

Neutral Citation No: [2024] NICty 2

Ref: KIN12408

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

ICOS No:

Delivered: 25/01/2024

IN THE COUNTY COURT OF NORTHERN IRELAND

BETWEEN:

FERMANAGH AND OMAGH DISTRICT COUNCIL

Plaintiff

and

GERARD O'NEILL AND OTHERS

Defendants

Mark Orr KC and Richard Shiels (instructed by Fermanagh and Omagh District Council)
for the Plaintiff

Rory McNamee BL (instructed by Doris and McMahon Solicitors) for 1st to 4th Defendants
Stewart Beattie KC and Adrian Colmer KC (instructed by Cleaver Fulton Rankin
Solicitors) for 7th to 9th Defendants

DECISION ON COSTS

KINNEY J

Introduction

[1] I dismissed an application made by the plaintiff for a declaration of a public right of way under the provisions of the Access to the Countryside (NI) Order 1983. The parties have now returned to the court as there is disagreement on the appropriate basis on which to measure costs in this matter. The defendants contend that the court has a discretion to award substantial costs which are well outside the relevant County Court scale fees for applications of this nature. The plaintiff contends that there is no discretion for the court to move outside the scale costs provided for proceedings of this nature, whilst conceding that the court has a discretion to move between the scales.

Background

[2] I have already provided a detailed judgment regarding the core matters in issue between the parties. The hearing lasted for four days. The parties were represented by solicitors and counsel, and a number of the parties were also represented by senior counsel. I heard from a range of witnesses including lay witnesses and experts. The parties provided detailed skeleton arguments in the case along with extensive closing submissions. In the course of my judgment I noted that the burden of proving the existence of a public right of way lies with the person making that claim. It is a fact-based exercise and where there is no express act of dedication of the public right of way the court is invited to infer the dedication from the evidence. In this case there was no evidence which supported such an active dedication for public use. I was further satisfied there was no evidence of acceptance or user by the public. I therefore concluded that the plaintiff had failed to prove either dedication of the route or any acceptance or user by the public and I dismissed the plaintiff's application.

The law

[3] There is no dispute between the parties regarding the applicable law. It is agreed that the case involved the assertion of a public right of way and comprised a title suit.

[4] Article 12(1) of the County Courts (Northern Ireland) Order 1980 ("the 1980 Order") provides:

"Actions for recovery of, or involving title to, land

12.(1) A county court shall, subject to paragraphs (1A) to (4) have jurisdiction to hear and determine any action –

- (a) for recovery of land; or
- (b) in which the title to any land comes in question; if either of the following sub-paragraphs applies –
 - (i) the net annual value of the land does not exceed £4,060; or
 - (ii) the capital value of the land does not exceed £400,000."

[5] The parties also agreed that the County Court is the suitable and correct forum for these proceedings pursuant to the above provision.

[6] The relevant provisions regarding costs are set out in Order 55 of the County Court Rules (Northern Ireland) 1981 (“the County Court Rules”):

“Scales of costs

2.-(1) Subject to Rule 7(2), in all actions, suits and matters and other 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;
- (b) to or in respect of witnesses, fees and expenses subject to the provisions hereinafter in rule 6 specified.

...

6. 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) shall in his discretion think just.

7.-(1) 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).

(2) Where, in any suit or proceedings for which a scale of costs is prescribed, the judge or district judge (as the case may be) is satisfied that any party has unreasonably and for the primary purpose of increasing his costs included in his claim an amount in respect of any undisputed loss or damage, the judge or district judge (as the case may be) may reduce the amount of costs payable to that party by such amount as he shall think fit.

(3) The costs awarded on any application under Article 14 of the 1988 Order shall be in the discretion of the judge or district judge (as the case may be).

