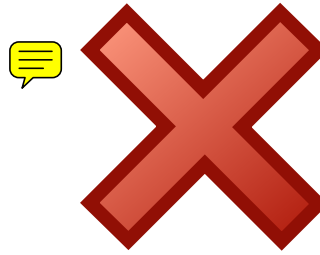


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# THE SUPREME COURT

Keane C.J.  
Murphy J.  
Hardiman J.  
259/01



**BETWEEN**

**ALBERT DAWSON AND DUDLEY DAWSON**

**TRADING AS A E DAWSON AND SONS**

**PLAINTIFFS**

**AND**

**IRISH BROKERS ASSOCIATION**

**DEFENDANT**

**JUDGMENT delivered the 8th day of May, 2002 by Keane C.J.**

These proceedings have a lengthy history which, for the purpose of this judgment, can be briefly summarised. The plaintiffs are insurance brokers and the action was brought in respect of an alleged defamation of them by the defendants. There were four separate trials of the proceedings in the High Court before a judge and jury. The last of the four - presided over by Kelly J - resulted in a verdict in favour of the plaintiffs and an award of damages of £135,000. The plaintiffs, who were awarded the costs of the proceedings, appeared in person at that trial, in the subsequent taxation of costs before a

taxing master, in a motion to review the taxation (again before Kelly J) and in the present appeal to this court from the judgment and order of the High Court on that review.

Two issues arose on the hearing of the appeal to this court. The first was whether the learned High Court judge was correct in law in upholding the determination of the Taxing Master that the plaintiffs, conducting the litigation as they had done in person, were not entitled to recover costs on the same basis as a solicitor for preparatory work undertaken by them prior to the trial. The second issue was whether he was correct in setting aside the determination of the Taxing Master that the plaintiffs were entitled to recover from the defendants the sum of £7,000 in respect of fees for advice furnished to them by a firm of solicitors at a stage when they were not on record in the proceedings.

While those were the only two issues of any substance before the High Court also, the plaintiffs - as is clear from the comprehensive extempore judgment delivered by the High Court judge - attempted to introduce on the hearing of the motion before him what he described as "serious and scurrilous statements" concerning a wide range of people, including members of the Government, a professional institution, barristers, solicitors and a number of High Court judges, including the then President of the High Court and the trial judge himself. The plaintiff also attempted to introduce the same material on

the hearing of the appeal in this court, despite frequent reminders from members of the court that the court was solely concerned with the appeal from the judgment and order of the learned High Court judge. In the light of what this court heard from the first named plaintiff on the oral hearing, I have to agree with the conclusion of the learned trial judge that, unfortunately, in the case of these plaintiffs,

*“Obsession has replaced reason and invective has replaced argument.”*

I turn now to the first of the two issues that arose on the appeal. The plaintiffs in the bill of costs taxed by the taxing master sought to recover fees at a charge out rate of £140 per hour in respect of the preparatory work carried out by them in preparation for the trial. That would result in a charge of £355,675 and a further sum of £140,000 was claimed in respect of unrecorded time said to have been spent on the case, amounting to a total of approximately £500,000. It is not in dispute that the first-named plaintiff was allowed on taxation the sum of £300 per day and the second-named plaintiff the sum of £100 in respect of their attendance in court at the trial.

The Taxing Master in his report to the High Court said that he had disallowed this item having regard to the decision of Finlay P (as he then was) in *Henehan -v- Allied Irish Banks plc* (unreported; judgment delivered 19th October 1984). The trial judge, while pointing out that the decision, although of high persuasive authority, was not binding upon him, was satisfied that it was in accordance with well settled authorities in England, i.e., *London Scottish Benefit Society -v- Chorley* [1884] 13 QBD 872 and *Buckland -v- Watts* [1970] 1 QB 27 and was correct in law.

The first named plaintiff, whose submissions were adopted by the second named plaintiff, submitted that the decision in *Henehan* was unjust and anomalous, as were the earlier English decisions which it followed. He urged that those decisions proceeded on the basis that, although a solicitor appearing for himself was entitled to recover such costs in respect of the preparatory work undertaken by him for the trial, a lay litigant, in the same position, was not entitled to be recompensed in any way for the time and trouble to which he was put in preparing for the trial. He submitted that this was wrong in principle and infringed the constitutional right of access of citizens to the courts, since it necessarily resulted in litigants who elected to appear for themselves in being at a loss which was irrecoverable either in the form of costs or damages from the unsuccessful party.

