Neutral Citation: [2016] IEHC 201

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 441 JR]

BETWEEN:

JOHN J. BUCKLEY

APPLICANT

-AND-

DECLAN O'NEILL (TAXING MASTER)

RESPONDENT

-AND-

DENIS DOYLE

NOTICE PARTY

JUDGMENT of Mr. Justice Twomey delivered on 20th day of April, 2016

1. This dispute relates to a court ordered taxation of costs between a solicitor, Mr. Buckley and his former client, Mr. Doyle. It relates to allegations of overcharging and the alleged wrongful retention of a deposit held by Mr. Buckley for Mr. Doyle's account. It is important to bear in mind that this is not a taxation of costs that was done at the behest of a client, but rather as a result of a High Court judgment of Charleton J. on the 25th March, 2013 (Doyle v Buckley [2013] IEHC 292).

Background

2. The matter was before Charleton J. because Mr. Doyle instituted plenary proceedings against his former solicitor, Mr. Buckley on the 5th July, 2011, claiming, inter alia, an account of monies which he alleges are owed to him. The order to tax was made by that Court to determine what amounts, if any, are owed to Mr. Buckley by Mr. Doyle for legal services, or in the alternative what amounts, if any, are to be repaid to Mr. Doyle by Mr. Buckley in the event of overcharging. In the words of Charleton J:-

> "It is utterly pointless to have a plenary hearing on issues of breach of contract, and in what ever other legal dressing the cause is pleaded, when central to the issue as to whether money was taken by the defendant wrongly is how much he was entitled to charge."

3. This dispute also appeared before Murphy J. on the 18th July, 2011. Murphy J. made interlocutory orders requiring Mr. Buckley to account for the whereabouts of a deposit of €600,000 and noted an undertaking of Mr. Buckley's to preserve all records and to immediately and forthwith pay any monies that the Taxing Master might certify are payable to Mr. Doyle.

4. In the hearing before Charleton J., Mr. Doyle brought a motion for an order for taxation pursuant to s. 2 of the Attorneys and Solicitors (Ireland) Act, 1849, as amended by s.2 of the Legal Practitioners (Ireland) Act, 1876, or alternatively, an order under the inherent jurisdiction of the High Court referring Mr. Buckley's bill of costs to the Taxing Master. On the 25th March, 2013, Charleton J. ordered that two bills of costs, with the administrative numbers D215 and D226, be referred to taxation. These related to work done on a case known as the 'Sandystream matter'. In addition, Charleton J. ordered that:-

> "The Taxing Master must adjudicate on the issues as to costs from the year 2000 onwards and may have to decide:-
>
> (1) in respect of any matter whether a proper bill of costs was furnished or not; and
>
> (2) whether evidence of voluntary payment by [Mr. Doyle] to [Mr. Buckley]… exists.
>
> There is liberty to apply to the court on this motion by re-entry and simple brief affidavit on both sides should any intractable issue arise that is not capable of being dealt with in accordance with the principles set out herein."

5. The matter was duly heard by the Taxing Master and he gave interim rulings on the 30th April, 2014, the 10th September, 2014, and the 11th September, 2014, and his final ruling on the 22nd May, 2015. In his rulings the Taxing Master taxed the two bills specifically referred to him, namely those with administrative numbers D215 and D226 and reduced the amounts charged on those bills. In his adjudication on the costs from the year 2000 onwards, he found that there were eight matters, with administrative numbers D151, D151/A1, D151/A2/A3, D151/A4, D151/A5, D240 (i)&(ii), D254, D151/A6 which fell within the terms of the order of Charleton J. and he taxed those bills accordingly. The net effect of the Taxing Master's rulings was that a sum in excess of €700,000 has been found by the Taxing Master to have been overcharged by Mr. Buckley to Mr. Doyle.

6. What appears before this Court is the judicial review of the ruling of the Taxing Master. In his statement grounding the application for judicial review before Noonan J. on the 27th July, 2015, Mr. Buckley sought leave to seek certiorari of the five bills with administrative number D151 and the bill with administrative number D240 (a total of six bills) on the grounds that these bills did not fall within the order of Charleton J. since proper bills of account had in fact issued and had been voluntarily paid by Mr. Doyle,

7. In this statement, Mr. Buckley also sought leave for an order of certiorari in relation to two bills with administrative numbers D254 and D151/A6. Mr. Buckley alleges that these two bills should not have been taxed as they fall outside the order of Charleton J. on the grounds that those bills had been delivered to Mr. Doyle and agreed in their respective amounts as an integral part of the settlement of actions by Mr. Buckley on behalf of Mr. Doyle.