(4) The costs awarded on an application under

- (a) Article 7(3), 8(1), 16(1) or 16(4) of the 1977 Order;

- (b) Article 151 16(6), 17 or 18(4) of the 1988 Order [rep];
- (c) section 28(4) of the 1978 Act or section 63(3) of the 1991 Act [rep] [, s.5 of the 1996 Act [rep] or Sch.12 to the 2000 Act [rep]].

shall be in the discretion of the judge both as to incidence and amount.

(5) In this Order- "the 1977 Order" means the Criminal Damage (Compensation) (Northern Ireland) Order 1977;

"the 1978 Act" means the Northern Ireland (Emergency Provisions) Act 1978;

"the 1988 Order" means the Criminal Injuries (Compensation) (Northern Ireland) Order 1988;

"the 1991 Act" means the Northern Ireland (Emergency Provisions) Act 1991;

["the 1996 Act means the Northern Ireland (Emergency Provisions) Act 1996; "the 2000 Act" means the Terrorism Act 2000]

...

11.-(1) This rule only applies where the plaintiff's cause of action (or if there is more than one cause of action the principal cause of action):

- (a) related to contracts for works of building or engineering construction, contracts of engagement of architects, engineers or quantity surveyors, the sale of goods, insurance, banking, the export or import of merchandise, shipping or other mercantile matters, agency, bailment, carriage of goods, professional or clinical negligence or title to land;
- (b) claimed assault, battery, wrongful arrest or false imprisonment and where a named defendant is the Ministry of Defence, Chief Constable of the Police Service of Northern Ireland or Head of the Northern Ireland Prison Service;

(ba) claimed diffuse mesothelioma or any asbestosis related disease; or

(c) was brought under:

(i) Part IV of the Sex Discrimination (Northern Ireland) Order 1976;

(ii) Part III of the Race Relations (Northern Ireland) Order 1997;

(iii) Part IV of the Fair Employment and Treatment (Northern Ireland) Order 1998;

(iv) Part III of the Disability Discrimination Act 1995;

(v) section 76 of the Northern Ireland Act 1998; or

(vi) regulations 24 or 25 of the Employment Equality (Age) Regulations (Northern Ireland) SR (NI) 2006/261;

(vii) regulations 5 to 17 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) SR (NI) 2006/439;

(viii) the Consumer Credit Act 1974; or

(ix) the Special Educational Needs and Disability (Northern Ireland) Order 2005.

(2) Subject to paragraph (4) where, at the conclusion of a cause of action to which this rule applies, the judge or district judge (as the case may be) is satisfied that the issues in the case were of particular complexity, he may order that the parties receive an enhancement of their costs in addition to the scale costs set out in Appendix 2.

(3) The amount of any enhancement under this rule shall be one-third of the scale fee in Appendix 2 to which the parties are entitled.

(4)(5) [rep. SR (NI) 2013/19]”

[7] Part VIII of App 2 deals with equity costs and it applies here.

“Equity and Title suits

1. Subject to the judge or district 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.

2. In equity and title matters solicitor’s costs and counsel’s fees shall be determined in accordance with Tables 1 and 2 respectively.

...

5. Notwithstanding the foregoing provisions of this Part, the judge or district judge may in any case direct that any of the scales prescribed in this Part be wholly or partly applicable for the determination of the costs of any party thereto.

6. Where, having regard to the work actually performed, the amounts provided under the relevant scale are in the opinion of the judge or district judge inadequate, he may for any particular case make a special order allowing such costs and expenses as he may think just.”

Arguments of the parties

[8] The plaintiff asserts the primacy of scale costs in the County Court. Appendix 2, part VIII paragraph 2 is clear and unequivocal in its terms in stating that in equity and title matters costs shall be determined in accordance with the tables set out in that part. The plaintiff notes that the County Court Rules permit a professional fee for only one counsel per party and sets the rate for refreshers. Paragraph 6 of part VIII provides a discretion to the judge in allowing costs and expenses, but this must be read in the context of the entirety of part VIII and of the County Court Rules as a whole.

