

THE HIGH COURT

1986 10898 P

BETWEEN

**BULA LIMITED (IN RECEIVERSHIP), BULA HOLDINGS,
THOMAS C. ROCHE, THOMAS J. ROCHE, RICHARD WOOD AND MICHAEL WYMES**

PLAINTIFFS

AND

**TARA MINES LIMITED, OUTOKUMPU OY, THOMAS FARRELL, BRENDAN HYNES, MICHAEL MCCARTHY, SEAN MURRAY,
DAVID LIBBY, MURROUGH O'BRIEN, YVONNE SCANNELL,
HEIKKI FOLIN, JUHANTI TANILA, JOHN TULLY,
RISTO VIRRANKOSKI, PERTTI VOUTILAINEN,
THE MINISTER FOR ENERGY AND MICHAEL O'CONNELL**

DEFENDANTS

Judgment delivered by Ms. Justice Dunne on the 19th day of December, 2008

1. This is an application for orders pursuant to O. 42, r. 24 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court. Granting leave to issue execution of an order of the High Court dated 24th February, 1997, and an order of the Supreme Court dated 15th January, 1999, whereby each court ordered that the fifteenth and sixteenth named defendants recover against the first, second, fifth and sixth named plaintiffs, their costs of these proceedings when taxed and ascertained on a party and party basis the costs to include certain reserved costs.

2. By way of response to the application of the fifteenth and sixteenth named defendants, a motion was issued on behalf of the first, second, fifth and sixth named plaintiffs, seeking an order dismissing the application for leave to issue execution on the grounds of inordinate and inexcusable delay and pursuant to the inherent jurisdiction of the court. It was also sought to have the application for leave to issue execution dismissed on the grounds that the application is contrary to Article 6 of the European Convention on Human Rights, as enacted by the European Convention on Human Rights Act 2003.

3. The proceedings herein were commenced in 1986, in respect of claims for damages and other reliefs against Tara Mines Limited and the fifteenth and sixteenth named defendants and others arising out mining agreements and licences in respect of adjoining properties in County Meath. For ease of reference I shall refer to the first, second, fifth and sixth named plaintiffs as "Bula" and I shall refer to the fifteenth and sixteenth named defendants as "the Minister". The proceedings ultimately came on for hearing before Lynch J. in the High Court on various dates between 14th December, 1993, and 29th November, 1996. In total, the hearing before Lynch J. lasted 272 days. There were a number of interlocutory applications prior to the hearing. On 6th February, 1997, judgment was delivered dismissing each of the plaintiffs claims and after a further three days of hearing, an order was made, *inter alia*, in the following terms:-

"That the Minister and Mr. O'Connell do recover against the first, second, fifth and sixth named plaintiffs their costs of the said proceedings when taxed and ascertained on a party and party basis, said costs to include the costs reserved by the orders set forth in Schedule 4 thereof.

The execution on foot of the foregoing order be stayed with the exception of 25% of the costs of trial (to include application made in the course of trial) for a period of 21 days from the date of the perfection of the order and, in the event of the first, second, fifth and sixth named plaintiffs serving notice of appeal within that period and duly entering same that execution be further stayed until the final determination of such appeal."

4. A notice of appeal dated 24th March, 1997, was lodged, appealing against the order. By a judgment and order dated 15th January, 1999, the Supreme Court dismissed the appeal, affirmed the judgment and order of the High Court and further ordered that the Minister recover against Bula their costs of the appeal including reserved costs when taxed and ascertained. Subsequently, by notice of motion dated 2nd June, 1999, Bula claimed, *inter alia*, an order setting aside the said judgment and order of the Supreme Court on the grounds of objective bias. That matter was considered by the Supreme Court and again Bula was unsuccessful in its application and a further order for costs limited to ten days was ordered against Bula, when the same were taxed and ascertained.

Taxation Process

5. It is necessary to refer in some detail to the taxation process. The first step in this process was the taxation of the costs of the hearing before the High Court. The Bill of Costs was sent under cover of a letter dated 24th November, 1997, to the solicitors for Bula, together with a summons to tax. The taxation of costs took place at a hearing on 3rd, 4th, 5th and 8th of December, 1997. Separate but concurrent taxations took place in respect of the costs due by Bula and those due by the third and fourth named plaintiffs. A written ruling was delivered by the Taxing Master on 25th March, 1998. All of the plaintiffs lodged objections to the ruling and there was a further hearing which led to a further ruling on 9th July, 1998. An interim certificate in the sum of IR£283,918.00 issued on 19th May, 1998, as against Bula, being their liability in respect of 25% of the costs of the hearing in the High Court in respect of which there was no stay pending the appeal. Bula then obtained leave to apply for judicial review in respect of the interim certificate of taxation on 22nd June, 1998. Subsequently, on 23rd October, 1998, Bula issued a motion to review the taxation of costs in respect of the High Court proceedings pursuant to O. 99, r. 38 of the Rules of the Superior Courts. The application for judicial review and the motion to review taxation came on for hearing together before McGuinness J. and judgment in both matters was delivered on 7th March, 2000. One of the issues raised in the course of the proceedings before the High Court at that time was the question of service of the summons to tax on the Bula plaintiffs. The complaint by them in that regard was rejected.