8. Mr. Buckley also sought leave for an order of certiorari in relation to the bills with administrative reference D215 and D226 (the Sandystream matter) which were specifically referred to taxation by Charleton J. on the grounds that they were taxed by the Taxing Master on a party and party basis, when they should have been, in Mr. Buckley's view, taxed on a solicitor client basis, and he seeks an order of mandamus requiring the Taxing Master to tax those bills on a solicitor client basis. Mr Buckley also seeks an order of quo warranto against the Taxing Master.

9. The taxation of costs in this case is ancillary to the aforesaid High Court plenary proceedings in being between Mr. Doyle, as plaintiff, and Mr. Buckley, as defendant, since the taxation was ordered by the High Court judge hearing those plenary proceedings to enable that court resolve the amounts owed between the parties. Accordingly, the challenge to the taxation in this case must now be considered in that context.

Preliminary Matter

10. It was brought to this Court's attention on 18th April, 2016 when the Court was due to deliver it's judgment, that since the hearing of this matter on the 26th February, 2016, the Court of Appeal had delivered its judgment in the case of *Dorgan v Spillane* [2016] IECA 84. That Court of Appeal judgment considers the High Court decision of Doyle v Buckley [2013] IEHC 292 in which the ten bills of costs (which are the subject matter of this judicial review) were referred to taxation. The Court of Appeal in *Dorgan v Spillane* found that in *Doyle v Buckley*, Charleton J. incorrectly interpreted s. 2 of the Attorneys and Solicitors (Ireland) Act 1849, since in determining when a proper bill of costs has issued by a solicitor to a client, such that the time period for the client to challenge the bill of costs begins to run, he incorrectly found that to be a proper bill of costs for the purposes of that section, the bill of costs which is sent to the client had to be in the detailed seven column format in which bills of costs are required to be presented to the Taxing Master under of O. 99 r. 29(5), rather than the much less onerous requirements of s. 68(6) of the Solicitors (Amendment) Act, 1994, where a brief summary of the legal services provided can be sufficient for there to be a proper bill of costs.

11. This Court heard submissions from both parties in relation to the significance of the finding by the Court of Appeal, that Charleton J. incorrectly interpreted s. 2 of the Attorneys and Solicitors (Ireland) Act 1849, for the decision now being taken by this Court.

12. While it is patently obvious to lawyers, it is important to emphasise that the Court of Appeal decision in *Dorgan v Spillane* was not an appeal of Charleton J.'s decision in Doyle v Buckley. Rather it was an appeal of a decision by Charleton J in the case involving a Ms. Spillane and her solicitor, Ms. Dorgan. The Court of Appeal did not over-turn Charleton J.'s decision in Doyle v Buckley to submit to taxation the ten bills of costs, which are the subject to this judicial review. Indeed, one cannot say with any certainty whether the Court of Appeal would have reversed Charleton J.'s decision in Doyle v Buckley, if that decision had been appealed, since it seems that Charleton J.'s referral to taxation was done on the basis of his inherent jurisdiction. Accordingly, even if it had been appealed, it is possible that the Court of Appeal could have found that Charleton J. was entitled to refer all ten bills that were referred to taxation, under his inherent jurisdiction, in which case the question of whether Charleton J. correctly interpreted s. 2 of the Attorneys and Solicitors (Ireland) Act, 1849, or not, becomes irrelevant, since this section has no bearing on the inherent jurisdiction of the High Court to refer bills of costs to taxation.

13. On this basis, this Court is firmly of the view that the decision in Doyle v Buckley to refer the ten bills of costs to taxation still stands as far as this Court is concerned and this Court, as a court of equal jurisdiction, has no authority to reverse the decision of Charleton J. in Doyle v Buckley. This Court's only role is to decide on the judicial review of the Taxing Master's decision in relation to the ten bills of costs, which were referred to the Taxing Master by Charleton J., in light of the fact that no appeal was taken by either Mr. Doyle or Mr. Buckley to the decision to refer those ten bills to taxation.

14. In summary, this is judicial review of the Taxing Master's decision and not judicial review of a decision of Charleton J., which would not be permitted, even if the applicant had sought leave for such a judicial review.