[9] The plaintiff quotes from Valentine’s commentary on paragraph 6, which is to the effect that a judge may award a higher scale if he or she is of the opinion that the appropriate scale is inadequate. The plaintiff points out that there is no authority in this jurisdiction where the exercise of the discretion on title suit costs has moved the assessment of fees outside the scales.

[10] The plaintiff also referred to the dicta in *Re (Mary) Graham* [2006] NIQB 62 that there is no inherent jurisdiction to tax costs in the County Court. Notwithstanding

this general approach the plaintiff also asserted that in this case the legal and factual issues were entirely typical and usual of cases of this nature.

[11] The costs of expert witnesses should properly be taxed on an itemised and detailed basis and this aspect of the claim for the expert witnesses should be remitted to the District Judge for taxation as disbursements in the normal course.

[12] The defendants argue that this was a complex and difficult case with considerable expert evidence required. A key element in evaluating the appropriate costs recoverable were the commercial value and significance of the matter in dispute. The asserted public right of way was of pivotal practical importance to the development of a goldmine by one of the defendants, Dalradian Gold Ltd. The defendants assert that the potential commercial value of the development of the goldmine is over £5 billion.

[13] The defendants point to the references in the rules to the judge's discretion. They argue that the costs and fees set out in the County Court scale in part VIII are inadequate. The court should consider the work actually performed by the legal representatives, the exceptional complexity of the case, its importance and the gross value of the asset in assessing the appropriate costs.

[14] The defendant acknowledges that in determining the expert witnesses fees the judge should apply the High Court taxation principle. The defendant argued that all of the experts called by them were reasonably necessary for defending the defendant's rights and the court should award the costs claimed by each of the experts in the case.

Consideration

[15] The parties are agreed, and I am satisfied, that the County Court is the correct jurisdiction for this case under Article 12 of the 1980 Order. No one sought to have the matter removed to the High Court. The lands themselves were agricultural. Whilst the defendants have submitted that a considerable commercial interest with a very substantial value rests on the outcome of this case, no planning permission has been granted for goldmining or other commercial activities and the land remains agricultural.

[16] Order 55 of the County Court Rules deals with the issue of costs. Rule 2 of Order 55 provides that the costs payable for all actions are those costs according to the scales set out in Appendix 2 and subject to the provisions set out further in Order 55. Thus, the use of the scales is specifically incorporated and relied upon in the wording of rule 2. The only qualification in rule 2 in relation to any discretion on the use of the scales in Appendix 2 is a reference to rule 7(2) which allows the judge to reduce the scale costs in certain circumstances. The only other qualification, such as it is, in rule 2 is to the "provisions hereinafter in this order specified."

[17] There are some areas of discretion in the measuring of costs in County Court proceedings contained in the other rules in Order 55. For example, rule 5A makes provision for taxation of costs under the Solicitors (Northern Ireland) Order 1976 (see *Falls v LIDL (NI) Ltd* [2023] NIKB 115). Rule 7 contains an express discretion for the assessment of costs in any suit or proceedings for which no scale of costs is prescribed. Rule 7 also contains a provision to reduce scale costs in certain circumstances where the judge is satisfied a party has unreasonably included a claim for the primary purpose of increasing costs. Finally, rule 7 identifies certain clearly specified proceedings, such as criminal damage or criminal injuries claims or applications under the Terrorism Act 2000, where costs are at the discretion of the judge as to both incidence and amount. Rule 10 deals with counterclaims. Rule 11 deals with the enhancement of costs in certain complex cases. A list of causes of action is provided (including actions for title to land - 11(1)(a)). However, the power to enhance costs is based on the entitlement to scale costs set out in Appendix 2 and the uplift is confined to one third of the scale fee in Appendix 2 to which the parties are entitled.

