Neutral Citation Number: [2009] IEHC 293

**THE HIGH COURT**

**2005 254 P**

**BETWEEN:**

**MICHAEL BARRETT T/A CORPORATE RECOVERY SERVICES**

**PLAINTIFF**

**AND**

**MICHAEL BEGLAN AND ERT FOUNDATION LIMITED**

**DEFENDANTS**

**Judgment of Mr Justice Michael Peart delivered on the 18th day of June, 2009:**

On the 14th June, 2007, having heard an application by the first named defendant to strike out these proceedings as against him as being an abuse of process, I made the order sought pursuant to Order 19, rule 28 of the Rules of the Superior Courts ("RSC"), and ordered that a *Lis Pendens* registered against the estate of the first named defendant be vacated. In addition it was ordered that the plaintiff do pay to the first named defendant the costs, when taxed and ascertained, of two Notices of Motion dated respectively 3rd November, 2005 and the 15th December, 2005.

However, by order dated 8th April, 2008 the Court amended that order pursuant to the provisions of Order 28, rule 11 RSC by ordering, instead, that the proceedings be dismissed against the first named defendant, that the *Lis Pendens* be vacated, and that the plaintiff do pay to the first named defendant the costs of the proceedings (including reserved costs) and the costs of the motion dated 3rd November, 2005 and 15th December, 2005 respectively when taxed and ascertained.

Those costs were duly taxed and ascertained by the Taxing Master on the 30th July, 2008 in the sum of €75260.75. However, the first named defendant is not in a position to discharge the court fees in the sum of €4309 which must be discharged by him under the Rules of the Superior Courts before he is permitted to take up the Certificate of Taxation, and is prevented therefore from taking steps to recover the said amount from the plaintiff on foot of that Certificate of Taxation. It is this dilemma which has led to him issuing the present Notice of Motion (undated) which was filed in the Central Office on the 2nd March, 2009 in which he seeks certain reliefs to address the situation in which he now finds himself. Those reliefs are set out as follows therein:

> *"(a) An order directing the plaintiff to discharge the duty payable on the Certificate of Taxation such duty being his responsibility.*
>
> *(b) In the alternative, an order dispensing with the obligation to pay duty prior to the release of the certificate of Taxation and an undertaking to the Court to secure and pay the said duty as and when same is collected or paid.*
>
> *(c) In the alternative, an order directing the Taxing Master to issue the Certificate of Taxation with an undertaking from the defendant to pursue the plaintiff for the duty thereon and to lodge same with the Offices of the Taxing Master as and when same is collected or paid.*
>
> *(d) Such further or other order as this Honourable Court would seem meet."*

The first named defendant's solicitor, Fiona Healy, has sworn an affidavit to ground this Notice of Motion. Having set out a brief history of the case, she has stated that once these costs were taxed by the Taxing Master she asked her client for a cheque so that she could pay the court fees payable in order to take up the Certificate of Taxation. The first named defendant has informed her that he is impecunious and cannot afford to discharge these fees, and that his only available asset for sale is a plot of land for which he has been seeking a purchaser for a year without success. She thereupon wrote to the solicitors on record for the plaintiff calling upon the plaintiff to provide a cheque in the required sum. She received no reply to this letter.

It has not been asserted on this application that the plaintiff is not a mark for the costs if the first named defendant was in a position to seek their recovery following the taking up of the Certificate of Taxation. The grounding affidavit is silent in that regard. Neither is there any detail as to the means of the first named defendant apart from the description of his as being impecunious and the reference to the only available asset which he might realise to raise funds.

