowed These are matters which are more properly within the jurisdiction of The Taxing Master who will carry out a taxation in due course.
11. The First Named Defendants further submitted that where a direction to the Taxing Master arises it is only in truly exceptional cases and a list of such cases was given.
12. They submit that only one S C was briefed for each Defendants unlike some other cases where a second Senior was allowed and doubt that Order 99 r 1 (5) confers jurisdiction to make the order as sought.
13. The Second Named Defendants make similar submissions to the First and rely on The 2015 Act to set the basis for Taxation and rely on the statement from Barr J in Brennan v DePuy above.
14. The Second Named Defendants also submit that there is nothing to suggest any special features in this case as the law was settled in Morrissey.

Decision

15. I find that the Court has jurisdiction under Order 99 r 1(5) to make the Order sought. However, I also agree with Barr J in Brennan v De Puy that the Taxing Master is the person who has been given the task of assessing all matters concerning taxation including the number of Counsel that will be allowed and the Taxing Master must generally be given the deference to decide the issue.
16. Therefore it is not a question as to whether the Court thinks that the engagement of a second Senior was reasonable but whether the successful Plaintiffs have demonstrated the high barrier that a special Order should be made directing that two Seniors should be allowed. I find that it would only be in exceptional cases that such an Order would be made.

17. Two Senior Counsel and one Junior used to be engaged by both plaintiffs and defendants in every Personal Injury case in the High Court no matter how small or how straightforward. It was a rule as unchangeable as The Laws of The Medes and the Persians.
18. The individual fees paid were lower than when only one Senior was engaged so the extra cost was minor. Having two Senior Counsel enabled the Personal Injury List to be conducted much more efficiently as if a case was called the parties did not have to wait for the Senior to disengage from another case and deal with the case just listed.
19. After the Bar agreed to limit requests for taxation to one Senior, Plaintiffs still retained two Senior Counsel but generally divided the fees allowed between all the Barristers on a 3/8, 3/8 and 2/8 basis
20. The first justification for two Senior Counsel is therefore that it is more efficient and is not much more costly.
21. In Medical Negligence cases the issues are far more complex than in other Personal Injury cases and I fully accept the submissions of the Plaintiffs which highlight the difficulties of this case.
22. The fact that each of the Defendants engaged just one Senior does not mean that equality of arms requires only one on the Plaintiffs side as the task facing a Plaintiff in a Medical Negligence case is very difficult due to the law in *Dunne v National Maternity Hospital* but also as the Supreme Court in *Morrissey* found direct liability in the HSE, both Defendants in this case had essentially the same interest in most of the issues in the trial. So two Senior Counsel for the Defence were facing two for the Plaintiffs.
23. However as I stated I am not deciding that I would allow two Senior Counsel but whether the Plaintiffs have established that the Court should unusually direct the Taxing Master to allow for two Seniors.
24. As I stated in *Swift* above these cases are complex more complex than most medical negligence cases, this case was clearly complex as it required a long day to successfully mediate. However, the reasons advanced by the Plaintiffs in their submissions are not sufficient to meet the test that it is only exceptional cases that the Court should impose its view on the Taxing Master whose function is to decide these matters. Exceptional means unusual or highly unusual but not necessarily unique. The Legal principals have been decided in *Morrissey* so this case does not have the unique features of that case from a legal point of view.
25. I am not of course saying that the Taxing Master should or should not allow a second Senior, that is a matter to be decided on its merits.
26. Accordingly I refuse the application to direct that two Senior Counsel should be allowed and state that in the absence of agreement that issue falls for decision on taxation.

27. I make no Order as to Costs on this application.

Kevin Cross