On behalf of the defendants, Mr. Denis McDonald SC submitted that the law was as stated by Finlay P in *Henehan -v- Allied Irish Banks*. It was a long established principle of the law that, while the successful party in litigation was entitled to be indemnified as to the costs incurred by him in bringing the proceedings, that indemnity extended only to legal costs which the court could measure. There was no Irish decision to the effect that a solicitor appearing in person could recover such costs, but there was in any event no reason to assume that, even if that were the law in Ireland, the decision in *Henehan -v- Allied Irish Banks plc* would have been any different. Mr. McDonald also submitted that it was significant that, when the powers of taxing masters on a taxation of costs were being clarified by the Oireachtas in s.27 of the Court and Court Officers Act 1995, no alteration in the law on this topic was effected, although the draftsman must be taken to have been aware of the decision in *Henehan*. In contrast, the legislature had intervened in England by enacting the Litigants in Person (Costs and Expenses) Act 1975 and Order 62 Rule 28a of the former Rules of the Supreme Court in England.

In considering this issue, I think it is helpful to refer to a passage from the judgment of Bowen LJ in *London Scottish Benefits Society -v- Chorley*. He had this to say about the nature of costs:

*“Cost are the creation of statute. The first enactment is the statute of Gloucester, 6 Edw. 1 c1, which gave the costs of the ‘writ purchased’. There is a passage in Lord Coke’s Commentary, 2 Inst. 288 which it is worthwhile to examine as it affords a key to the true view of the law of costs. That passage is as follows:*

*‘Here is express mention made but of the costs of his writ, that it extendeth to all the legal costs of the suit, but not to the costs and expenses of his travel and loss of time, and therefore ‘costages’ cometh of the verb ‘conster’, and that again of the verb ‘constare’, for these ‘costages’ must ‘constare’ to the court to be legal costs and expenses.’ What does Lord Coke mean by these words? His meaning seems to be that only legal costs which the court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course with it takes.”*

That explanation of the reason why legal costs are recoverable from the unsuccessful litigant, and of the nature of such costs, remains, in my judgment, the underlying basis of our law on the topic. In that case, the right of a solicitor appearing for himself to recover professional charges in respect of work done

by him as a solicitor in his own case was at issue and Bowen LJ goes on to point out the different considerations which apply to such charges:

*“Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs: and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk.”*

The fact that Bowen LJ went on in that case to contrast the position of a solicitor seeking to charge for his time and labour in preparing a case with that of a lay litigant does not lessen the weight to be attached to the earlier passage to which I have referred. That was the view also taken by the Court of Appeal in England in Buckland -v- Watts and by Finlay P in Henehan -v- Allied Irish Banks plc and I am satisfied that it represents the law in this jurisdiction.

It may be thought that it is somewhat unjust that a person who has been wrongfully obliged to institute or defend proceedings should be unable to

recover any costs in respect of time which he has spent in the preparation of his case and that the unsuccessful party should be under no obligation to pay anything in respect of that loss. However, that is a matter which it must be for the legislature, and the legislature alone, to redress and it is noteworthy that, when they came to clarify the powers of a taxing master in respect of the taxation of costs as between party and party, they expressly refrained from making any alteration in the law, although a possible model existed in the form of the Litigants in Person (Costs and Expenses) Act 1975 in the United Kingdom. In the absence of any such legislation, the difficulty long ago identified by Bowen LJ remains: i.e., that it is only legal costs which the court can measure that are to be allowed. No doubt the exercise by a citizen of his/her right of access to the courts would be facilitated by making some provision for the recovery of such costs, but it certainly does not follow that the common law principle that they are irrecoverable in the absence of legislation is inconsistent with that constitutional right. I am fortified in that conclusion by the fact that in *Henehan -v- Allied Irish Banks plc* Finlay P, although he adverted to the constitutional right of access in another context, appears to have been of the view that it did not affect the existence in our jurisdiction of the general principle as to the irrecoverability of such costs.

The second issue can be dealt with more briefly. The firm of Augustus Cullen and Son were on record for a period of time as solicitors for the

plaintiffs. The plaintiffs also claimed fees in respect of a period of time during which they were not so on record. The Taxing Master, allowed them a sum of £7,000 in respect of advice which they obtained from that firm while they were not on record. The Taxing Master, in making that allowance, relied on the following passage from the judgment of Brett M R in London Scottish Benefits Society -v- Chorley:-

*“Where an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him; the remuneration paid to the solicitor is money paid out of pocket.”*

The trial judge was of the view that this passage was not authority for the proposition that a litigant appearing in person who obtained advice from a solicitor in relation to the case was entitled to recover the costs of that advice. He considered that it referred to the taking of steps which were necessary in the course of the proceedings and which the litigant could not take himself, e.g., maintaining an address for service of documents within two miles of the Four Courts. I am satisfied that he was correct in so holding and that the Taxing Master should have disallowed this item.

In the result, I would dismiss the appeal and affirm the order of the High Court.