A party who has obtained an order for taxation of his costs against another party cannot execute for those costs or otherwise seek enforcement thereof without first taking up the Certificate of Taxation. In that regard, Order 99, rule 37(34) RSC provide:

> *"(34) in any case in which costs are directed to be paid by any order, and the same shall be subsequently taxed and ascertained, the party entitled to those costs may, upon production of such order, and the Taxing Master's certificate of the amount thereof, have an order of execution for the payment of the certified amount of such costs."*

Before taking up a Certificate of Taxation, the party who is entitled to the costs must defray the stamp duty and fees

required to be discharged. The origins of this requirement are very well set out in *Taxation of Costs* by Flynn and Halpin, 1999, Blackhall Publishing at pages 729 et seq. The learned authors state that a bill of costs may be construed as an 'instrument' for the purposes of the Stamp Act 1891 by reference to the definition of an instrument contained in s. 122(1) thereof, and that therefore "the bill of costs is, therefore, subject to mandatory stamp duty in accordance with the provisions of the Finance Act 1990. The authors then refer to the Supreme Court and High Court Fees Order, 1989 (S.I. No.341 0f 1989) where in Part V thereof the rate of duty payable is stated to be 5% of the costs allowed (including witnesses expenses). The learned authors state at page 730:

> *"The duty is payable on both VAT and witnesses expenses and is paid by the party taking up the certificate of taxation but is recoverable from the paying party. The avoidance of this duty is often an incentive to the paying party to settle and/or agree the bill of costs prior to taxation. The practice in the Taxing Master's Office is to have the duplicate/certified copy of the certificate stamped with the duty in the stamping office."*

It is against this background that David Goldberg S.C. for the first named defendant urges the Court to grant an appropriate relief on foot of the Notice of Motion issued herein in order to relieve the first named defendant from the obstacle facing him in the light of this requirement to discharge the duty payable on the Certificate of Taxation before taking same up from the Taxing Master's Office and so that he can take such steps as may be open to him to recover the amount taxed (including all duties and fees) and to discharge those duties and fees immediately following recovery of a sufficient sum from the plaintiff.

This appears to be the first occasion on which such reliefs have been sought. I am certainly not aware of any decision dealing with the jurisdiction to grant such a relief, and Mr Goldberg has been unable to refer to any judgment on the point, in spite of, what I am certain was, a thorough search for one. In addition, the learned authors Flynn and Halpin do not refer to any such authority or even to the possibility of making an application such as the present one which might enable a party to seek such relief from the need to discharge these duties and fees in advance of taking up a Certificate of Taxation. Order 99 RSC is silent on the matter also. In aid of my own researches into this question I have looked at The Annual Practice 1941 (The White Book) to see what the position might have been historically and have discovered the following at page 1925 thereof that under Paragraph 3 of The Supreme Court Fees Order, 1930:

> *"3. Where it appears to the Lord Chancellor that the payment of any fee specified in the First Schedule to this Order would, owing to the exceptional circumstances of the case, involve undue hardship, the Lord Chancellor may, with the concurrence of the Treasury, reduce or remit the fee in that particular case."*

There is not to my knowledge any equivalent power vested in the Chief Justice or other person to remit or reduce court fees or other duties payable under the Rules or statute.

In fact, in is interesting to note also that under Order 65, rule 26(a)(2) of the Rules of the Supreme Court, 1883 contained in that White Book the Taxing Master was provided with the power to require, if he so chose, to that the person lodging a bill for taxation lodge prior to taxation a deposit on account of fees, that deposit not to exceed the total fees which would be payable on the bill if were taxed in the full amount claimed. There is no such provision in the current rules here.

It is against this background that Mr Goldberg submits that this Court should dig deep into its reserve of inherent jurisdiction to fashion a remedy for the first named defendant in the difficult circumstances in which he finds himself in being unable, by reason of his inability to discharge the sum required before he can take up the Certificate of Taxation, to seek to recover his costs on foot of this Court's order in his favour. He submits that the Court should provide a remedy *ex debito justiciae*. He has submitted also that this Court has the power to take whatever steps may be necessary to ensure compliance with its orders.

Mr Goldberg has sought to derive assistance from the case of *Airey v. Ireland* [1979] 2 E.H.R.R. 305 where the European Court of Human Rights found that the absence of a scheme of legal aid in Ireland to assist the impecunious applicant in proceedings which she wished to bring for a judicial separation constituted barrier to access to justice and a violation of her rights under Article 6 of the Convention, and submits that the first named defendant is similarly hindered from achieving justice by the requirement that he discharge the substantial court fees payable before he can take up the Certificate of Taxation. He submits that while the first named defendant has enjoyed access to the court in order to defend the case commenced against him, that right is not an effective right given the inability to gain compliance by the plaintiff with the Court's costs order.

