Update on Payment of and Taxation of Costs

Over the past number of years the taxation of legal costs in Ireland has been a regretfully slow process. Parties have been under pressure to try to negotiate settlement of bills of costs or else face a long delay in having the matter resolved at taxation. This can have the undesirable result for insurers of having to keep a file open for a much longer period than would be expected, after settlement of or judgment in a case.

A new practice direction issued in April 2017 by the President of the Irish High Court intends to reduce the significant delay encountered by a successful party to litigation in recovering its costs from the other side, in situations where liability as to the payment of said costs is not in issue but taxation is necessary.

On 24th April 2017, Mr Justice Peter Kelly gave effect to Practice Direction 71:

“In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B (5).

I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.”

The intention is clear: to soften and alleviate the financial burden frequently borne by the successful party to litigation in awaiting receipt of monies owed
in respect of payment of costs. Building upon the recent Legal Services Regulation Act 2015, Practice Direction 71 intends to expedite the process involved in the discharge of legal costs while the delay in getting costs taxed is tackled.

Key points:

+ The practice direction only applies where liability for payment of costs is not in issue or where the Court, in applying its discretion, thinks it appropriate.
+ It concerns payment on account pending the Taxing Master’s determination.
+ The Court must make an Order directing the payment on account.
+ The solicitor for the successful party must provide an undertaking that, in the event of it being found that a lesser sum is owed, any overpayment will be repaid.
+ The sum directed to be paid must constitute a reasonable sum.

Recent judgments:

Two recent judgments appear to have set the tone which the Courts will take when considering applications pursuant to Practice Direction 71 and, more importantly, emphasise the caution and restraint to which judges are having regard when exercising their discretion on the matter.  

Mr Justice Barr, the Judge presiding over both matters, considered the Plaintiffs’ applications pursuant to Practice Direction 71, in each case seeking part payment by the Defendants of monies owed to the Plaintiffs in relation to legal costs incurred.

In giving his judgments he emphasised a number of key points:

i. It is for the Taxing Master to determine what the appropriate final fee recoverable should be. The role of the Court is limited to attempting to determine what would represent a reasonably substantial payment on account in respect of costs.

…”

...in all cases where there is no dispute as to the liability for the payment of costs ... an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs.

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1 Heeney -v- Depuy International Limited & anor [2017] IEHC 355
2 Brennan -v- Depuy International Limited & anor [2017] IEHC 413
ii. The Court, in making an Order pursuant to Practice Direction 71, must be mindful not to expose the unsuccessful party to a substantial and detrimental overpayment.

iii. The Court must consider the possibility that a defendant will be left to chase a plaintiff in situations where there has been a substantial overpayment by that defendant to the plaintiff pursuant to Practice Direction 71.

iv. The Court must be careful to refrain from giving an indication as to what is considered an appropriate fee in circumstances where substantial evidence and argument on the issues raised before it have not been properly addressed and/or advanced.

v. Any figure to be paid by one party to another which is ordered by the Court pursuant to Practice Direction 71 constitutes a payment on account, and “is not an indication as to the level of costs which may ultimately be recovered by the plaintiff on taxation.”

Current status of taxation system and delays

On the 24th of April 2017, Paul Behan, managing partner at Behan & Associates, Legal Costs Accountants was appointed as a second Taxing Master of the High Court. He joins the current Taxing Master, Declan O’Neill and his appointment was greeted with approval from litigators. It appears the new appointment has already helped to ease the backlog of cases.

Consequently, while Practice Direction 71 still offers a useful tool to obtain a part-payment of costs expeditiously, the necessity of and use for it may be reduced due to this recent development. We understand that in recent weeks a number of High Court Judges have chosen to refuse applications for payment on account due to the appointment of the second Taxing Master and an almost immediate reduction seen in the delay to reach taxation.

Conclusion

The untenable situation that had transpired with a taxation system that had almost ground to a halt has now been vastly improved by these two welcome
developments. No doubt it will go some way towards easing the burden on firms struggling to carry the cost of litigation and also to provide certainty and finality for the paying party. It remains to be seen if the payment on account of a certain percentage of a bill of costs will result in ultimate settlement of the bill, which would be the desired effect for insurers to achieve finality. Anything that might break a log jam for insurers and avoid having to keep files open for many years following settlement or judgment would be welcome. We will just have to watch this space to see if this Practice Direction has a particular impact.

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