

UNAPPROVED
No Redaction Needed



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 23

Record No.: 2019/101

**Edwards J.
Donnelly J.
Haughton J.**

BETWEEN/

ANTHONY J. FITZPATRICK

APPELLANT

-and-

**PAUL M. BEHAN (IN HIS CAPACITY OF TAXING MASTER
OF THE HIGH COURT)**

RESPONDENT

-and-

MYLES KIRBY

NOTICE PARTY

JUDGMENT of Ms. Justice Donnelly delivered on the 2nd day of February, 2021

1. On the 24th November, 2020 this Court dismissed the appellant's appeal in respect of a refusal to grant him judicial review of three certificates of taxation of costs granted by the respondent Taxing Master.
2. The Court indicated in its judgment that as the Taxing Master and the notice party had been entirely successful in this appeal, the provisional view was that they are both entitled to their costs in this Court. The Court permitted a brief supplemental hearing on the issue of costs. At a later date, at the request of the appellant, the Court permitted written submissions of no more than 2,000 words to be filed by a given date. The appellant breached both parts of that indication with lengthier submissions than allowed and filed late.

3. The facts of this case are set out in the judgment of the 24th November, 2020. In short, the appellant sought *certiorari* of the decision of the respondent Taxing Master on the basis that fair procedures were breached in failing to adjourn the case due to the lack of supposed readiness of the appellant and also on the basis of objective bias. The objective bias claim arose where it was argued that there was a connection between the Taxing Master and the firm of costs accountants representing the notice party at the hearing due to the previous working relationship with Mr. Conlon of that firm, the fact that the respondent had had an interest in the property leased to the costs accountants and the registration of the business name “Behan & Associates” in the respondent’s name.

Basis for Costs Order

4. The hearing of this appeal post dated the coming into force of ss. 168 and 169 of the Legal Services Regulation Act, 2015. I am satisfied that this application should be considered on that basis. The applicable principles have been set out by Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. None of the parties argued that there was a substantive difference between the old regime and the new regime. The general principles will therefore apply.

No Order as to Costs

5. The appellant claims as against both the respondent and the notice party that no order as to costs should be made.

6. As regards the respondent, the appellant makes the case that he would not have brought the proceedings except for the registration of the business name and that this amounted to a particular or special circumstance to justify no award of costs.

7. The respondent was entirely successful on this appeal. The fact that the business name was registered in his name was not the sole ground on which this appeal was brought. The appellant left the taxation hearing when the adjournment was refused. He intended to take a

judicial review on that ground and he did so. The registration of the business name was one part of his argument about fair procedures. Even if it could be said that this was a real concern of the appellant, when the entire situation had been explained to him by the appellant, he could have decided not to proceed or even to withdraw his proceedings.

8. These do not amount to particular or special circumstances that would merit the Court in departing from the general principle that costs follow the event (especially in circumstances where the respondent was entirely successful).

9. The appellant's claim for no order as to costs in relation to the notice party is based upon the same argument. His claim to no order is rejected for the same reasons as those applicable to the respondent. It should also be stated that the notice party was the *legitimus contradictor* in the judicial review proceedings.

10. I therefore grant the respondent his costs of this appeal. For the avoidance of doubt, I will state specifically that these costs are to include the costs of the submissions on this costs issue as well as the costs of the oral hearing on costs.

11. The notice party is also entitled to his costs of this appeal. The remaining issues are whether they are entitled to the costs on the basis of solicitor and (own) client costs and to an interim payment order in relation to costs.

Solicitor and Client Costs

12. In written submissions the notice party sought costs on a solicitor client basis. He relies upon the decision of Barnville J. in *Trafalgar Developments Ltd. v. Mazepin* [2020] IEHC 13 considered in more detail below. In oral submissions, counsel for the notice party did not press his claim with any great emphasis and accepted as he did, that in the context of an appeal of a judicial review, there would be no significant difference between party and party costs and solicitor and client costs.

13. The argument on solicitor and client costs had been premised on the following grounds;

- a. The appellant is the former liquidator of Star Elm Frames Limited, a company in insolvent liquidation and it is the appellant who should bear the financial burden of costs rather than creditors of that company; of whose interests the appellant should be keenly aware as an insolvency practitioner but whose interests have in fact been utterly disregarded by him in the conduct of multiple proceedings, including this appeal, in the liquidation.
- b. The disputed certificates of taxation arose from the appellant's breach of a High Court order which necessitated attachment and committal proceedings.
- c. The appellant has repeatedly failed to discharge a number of costs orders in proceedings in this liquidation to date.
- d. The appellant has brought numerous applications in the liquidation of the company all of which have failed; this is the appellant's fifth application to the Court of Appeal which has been unsuccessful. The notice party then proceeded to set out those applications.