Judicial review before this Court

15. Having dealt with that preliminary matter, this Court must now consider the judicial review which is being sought by the applicant of the Taxing Master's decision. This Court is of the view that, after the Taxing Master made his final ruling on the 22nd May, 2015, if Mr. Buckley was unhappy that the ruling did not properly carry out the terms of the order of the High Court, the correct course of action was, as Mr. Buckley did, for him to return to the High Court in which the plenary proceedings were brought and which had ordered the taxation.

16. This is because the only reason that we have taxation in this case is because there are proceedings in being between the parties and a court order for the taxation to take place. It is important to bear in mind that the court ordered taxation is, in this sense, ancillary to the High Court plenary summons that was issued on the 5th July, 2011, by Mr. Doyle against Mr. Buckley, since the order to tax was granted by Charleton J. upon the motion of Mr. Doyle as part of those proceedings.

17. It is also relevant that Charleton J. refers during, the course of his judgment, to the fact that the dispute between the parties is "bitter" where "very little is agreed between" them. As already noted, when granting his order to tax, Charleton J. also gave the parties liberty to apply to the High Court on the original motion on simple brief affidavit on both sides should any "intractable" issue arise during the taxation of the costs. Indeed, it is difficult to escape the conclusion that in granting liberty to re-enter, Charleton J. was in fact predicting (correctly as it happens), in view of the intractable nature of the dispute at that stage, that there would be further problems in relation to the taxation of the costs, and for this reason, rather than delaying the resolution of these future problems any longer than necessary, that he wanted to ensure that the parties could return to the High Court to have the matters resolved as quickly as possible.

18. Whether this was Charleton J.'s thinking or not, that is how matters transpired, as there were further problems in relation to the taxation of costs. When the Taxing Master issued his final ruling of the 22nd May, 2015, the last day of the Easter term, and it became obvious to Mr. Buckley that the taxation of costs was not to his liking. The correct approach for him, if he wished to challenge that taxation, was to seek to have the matter re-entered in the list. As is clear from para. 19 of Mr. Buckley's affidavit dated the 8th February, 2016, this is the exact conclusion which he reached since he states:-

> "I say therefore that I found myself in vacation, with a series of determinations of an intractable nature, which I considered warranted exercising the leave granted by Mr. Justice Charleton to apply on [Mr. Doyle's] motion."

19. This was what Mr. Buckley duly did during the Easter vacation before Eagar J. who listed the matter for the first week of the following term. On the application of Mr. Doyle's counsel, the matter was then listed before the President and the re-entry application came before Kearns P. on the 1st July, 2015.

20. At para. 10 of Mr. Buckley's affidavit, dated the 8th February, 2016, he avers that the application before Kearns P. was opposed

by counsel for Mr. Doyle and that:-

> "…without opening my affidavit the President intimated that he considered there were adequate remedies in the form of judicial review, and/or an appeal from the decision of the Taxing Master."

21. Kearns P. refused Mr. Buckley's application to have the matter re-entered and he made an award of costs against him. While I must attach significance to the order of Kearns P., namely his decision to reject the application of Mr. Buckley and his decision to award costs against Mr. Buckley, as this Court must to any decision of the High Court, this Court attaches much less significance to comments attributed to him regarding judicial review being an adequate remedy. Such comments were not in any way germane to the application before him and were thus obiter. All Kearns P. was asked to do was to re-enter the matter by Mr. Buckley and he refused to do so and awarded costs against Mr. Buckley. This Court certainly does not conclude, from these obiter comments at the hearing of that application, that Kearns P. was recommending that judicial review was the appropriate remedy for Mr. Buckley to pursue in this case.

22. However, what this Court must now do is consider, in all the circumstances, whether Mr. Buckley should be allowed to judicially review the decision of the Taxing Master and if so the result of that judicial review.

23. As is clear from the Supreme Court decision in *G v D.P.P.* [1994] 1 I.R. 374 at p 378, an applicant who is seeking liberty to issue judicial review proceedings must satisfy the court, inter alia, that:-

> "the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate remedy".

While this statement of principle by Finlay C.J. was made in the context of an ex parte application for liberty to institute proceedings by way of judicial review, it is even more relevant in the judicial review proceedings themselves. This is because, as is clear from the judgment of Denham J., as she then was, at p 381 of the same case, the burden of proof in an application for leave to take judicial review proceedings is simply to make "a statable case, an arguable case in law". However, in the judicial review proceedings themselves, such as are before this Court, the applicant must establish much more than simply that he has an arguable case. He must convince this court, on the balance of probabilities, that judicial review is the appropriate remedy for his challenge to the Taxing Master's rulings in this case.