I should say perhaps that Mr Murphy BL appeared as a matter of courtesy to the Court on the instructions of the solicitors on record for the plaintiff, but had no instructions to make any submissions in answer to the motion before the Court.

At the outset I should state the obvious perhaps, namely that on the present application, the Court is not being, and of course could not be, asked to declare unconstitutional the Supreme Court and High Court (Fees) Order, 1989 (S.I. 341 of 1989). That would clearly have to be the subject of entirely separate and different proceedings commenced by way of Plenary Summons in the usual way. I say that because, though understandably not referred to by Mr Goldberg, there have been some judicial comments in relation to the question as to whether the requirement to pay court fees of one kind or another by litigants seeking to bring and pursue proceedings through the courts presents such an obstacle to justice as to constitute an unreasonable barrier to access to justice. For example, in *MacGairbhith v. The Attorney General* [1991] 2 I.R. 412, a litigant in person sought declarations, *inter alia*, that he should not have to pay money to gain access to the courts. During the course of his judgment, O'Hanlon J. stated the following:

> *"The plaintiff has raised an important issue and one which has caused considerable concern in legal circles as well as among ordinary laymen. The levies payable to the State by litigants in the form of stamp duty on legal documents and other charges have risen in our own time to levels which would have been unthinkable in former times. On top of these standard charges of which the plaintiff complains, the imposition of value-added tax on solicitors' and barristers' fees (initially at 25%) must have had a calamitous effect on litigants who had no possibility of setting it off against value-added tax credits to which they might have been entitled. These charges*

*levied by the State are the price the citizen has to pay for access to the courts where his rights under the Constitution and the ordinary law are to be protected, and disputes are to be resolved between parties in an orderly and acceptable manner."*

In disposing of the plaintiff's proceedings in *MacGairbhith*, O'Hanlon J. stated:

*"I do not think, however, that the present case is an appropriate one for passing judgment on the constitutionality of the charges which are the subject of complaint by the plaintiff. Before such an important issue could be resolved it would be necessary to put before the court much more detailed evidence that has been given in the present case concerning every aspect of intervention by the State in the work of the law courts for the purpose of raising revenue for the public finances. It would also be difficult to convince me that any imposition of this kind, however small, would involve a breach of constitutional rights, and that no regard should be had in determining the issue, to the ability of the plaintiff to meet such charges without undue hardship. In the present case it is apparent that the plaintiff has, in fact, exercised his right of access to the courts on a number of occasions and there is no evidence to suggest that he has actually been prevented from exercising that right or caused undue hardship in the process of exercising it, by having to pay the levies of which he complains. The question of locus standi must therefore be in doubt and for this reason also I think the issue should be left for determination to another time."*

This last comment clearly left open the question, and certainly the first named defendant in the present case is faced with the payment of fees of a much higher amount than those in contemplation by O'Hanlon J. being one of 5% of the amount of the taxed costs, and not simply the reasonably modest fees payable on the originating summons or subsequent documents required to be filed in order to progress a case to finality. It is also of course the case that the first named defendant cannot and does not say that his right of access to the courts is denied by the requirement to pay fees of this magnitude, but rather that he prevented from accessing the remedy provided by the Court's order for costs in his favour.

This issue was considered also by Murphy J. in *Murphy v. The Minister for Justice, Equality and Law Reform and others* [2001] 1 I.R. 95. In that case the applicant sought a declaration, by way of judicial review, that Articles 8 and 10 of Part III of the Supreme Court and High Court (Fees) Order, 1989 were unconstitutional on the basis that being an impoverished person he was impeded by the imposition of court fees from proceeding with a claim for damages in the High Court arising from his alleged false imprisonment. Keane C.J. upheld the refusal of the reliefs in the High Court. In doing so he noted that the fees in question in that case were a fee of £7 payable on the filing of an affidavit, £10 on the filing of a Notice of Motion, and a fee of £50 on the filing of a Notice of Appeal to the Supreme Court. It was this level of fees which formed the basis of the challenge to the constitutionality of the fees order impugned, it being claimed by the applicant that the fees required in order to bring an application for judgment in default of defence.