6. The next phase of the taxation process relates to the taxation of the Bill of Costs arising from the appeal of the High Court proceedings to the Supreme Court. A Bill of Costs in respect of the Supreme Court appeal was forwarded under cover of a letter dated 29th April, 1999, to Pearls Solicitors on behalf of Bula and a summons to tax dated 29th April, 1999 was enclosed therewith. The papers were also served on the fifth and sixth named plaintiffs under cover of letter dated 29th April, 1999. The taxation was heard on 17th May, 1999. Bula was represented at the hearing by Stephen Daly of Connolly Lowe, Legal Costs Accountants. On 16th June, 1999, objections to the allowances made on foot of the Bill of Costs were lodged. A hearing took place in respect of those objections on 19th July, 1999, with Mr. Daly again representing Bula. A ruling was issued on 30th July, 1999. At that point, an application was made for an interim Certificate of Taxation and the same issued in the sum of IR£175,000.00 (22,204.16) on account of the costs of the Minister awarded pursuant to the order of the Supreme Court dated 15th January, 1999.

7. A final Certificate of Taxation issued on 22nd February, 2000, certifying that the costs of the Supreme Court hearing were IR£352,536.26 leaving a balance of IR£177,536.26 after the amount of the interim certificate was deducted. Payment of the balance

was sought by letter dated 24th August, 2000. Subsequently, further letters seeking payment were sent on 24th November, 2000, seeking payment of the balance due on foot of the taxation of the Bill of Costs in respect of the Supreme Court hearing. A sum of £200,000 was recovered from Anglo Irish Bank on account in respect of the interim certificate.

8. There were, as previously mentioned, further proceedings in the Supreme Court. Following delivery of its judgment on 15th January, 1999, a separate application was brought to the Supreme Court seeking to have that judgment and order set aside on the grounds of objective bias. The hearing in respect of that application took place over eight days up to 8th June, 2000. On 3rd July, 2000, the court refused to grant the reliefs sought and dismissed the application. On 6th July, 2000, it was ordered that the Minister recover from Bula the costs of the proceedings when taxed and ascertained. The costs of that application were taxed, and without going into all of the detail in respect of the taxation of the costs in that respect, it should be noted that the Bill of Costs for that appeal was heard by the Taxing Master on 13th June, 2002. Stephen Daly, who had previously appeared on behalf of Bula in relation to the question of the taxation of costs, advised that he had no instructions. The taxation proceeded on 13th June, 2002, and a Certificate of Taxation in the sum of €249,238.90 issued on 7th March, 2003.

9. No money was paid by Bula on foot of the interim Certificate of Taxation dated 19th May, 1998. On 31st July, 2003, the Taxing Master directed the surrender of the interim Certificate of Taxation and issued a final Certificate of Taxation pursuant to the order dated 24th February, 1997, for the sum of IR£3,297,493.33. A set-off was allowed in respect of that sum in the amount of IR£914,211.42 in respect of costs received by the Minister from the third and fourth named plaintiffs. Thereafter, Croskerrys Solicitors were appointed by the Minister to recover the costs due on foot of the Certificate of Taxation.

10. The final certificate was issued in respect of the Supreme Court costs by the Taxing Master on 22nd February, 2000. The final certificate in respect of the High Court costs issued on 31st July, 2003. Following their appointment as solicitors for the Minister, Croskerrys forwarded copies of the Certificate of Taxation to the first, second, fifth and sixth named plaintiffs. In a replying letter of the 20th September, 2004, a firm of solicitors called Ryan Smith and Company, indicated that they were now acting for Bula, that they had no relevant files in the matter, and asked for certain information in relation to the date of the certificate and the dates that the Bills of Costs were furnished to their clients. They also requested copies of the summonses to tax and proof of service thereof. They also noted that in coming on record, Croskerrys had indicated that they were on record on behalf of all of the defendants. In fact, they were acting on behalf of the fifteenth and sixteenth named defendants only. Further correspondence then took place. In the course of that correspondence, Ryan Smith & Company, on behalf of Bula, indicated that their position was that their clients never received or were notified of any Bill of Costs or summons to tax. It was also noted that the certificate of 31st July, 2003, referred to Bula as having been represented by Messrs. Gore and Grimes who were not on record in the proceedings since 1998. On that basis, it was contended that the certificates are defective. Croskerrys took issue with this contention.