14. The principles subtending the jurisdiction to award solicitor and client costs were recently summarised by Barniville J. in *Trafalgar Developments Ltd. v Mazepin*, at para. 54: -

“(1) The normal position is that where costs are awarded against one party in favour of on (sic) other, those costs will be taxed or adjudicated on the party and party basis.

(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.

(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).

(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.

(5) The conduct in question can include: -

(a) A particularly serious breach of the party's discovery obligations;

(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;

(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;

(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.

(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;

(d) [I]n light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).

(7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis)."

15. The appellant submitted that the test for solicitor and client costs was not met. In particular, he submitted, there was no finding of misconduct in these proceedings.

16. I consider that in the circumstances that have arisen here, this Court should not proceed to award solicitor and client costs. Such an order is a significant one to make and it should not be done lightly. We should only do so where we have identified with precision the impugned conduct and the consequences for the other party. In the circumstances presenting themselves here, I am satisfied that where the difference between solicitor and client costs and party and party costs is minimal and the issue was not pressed, that this Court should decline to engage in such an extensive examination of the position.

17. The costs of the notice party are therefore awarded on the usual party and party basis. For the avoidance of doubt, I will state specifically that these costs are to include the costs of the submissions on this costs issue as well as the costs of the oral hearing on costs.

Interim Payment Order

18. The notice party pressed the Court to order an interim payment of €30,000 in this case. He relied upon the inherent jurisdiction of the Court to do so. He refers to the practice direction from the High Court regarding payment of interim costs and the increasing practice of the High Court to so order. Counsel relies upon “long delays already visited on the liquidation in enforcing costs Orders made to date caused by the Appellant's conduct”. The second is that there are long delays in the adjudication process, and it is said that the financial burden should be borne by the appellant as the losing party rather than the company/its creditors. He submits that the Court should not ignore the history of this liquidation. The appellant has been pursuing remedies because he has not met costs orders.

19. The notice party submits that if the Court is to make an interim payment order it is a cashflow issue. He submits that the appellant has never submitted that he is not in a position to pay them. He submits that the balance of fairness lies in the amount to be paid over on an interim basis. He gave an undertaking on behalf of his client to hold the money and to set off with other costs orders or, if simpler, repay any difference immediately should the costs be taxed at lesser amount. He also undertook to tax the costs of the appeal quickly.

20. Counsel for the appellant submits that the notice party assumes the Court is going to award costs. That has not yet occurred. He submits that he would be entitled to a Bill of Costs from the solicitor of the notice party. He submitted that he would be entitled to make submissions on this Bill of Costs.

21. HC71 governs practice in the High Court (Kelly P, 28 March, 2017). It reads:

“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.”

22. I consider that it would be anomalous if the Court of Appeal had no similar inherent jurisdiction. Although the system of taxation as such no longer applies, there are still long delays in the system of adjudication of costs and there is no reason why an unsuccessful litigant should automatically be entitled to the benefit of those delays. On the converse side a successful litigant should not have to bear the burden of the litigation.

23. I also consider that the history of these proceedings is something that has to be taken into account. They have been long. In particular, these proceedings relate to the payment of three separate bills of costs which have now been outstanding for some time. The delay in paying them has been significantly contributed to by the taking of these proceedings. I do note that a payment of €18,000 was made as a condition of obtaining a stay on the overall payment of the costs pending the determination of this appeal.

24. It is true to say that no Bill of Costs has been presented but that is not insurmountable. The Court is in a position to order an interim payment which would be highly unlikely to be more than what will be payable after costs are ascertained and adjudicated upon. I am satisfied that the Court should in this case, in light of the history of these proceedings and delays in the adjudication system, order an interim payment. The creditors of the company at the centre of

this litigation should not have to bear the burden of all those delays. The notice party has proposed a sum of €30,000 to be paid on an interim payment. For the avoidance of any doubt I propose that this Court should order an interim payment of a more conservative figure of €20,000 on the undertaking of the notice party to hold that payment and to repay any difference should the ultimate amount of costs be adjudicated at less than that figure. The interim payment should be made within 21 days from the date of this judgment.

25. Edwards J. and Haughton J. are in agreement with this judgment and the orders I propose.