24. This Court does not believe that Mr. Buckley has discharged the onus upon him to prove that judicial review is the appropriate remedy for his attempts to challenge the decision of the Taxing Master to tax Mr. Buckley's costs. This is because this is an instance of court ordered taxation of costs, which is ancillary to the plenary proceedings issued by Mr. Doyle. Accordingly, it is this Court's view that it is the High Court that is hearing those plenary proceedings, and not the High Court in judicial review, which is the appropriate forum in which this matter should be ventilated and resolved.

25. However, as is clear, a decision has already been given by Kearns P. in this regard, but this decision did not go Mr. Buckley's way. If Mr. Buckley is unhappy with the manner in which Kearns P. took that decision (on the basis that Kearns P. did not consider Mr. Buckley's affidavit as he alleges) or the judgment handed down by Kearns P, then he should have appealed that decision.

26. In this Court's view, it is not appropriate for Mr. Buckley to seek to effectively circumvent a decision that went against him in one branch of the High Court (namely, the branch which deals with plenary proceedings and which referred the costs to the Taxing Master, but refused Mr. Buckley's application to re-enter the matter) by mounting a challenge in the judicial review list of the High Court seeking to achieve the result which he failed to achieve before Kearns P. (namely, a challenge to the ruling of the Taxing Master).

27. If Mr. Buckley was unhappy with the fact that Kearns P. had not opened his affidavit or with the manner in which Kearns P. conducted the hearing, or the decision which he made, then Mr. Buckley had a remedy, namely to appeal the decision of Kearns P. to the Court of Appeal. It is no defence to his failure to do so, to refer to an alleged comment made by Kearns P. during the hearing regarding judicial review being an adequate remedy, which comment is in any case obiter. This is the end of the matter in this Court's view and accordingly the orders of certiorari and mandamus being sought by Mr. Buckley should not be granted on the procedural grounds that it is not the appropriate remedy for Mr. Buckley's complaint. The appropriate remedy was to appeal Kearns P.'s decision. This judicial review amounts in effect to an indirect attempt to circumvent in this court, the decision of a court of equal jurisdiction.

28. If this Court is wrong in concluding that the challenge to the Taxing Master's ruling is not amenable to separate judicial review proceedings on these procedural grounds, then this Court would have to consider whether Mr. Buckley should be allowed to judicially review the Taxing Master's ruling, where he has alternative remedies. This is because it is clear from the judgment of O'Higgins C.J. in *State* (*Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381 at p. 393, that when considering judicial review applications:-

> "…while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate".

29. While one of the remedies open to Mr. Buckley was the application to re-enter the matter before Kearns P., it was not the only one. When Mr. Buckley sought and obtained leave from Noonan J. (on the 27th July, 2015), to institute the judicial review proceedings now before this Court, not only had he one avenue open to him to challenge the decision of the Taxing Master (namely by appealing the decision of Kearns P. of the 1st July, 2015), he also had, under O. 99, r.38 of the Rules of the Superior Courts, the right to challenge the decision of the Taxing Master, since this rule provides that a party in Mr. Buckley's position can make his objections in writing to the adjudication of the Taxing Master, who must then reconsider and review his taxation upon such objections.

30. At the hearing before this Court, counsel for Mr. Buckley confirmed that Mr. Buckley has in fact exercised his right to raise objections to the Taxing Master's adjudication in this case pursuant to O. 99, r. 38. As there was no evidence to the contrary, this Court must assume that the Taxing Master has not yet reconsidered his adjudication in this case, as he is required to do under O. 99 r. 38(2). It is also worth noting that under O. 99, r. 38(3), if Mr. Buckley is unhappy with the decision of the Taxing Master on the said review of his adjudication, he has a right of appeal, since he has 21 days to apply to the High Court for an order to review the taxation and the High Court is then entitled to make any order as may seem just.

31. In light of the foregoing, a fair summary of the position is that when Mr. Buckley was unhappy with the ruling of the Taxing Master dated the 22nd May, 2015, he had in effect four bites of the cherry to challenge that decision, without even considering a judicial

review of the Taxation Master's decision.

32. The first bite of the cherry was, as already noted, the fact that in the High Court proceedings which ordered the taxation of costs, the parties were granted liberty to re-enter the matter. Mr. Buckley has taken this bite of the cherry, and as he was disappointed with the decision of Kearns P., he had a second bite by virtue of the fact he could have appealed Kearns P.'s decision to the Court of Appeal.