11. In the meantime, Croskerrys Solicitors furnished the necessary documentation to the Central Office under cover of a letter dated 10th September, 2004, for the purpose of obtaining fifas in respect of the Certificates of Taxation. They furnished further documentation by letter dated 21st December, 2004, enclosing fresh documentation to reflect the fact the Crosskerrys acted on behalf of the fifteenth and sixteenth named defendants only. Between December 2004 and November 2005, there was correspondence between Croskerrys and the Central Office of the High Court in relation to the processing of the paperwork for the purpose of obtaining fifas. Towards the end of November 2005, Croskerrys were advised by the Central Office that it would be necessary to apply to court for leave to issue execution on foot of these two orders, as more than six years had elapsed since the date of the orders. Thereafter, this application was prepared. It is unfortunate that for a period following the resubmission of the necessary papers by Croskerrys on 21st December, 2004, the matter does not appear to have been processed, and it further appears that the papers were mislaid in the Central Office. Unfortunately, this caused a delay of approximately eleven months.

12. I mentioned at the outset that two issues fall to be considered. The first issue is the application for leave to issue execution, notwithstanding that more than six years has elapsed since the making of the relevant orders. The second issue raised herein, is whether the application for leave to issue execution should be dismissed on the grounds of the delay in pursuing the execution of these orders. Strictly speaking, it seems to me that the motion issued herein, on behalf of Bula, is somewhat superfluous and, perhaps, one might say, misconceived. The form of notice of motion is such as one would expect to see in relation to an application to dismiss proceedings. The basis if such applications is that the court on such applications is concerned to ensure that a party to proceedings is not put at a serious risk of an unfair trial by reason of the delay in prosecuting those proceedings. The application before the court, on behalf of the Minister, does not involve trial of an action and, as such, I do not think it is appropriate to approach this matter on the basis set out in Bula's notice of motion. Of course, I accept that the notice of motion and affidavit grounding same are by way of response to the application for leave to issue execution and that, as such, the affidavit sworn herein by Mr. Wymes on behalf of Bula is, in essence, sworn to challenge the entitlement of the Minister to seek the orders herein. I propose to approach the matter on that basis.

Relevant legal principles

13. Order 42, r. 24, of the Rules of the Superior Courts provide as follows:-

"In the following cases, viz:

(a) where six years have elapsed since the judgement or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

. . .

the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried; and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgement or order made in a matrimonial cause or matter, an order of *fiery facias* may be issued as of course upon an affidavit of service of the judgement or order and non-payment."

14. The provisions of O. 42, r. 24, of the Rules of the Superior Courts were considered by the Supreme Court (Geoghegan J.) in *Smyth v. Tunney* [2004] 2 I.L.R.M. 537. The first point of note considered by Geoghegan J. in that case was whether or not an order under O. 42, r. 24, was a discretionary order. He stated at p. 541 as follows:-

"[Mr. Noonan] argued that the order under rule 24 was not really a discretionary order at all, but that the court had to

decide whether to make the order or to direct first that an issue or question be determined as to the rights of the party which might be relevant to the order. That argument, however, cannot be correct, having regard to the decision of this court in *Fitzgerald v. Gowrie Park Utilities Society Ltd.* [1966] I.R. 662, which made it perfectly clear, as did some old Irish cases, that the order is discretionary. Once the order is discretionary, there must be something on which the judge can attach himself to in exercising the discretion."

15. In considering the manner in which discretion should be exercised, he went on to say at p. 543 as follows:-

"For reasons which I will explain in greater detail when treating of the law, I am satisfied that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time, provided that there is some explanation, at least, for the lapse of time. It is, of course, accepted by all sides that even if a good reason is given, the court must consider counterbalancing allegations of prejudice."

16. Finally, having reviewed the history of the predecessors of O. 42, r. 24 and cases in which the previous provisions had been considered, at p. 549 as follows:-

"I would pause here to note that none of this suggests that historically, a plaintiff had to have strong reasons for extension of time. Rather, the purpose of the application to the court was to give both a benefit to the plaintiff and a protection to the defendant if he was prejudiced."