In his judgment Keane C.J. stated that he was confident that there was no constitutional prohibition of a general nature on the imposition of court fees which might have the effect of inhibiting civil litigation, and referred to the need that public services must be funded by monies derived from the public either by way of general taxation or by a charge related to the service rendered or a combination of both. He stated at p. 101:

*"I am satisfied that the power conferred by the Act of 1936 to impose charges (provided they are reasonable) for and in respect of court services – and there is a constitutional presumption that unreasonable charges would not be imposed – is not unconstitutional."*

In relation to the question of reasonableness of these fees he was of the view that this would involve a consideration of the matters identified by O'Hanlon J. in *MacGairbhith*, and noted that "*the fixed fees imposed by the Fees Order range from £ to £60 and the particular fees challenged by the applicant herein were £10 and £7 respectively*". He concluded by stating:

*"It would be impossible to consider the impact of particular court fees without knowing the full circumstances of the intended plaintiff and the options and facilities available to him, but what can be said in the present case is that the two charges of which the applicant complains and amounting in total to £17 do not appear to have presented a significant obstacle to his engaging in litigation having regard to other proceedings which he has pursued and in particular the appeal herein…… I am satisfied that his argument and the facts on which he relied fell well short of establishing that the Fees Order was unconstitutional or ultra vires the powers of the Minister by whom same was made. Indeed I am not satisfied that the applicant established the necessary locus standi to maintain these proceedings."*

It is worth noting in that judgment, or that in *MacGairbhith*, that there is no mention of any procedure by which an impecunious person may apply to some person or body for any remission or reduction of the required fees. If there were it would seem reasonable to assume that it would have been mentioned. There would appear to be none such in this jurisdiction.

Given the level of fees required to be paid to take up a Certificate of Taxation (being 5% of the amount taxed), the reasonableness of those fees is a matter of more relevance to the constitutionality of the Fees Order than were the relatively small fees which were the subject of the *Murphy* case above. No more than that should be said at this stage. It would be a matter for the first named defendant to decide whether or not he should pursue the matter further, and I can express no view on that matter.

In my view there is no jurisdiction vested in this Court, whether by statute, rule or from within its inherent jurisdiction, to dispense with the requirement that the first named defendant pay the fees, albeit that they are substantial, so that he can take up the Certificate of Taxation, or to direct the Taxing Master to issue same to him on an undertaking to discharge the fees upon recovery thereof from the plaintiff. This is not a question of access to the courts. Neither do I consider that there is any basis on which the Court can direct the payment of the fee to the first named defendant in advance of the issue of the Certificate of Taxation. That is not to say that I do not appreciate the very real difficulty in which the first named defendant finds himself. After all he did not commence these proceedings and lose them. These proceedings were commenced against him and I earlier concluded that they were an abuse of process and should be dismissed. While I find it quite staggering that the taxed costs of a party who succeeds in having a claim brought against

him dismissed as an abuse of process, when the only pleading delivered has been the plaintiff's Statement of Claim, could be as much as €75260, even allowing for the fact that the first named defendant served a Notice for Particulars, issued a motion to compel a reply thereto, and of course the motion to dismiss the claim, the reality is that this is the sum which he seeks to recover from the plaintiff.

That reality certainly confirms the remarks made by O'Hanlon J. in *MacGairbhith* when he stated:

> *"I have no doubt that the frightening cost of litigation, made up in part of these heavy charges levied by the State, are a major deterrent to people who wish to have access to the courts established under the Constitution and may in many cases actually prevent parties from availing of rights normally guaranteed under the Constitution. Lord Devlin wrote on occasion: "Litigation, which was intended as a gentle solvent of disputes, has become instead a thing of horror".*

Those comments were made in 1991. There is no doubt that the period between then and now has served only to increase still further and exponentially the costs of litigation where even citizens of average and better prosperity, let alone impecunious ones, are deterred from embarking on the uncertain journey to justice as they see it, by the appalling vista of bankruptcy should they not succeed.

However, the sympathy which I have for the first named defendant and the solicitor and Counsel who have served him so well, is insufficient to enable this Court to grant any of the reliefs sought in the Notice of Motion, and I therefore must refuse them.