[18] In *Re C&H Jefferson (a firm)* [1998] NI 404 Lord Carswell said:

“Costs in the County Court are regulated by Order 55 of the County Court Rules (Northern Ireland) 1981. The structure of the provisions relating to costs is that in the very large majority of cases scale fees are payable both between party and party and between solicitor and client. They are fixed from time to time by the County Court Rules Committee and have statutory force. When the scales are applied there is no element of discretion and taxation of costs and fees is not required. They are largely related to the amount at stake in the proceedings and operate on the swings and roundabouts principle: in some cases solicitors and counsel may be fairly handsomely paid for a case which has not involved a great expenditure of time and effort, in others they may have to do a great deal of work for very modest reward. The virtue in fixed scales is twofold. If the scales are fixed at a suitable level proceedings in the County Court can be conducted at reasonable cost, while giving a reasonable return to the practitioners who conduct them. At the same time the cost of litigation is predictable because it is capable of fairly precise calculation and a prospective litigant may ascertain his financial commitment before he launches proceedings.

... Appendix 2 contains a series of scales of costs, most of which are not directly material to the present case, but

which show clearly the pattern in which the cost structure in the County Court is built.”

[19] The last substantive review of the system of fees in the County Court was the Review of the Civil Justice System in Northern Ireland which produced its final report in June 2000. That review concluded that the system of scale fees in the County Court as prescribed by the County Court Rules Committee should continue. At paragraph 83 of the review the Civil Justice Reform Group said:

“The Group recommends that the system of scale fees in the County Courts prescribed by the County Court Rules Committee and approved by the Lord Chancellor after consultation with the Lord Chief Justice, continue. It further recommends that the scales be regularly reviewed and that the Rules Committee, when conducting such a review, while having regard to any similar scales prescribed for England and Wales, and to the need for professional services to be remunerated on a fair and reasonable basis, should also have regard to the need to ensure that litigation in the County Courts in Northern Ireland is conducted efficiently and economically. The group further recommends that the County Court Rules Committee have regard to the provision of scale fees for experts, to be formulated after consultation with the relevant professional bodies.”

[20] Two key features of the County Court jurisdiction are firstly that the procedure is relatively straightforward and secondly that it is comparatively inexpensive. I acknowledge that, as the monetary jurisdiction of the court has increased, so has the volume and complexity of litigation. The County Court is an immensely important court in the civil justice system in Northern Ireland. Part of the structure of the court is predictability of costs. Lord Carswell in *Re C and H Jefferson* said that the County Court is “a court in respect of whose proceedings costs and fees should be both moderate and ascertainable.”

[21] When he was Recorder of Belfast, Judge Hart wrote an article for the Northern Ireland Legal Quarterly (volume 53, number 2). In that article he commented;

“A further virtue of the fixed scale costs system is that it avoids the need for taxation, itself a time-consuming process which inevitably creates further expense because of the time spent in preparing the bills for taxation, judicial time spent in determining the costs and the financial cost to the lawyers who do not receive the fees they are entitled to for an appreciable period after the

conclusion of the case, and therefore are having to carry the cost of funding the litigation, not just their own costs but the outlays in the form of expert witnesses fees and court fees which have been incurred on behalf of their clients. This is of particular significance in Northern Ireland where plaintiffs are not expected to meet the costs of litigation until the end of the case. As scales embody the swings and roundabouts principle it is inevitable that they cannot provide for the circumstances of every individual case, but provided the overall returns to practitioners are fair and reasonable the very considerable advantages of fixed scales to both the public and the legal profession are obvious.”

[22] Order 55 rule 9(1) had previously provided that costs in equity suits or proceedings should be taxed by the circuit registrar in default of agreement. That provision was repealed subsequent to the Civil Justice Review by the County Court (Amendment number 2) Rules (Northern Ireland) 2002. A further amendment also inserted a new rule 11 which provided for an uplift of fees in certain complex cases, but which still remained within the scale structure. The defendants argue that rather than rely on rule 11 which provides a limited power to uplift costs, the alternative is in fact found in paragraphs 1 and 6 of part VIII in Appendix 2.