17. He concluded as follows:-

"The emphasis is then, essentially, on prejudice to the defendant, though obviously some reason must be given by the applicant. Although in this case it has not been fully proved that the relevant respondents could not have executed the judgment debt by some means within the six year period, they have, nevertheless, shown sufficient reasons why they allowed a lapse of time and should still be allowed to execute if they can. Essentially, the conduct of the plaintiffs heavily contributed to the delay in execution."

18. It appears to me that certain principles can be derived from that decision. They are as follows:

1. Order 42, r. 24, is a discretionary order.
2. Reasons must be given for the lapse of time since the judgment or order during which execution has not taken place.
3. Even if there is good reason, the court must consider counterbalancing allegations of prejudice.

Applications of legal principle

19. At this point, I wish to consider the facts of this case in the light of the principles contained in *Smyth v. Tunney*. On that basis, I want to consider if there is some explanation for the lapse of time involved. I also want to consider whether there are counterbalancing allegations of prejudice and whether those allegations of prejudice, if any, are such as to affect the exercise of the court's discretion.

20. The affidavit of Brian Cox, to which I have already referred, sets out the background and history of this matter. The litigation commenced in 1986. Eventually, there was an exceptionally lengthy hearing before the High Court. The decision of the High Court was appealed to the Supreme Court. The decision of the Supreme Court was itself challenged. There was a stay on the High Court order for costs pending the appeal, save as to a limited amount. There was an interim certificate in respect of part of the costs unaffected by the stay, but the same was not paid. The final Certificate of Taxation in respect of the High Court costs did not issue until 2003. It is clear, therefore, that until the Supreme Court appeal was disposed of, the Minister could take no steps to execute on foot of the order of the High Court in respect of costs. It is also clear that the Minister could not execute the order until the final certification of taxation was issued in 2003. Crockerys were then appointed to deal with the costs due to the Minister and there were some difficulties in that regard as previously described and set out above.

21. Mr. Wymes, in his affidavit on behalf of the Bula plaintiffs, has been critical of a number of the steps taken in the proceedings and the delay involved herein. I think there is no merit in the criticism of the time involved in the taxation process itself. This was a most unusual case and it is not surprising that the taxation took some time. It is alleged by Mr. Wymes that the Certificate of Taxation is defective. I reject that suggestion. The basis of his complaint is that the final certificate referred to Messrs. Gore & Grimes as representing Bula. They did not in 2003, when the final certificate was issued, but of course they did in 1998 when the taxation was being carried out.

22. It is also the case that there can be no merit in any complaint as to delay in execution in respect of the period when the Minister could not execute by virtue of the existence of the stay on the order pending the appeal to the Supreme Court. Complaint has been made that there was no attempt to levy execution since 24th February, 1997, or at all. Quite clearly, as Bula well knew, execution could not be levied, given the stay on the proceedings, and then not until the final Certificate of Taxation issued.

23. Similar complaints are made in relation to the Supreme Court order for costs and the Certificate of Taxation in that matter. Issue was taken as to the question of representations of Bula at the taxation. It is clear from the affidavit of Peter Fitzpatrick, sworn herein on behalf of the Minister on 12th February, 2007, that Bula were properly served with the Bill of Costs and summonses to tax in respect of that taxation, and, indeed, were represented at all the taxations in relation to these proceedings, save for that which took place on 13th June, 2002. In my view, it is not appropriate for this Court in this application to look behind their Certificates of Taxation by reference to the question of service. In any event, the issue of service was determined in respect of the High Court costs in the proceedings before McGuinness J. to which reference has already been made. It is not appropriate in these proceedings to consider the issue of service in respect of the other taxations, given that those taxations have not been the subject of review of taxation or judicial review. In any event, the issue of service has been fully dealt with by Mr. Fitzpatrick in his affidavit and I accept the averments therein. It seems to me that there is absolutely no merit in contending that the taxations are defective by reason of any want of service.

24. Whilst complaint is made by Wymes in this affidavit as to delay, and undoubtedly there has been some delay on the part of the Minister, the only point at issue by reason of the delay that could conceivably be a source of prejudice to Bula is the question of interest being charged on the costs. So far as this issue is concerned, Mr. Cox, in his replying affidavit, pointed out that there was nothing to

stop Bula from paying the costs taxed herein at any time prior to this. The right to interest is not something which, in my view, could be regarded as a source of prejudice to a party that has not paid the monies found to be due on foot of a Certificate of Taxation such that it could outweigh the right to execute.