33. The third bite for Mr. Buckley is the fact that, as already noted under O. 99, r. 38(1), Mr. Buckley can put to the Taxing Master the objections to his rulings, namely that the Taxing Master should not have included certain of the ten bills of costs for taxation and that he should have taxed other bills on a solicitor client basis, rather than on a party and party basis. Indeed, under O. 99, r. 38(2), Mr. Buckley is entitled, when making this objection, to require the Taxing Master to "state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto." Counsel for Mr. Buckley stated that he has made such objections, so this appeal process on the part of Mr. Buckley is underway.

34. The fourth bite is provided by the fact that if Mr. Buckley is unhappy with the Taxing Master's response to the items objected to under the procedure set out in O. 99, r. 38, he can then apply to the High Court for a review of the taxation. At that stage, and assuming that Mr. Buckley required the Taxing Master to state in writing his grounds, reasons and special circumstances for his decision, the High Court will be able to consider the Taxing Master's written replies to Mr. Buckley's objections to the taxation. It is also worth noting that, in a judicial review, the views of the Taxing Master regarding the objections raised by Mr. Buckley are not available to this Court, since the Taxing Master is not taking any part in these proceedings (unlike a review by the High Court of the Taxing Master's decision on the objections to his rulings under O. 99 r. 38, where the views of the Taxing Master on the objections are likely to be before the Court).

35. In light of the foregoing, this Court concludes that there are thus two avenues of appeal or remedy open to Mr. Buckley in his challenge to the Taxing Master's rulings, which themselves can be subject to appeal. The notion that these avenues of appeal and challenge are not adequate is not something that this Court agrees with, nor does this Court agree with the notion that Mr. Buckley should have in effect a fifth bite of the cherry by also having the right to judicially review the decision of the Taxing Master.

36. In all of these circumstances, this Court does not believe that Mr. Buckley should be entitled to challenge the Taxing Master's ruling by means of a judicial review of that ruling. In making this decision, the Court relies on the judgment of O'Higgins C.J. in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381 at p. 393, where he states:-

> "In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights".

37. To conclude, even if this Court is wrong in its conclusion that an appeal of the High Court's decision not to re-enter the matter was the appropriate remedy for Mr. Buckley (and not judicial review), it would nonetheless exercise its discretion not to permit the judicial review of the Taxing Master's ruling because not only had Mr. Buckley got one avenue of challenge (which he took by seeking to re-enter the matter before the High Court) as well as a right of appeal to the Court of Appeal, but he also had a second avenue of challenge (which he also took by challenging the Taxing Master's ruling under O. 99, r. 38), with a right of review by the High Court.

38. Finally, it is to be noted that there is, in effect, an appeal pending on the objections raised by Mr. Buckley to the Taxing Master under O. 99, r. 38. This is because this Court has been told by counsel for Mr. Buckley that he raised his objections in writing to the Taxing Master. As this Court has not been told otherwise, it must assume that no decision has yet been made by the Taxing Master and that the decision of the Taxing Master on the objections raised to him by Mr. Buckley is pending. In this regard, the Supreme Court in State (Roche) v Delap [1980] I.R. 170 refused to grant an order of certiorari even though it accepted that the impugned order in that case was bad on its face. It did so for the reason that the applicant had an appeal pending in the Circuit Court. For this reason, although not a determinative factor in the Court's exercise of its discretion to refuse Mr. Buckley's application for certiorari, this Court has taken into account the fact that there is an appeal pending in this case, in the sense that Mr. Buckley has made his objections to the Taxing Master regarding his ruling and the decision of the Taxing Master is pending, since he has yet to give his decision on those objections.

39. Thus, this Court would not grant Mr. Buckley the relief of certiorari he has sought because the more appropriate remedy for Mr. Buckley, when Kearns P. did not grant his application to re-enter, was to appeal it. Even if the Court is wrong on this point this Court would exercise its discretion not to allow judicial review because, to use the words of O'Higgins C.J., the two separate avenues of challenge open to Mr. Buckley (re-entry to the High Court and objection and review of taxation under O. 99, r. 38) could not, in this Court's view, be said to offer an "inadequate remedy" to Mr. Buckley and in those circumstances, this Court does not think that it can be said that the relief of judicial review is in the words of O'Higgins C.J. "necessary for the protection" of Mr. Buckley's rights.

40. As regards the order of quo warranto being sought by Mr. Buckley, no evidence was put before the Court which would call into question the qualifications or appointment of the Taxing Master and accordingly this application is also refused.