[23] Paragraph 6 is set in relatively broad terms. It provides that where in the opinion of the judge the amounts provided under the relevant scale are inadequate, he may in any particular case make a special order allowing such costs and expenses as he may think just. The defendants point to this paragraph and say this is an unfettered discretion. The plaintiff argues that the discretion remains linked to the scale costs. In considering this provision it is important to have regard to the context of the rules. These reference the primacy of the use of scale costs. It is also of considerable importance that in paragraph 6 the starting point for the discretion is not where the scales provided in the Appendix are inadequate but rather where the relevant scale is, in the opinion of the judge, inadequate. This, it seems to me, firmly anchors the discretion in paragraph 6 to the scales of costs provided.

[24] The defendants relied principally on paragraph 1 of Part VIII of Appendix 2:

“1. Subject to the judge or district 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.”

[25] This on its face is capable of the wide construction which is advocated by the defendants. However, paragraph 1 is a part of Appendix 2. The appendix is referred to in rule 2 of Order 55. Rule 2 is specific in confining costs to the scale costs

set out in Appendix 2. Rule 2 is not restricted or made subject to any discretion contained in part VIII of Appendix 2.

[26] There are a range of other factors which would suggest that a narrower construction is correct. These include not least the statutory framework for costs and fees in the County Court and the use of scale fees throughout. The exceptions to the use of scale fees are discreet and well defined and I have set out some examples earlier.

[27] Paragraph 2 of part VIII is also emphatic in its unequivocal terms, where it provides that in equity and title matters costs “shall be determined in accordance with tables 1 and 2 respectively.”

[28] The primacy of scale costs is further emphasised by the removal of rule 9(1) of Order 55. This allowed for the taxation of costs in equity matters. The inclusion of rule 11 provided for a discretion confined by reference to the statutory scales. There is therefore no provision for taxation in cases such as this, nor is there a basis for an unfettered discretion.

[29] Furthermore, if there was an overall discretion for making costs orders it would render paragraph 6 of Appendix 2 otiose. Similarly, it would render rule 11 of Order 55, which provides for enhancement of costs in certain complex cases, including cases involving title to land, unnecessary.

[30] To read the statutory provisions as asserted by the defendants creates a conflict between rule 2 of Order 55 and paragraphs 1 and 6 of Part VIII of Appendix 2. I am satisfied this is not the correct approach. Any discretion available to the judge is defined within Appendix 2, and that discretion is then bound within the terms of Appendix 2. The discretion on costs stays within the parameters of the scales. If the discretion were to move outside those parameters, then it would conflict with the principle of the scale costs regime and the “swings and roundabouts” principle inherent in the County Court statutory scheme.

[31] I am satisfied that there is no inherent jurisdiction to assess costs or to direct taxation in the County Court. Any necessary jurisdiction is found within the terms of the rules and there is no need to imply any further discretion.

[32] I am satisfied that the scale costs provided for in part VIII of Appendix 2 are the appropriate costs for these proceedings. I am satisfied that there is no discretion available to me to assess costs, on whatever basis, outside the scale costs. I am further satisfied that I have a discretion to award costs on a different scale under paragraph 6 of part VIII of Appendix 2 if I am satisfied that the relevant scale is inadequate. I can also order that the parties receive an enhancement of their costs under rule 11 of Order 55.

[33] As the trial judge I am satisfied that I have the appropriate information to allow me to assess whether or not the relevant scale fee is inadequate. I have taken into account the complexity of the subject matter. I do not consider that the case was exceptionally lengthy given the nature of title suits nor do I accept the defendants' characterisation of the value.

[34] I determine that the appropriate scale for counsel and solicitor is scale 7. I will further enhance the scale fee for the defendants by one third of scale 7.

[35] There is no provision in the rules which permits me to award costs for more than one counsel. My award therefore is for one counsel only for each party.

[36] I direct that the expenses and fees of the expert witnesses be taxed by the District Judge in accordance with rule 6 of Order 55.