Delay

25. During the course of argument in this case, I was referred to a number of authorities in relation to delay jurisprudence, and, in particular, I was referred to a number of decisions of the European Court of Human Rights in respect of Article 6 of the European Convention on Human Rights. The cases, to which I was referred, included *Stephens v. Paul Flynn Limited* [2005] I.E.H.C. 148, *Barry v. Ireland* European Court of Human Rights, 15th December, 2005, *McMullen v. Ireland* European Court of Human Rights, 29th July, 2004, and *Desmond v. M.G.N. Limited* [2008] I.E.H.C. 65 and *Desmond v. M.G.N. Limited* [2008] I.E.F.C. 56.

26. The majority of those cases consider the issue of delay and its effect on the trial of an action. At an early stage in this judgment, I referred to the notice of motion herein brought on behalf of Bula, seeking to have the application for leave to issue execution dismissed on the grounds of delay in pursuing the execution of the orders. I indicated that I thought that such an application was not appropriate given that the thrust of the decisions arising in respect of delay is to ensure that a party to proceedings is not put at a serious risk of an unfair trial by reason of the delay in prosecuting those proceedings. Those are the issues at the heart of the authorities to which I was referred, save, to some extent, for the case of *McMullen v. Ireland* referred to above. That case involved lengthy litigation by a tenant against his landlord. Subsequently, because of the delays in dealing with his complaints against his landlord, the plaintiff issued proceedings against the firm of solicitors who had acted for him in those proceedings. Those proceedings also took a considerable period of time to dispose of; having issued those proceedings in June 1988, the matter was finally concluded by a Supreme Court judgment on 27th January, 1998. The applicant was unsuccessful in his case against his solicitors. They were awarded costs and ultimately the costs were taxed by 14th May, 1999. There was a stay put on the issue of the Certificate of Taxation and, ultimately, the former solicitors issued and served a notice of the particulars of demand requiring payment prior to the issue of a bankruptcy summons. That led the applicant to apply on 6th December, 2000, to dismiss the summons. That matter then dragged on for a period of time. The complaint before the European Court of Human Rights was that the length of the negligence proceedings brought by the applicant against his solicitors violated the reasonable time requirement of Article 6.1 of the Convention which provides as follows:-

"In the determination of his civil rights and obligations . . . everyone is entitled to a . . . hearing within a reasonable time by a tribunal"

27. In the course of its decision, it was stated by the European Court at para. 33. as follows:-

"The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation"

28. In the course of its judgment, the court took into account delay attributable to the applicant (see para. 31). The court went on to say:-

"In this regard, the Court notes that the applicant did not lodge the necessary appeal documents with the Supreme Court until July 1995, which was almost two years after he had lodged the notice of appeal. While he claimed that the disciplinary proceedings against S.C. provided an adequate explanation for this, he did not apply to the Supreme Court for an adjournment of the appeal pending the outcome of the disciplinary proceedings and, indeed, confirmed that the appeal documents were complete prior to the final decision of the Barristers' Professional Conduct Appeals Board. The Court also observes that the applicant made extensive use of the procedural opportunities open to him in the proceedings: he, *inter alia*, made three applications for discovery (1989-1992); he applied to strike out KC's defence; he applied for leave to amend his appeal in April 1997; and he requested that his appeal be heard by a differently constituted Supreme Court. In addition, the Court considers the delay in the proceedings after the issuance of the Taxation Certificate (April 1999) to be entirely attributed to the applicant who has, to date, failed to pay the costs established on taxation as due to KC."

29. It seems to me to be clear from the authority of that decision that a court may have regard to the provisions of Article 6.1 of the European Convention of Human Rights in a case such as this. However, on the facts of this particular case, I do not think that the decision of the European Court of Human Rights in that case is of any assistance to Bula. I note the view of the court in that case that it considered the delay in the proceedings after the issuance of the Taxation Certificate in that case to be entirely attributable to the applicant who had failed to pay the costs established on taxation. One could make the same comment in this case about the conduct of Bula who, likewise, had failed to pay the costs established to be due on taxation to the Minister.

Conclusions

30. As I said earlier, it seemed to me that this case fell to be decided, having regard to the decision in *Smyth v. Tunney*. I have referred to the reasons given for the delay in execution and to the issue of prejudice asserted on behalf of Bula by Mr. Wymes in his affidavit. Having considered the facts and circumstances of this case, I am satisfied that there is good reason for the delay on the part of the Minister in relation to the failure to execute before the period of six years had elapsed since the judgment or order was made and I am further satisfied that there is no relevant prejudice suffered by Bula as a result of the delay. Therefore, I will grant the relief sought by the Minister herein and I will dismiss the motion brought herein on behalf of Bula.