

BETWEEN

ERNEST J CANTILLON SOLICITORS

APPLICANT

AND

TAXING MASTER DECLAN O'NEILL

JUDGMENT of Mr. Justice Meenan delivered on the 8th day of May, 2019**Introduction**

1. Before the Court is an application seeking an order pursuant to O. 99, r 38(3) of the Rules of the Superior Courts (RSC) to review the ruling/decision of the Taxing Master in respect of an entitlement to recover VAT on a Bill of Costs.

2. The Bill of Costs in question relates to proceedings entitled *Christopher Gaffney v. DePuy International Limited*. These proceedings are one of many, possibly over one thousand, concerning claims arising from "plastic hips". Given the considerable number of claims, the High Court (Cross J.) wished to explore the possibility of these proceedings going to Alternative Dispute Resolution (ADR). To progress this possibility, it was necessary for the court to hear from the various parties involved. The *Gaffney* proceedings were, in a sense, a means through which this could be done in that a number of solicitors instructed by plaintiffs in the various proceedings were joined as notice parties so as to enable them to make submissions to the court concerning a proposed ADR scheme.

3. Having heard from the solicitors involved, Cross J. made an order as follows:-

"[I]t is ordered that the solicitors present in court this day either in person or by counsel herein before mentioned or set forth in the schedule to this order be and they hereby are made notice parties to this motion and that the applicant do pay to the defendant and to the said notice parties their costs of this motion when taxed and ascertained."

4. It was this costs order of Cross J. that was considered by the Taxing Master.

5. The issue that has arisen is whether the solicitor, named as a notice party and awarded costs, was representing his firm of solicitors or representing the various clients who were suing DePuy International Limited. The significance of this concerns the recovery of VAT. Were it to be determined that the solicitor was representing his firm then the VAT was not chargeable as it was "otherwise recoverable". However, were it to be determined that the solicitor was acting for the various instructing clients then the VAT element of the fees charged would be recoverable as the clients would not be registered for VAT.

6. This issue came to the fore at the hearing before the Taxing Master and the parties brought an application before Cross J. seeking to clarify the order on costs. Following a hearing, the transcript of which was opened to this Court, Cross J. ordered:-

"On hearing counsel for the notice party, and solicitor for DePuy International Limited, and it appearing that the taxation process in respect of the ADR application is not complete, and that the Taxing Master reserved his decision pending the hearing of this motion, and the court expressing the view that it cannot see how a solicitor would act other than for a client, though make the observation that the solicitors before the court on 16th December, 2015, were acting for clients."

Ruling of the Taxing Master

7. In the course of his ruling on 19 October 2018, the Taxing Master stated:-

"31. I note that this issue was discussed at some length before Mr. Justice Cross on 23 March 2018 and I have read the transcript... Mr. Cantillon's cost accountant...has drawn my attention particularly to page 18, lines 27 – 29 and page 19, lines 1, 2 thereof. The learned judge observes that 'I can't see how a solicitor would act other than for a client'. This is of course the position and is not in dispute. However, the issue which arises is whether the VAT payable on the party and party costs awarded to the solicitors (as notice parties) is 'otherwise recoverable'. I also note that the court was informed by the defendant's solicitor in the course of submissions that the plaintiff's solicitors were acting for the benefit of the practice and that, in accordance with the terms of the order, the VAT which must be paid by the solicitors is otherwise recoverable."

8. In the "Taxing Master's report" prepared for the Court, dated 30 January 2019, the Taxing Master stated:-

"3. In the course of my second ruling, dated 19 October 2018 following upon the hearing of the notice party's objections, I set out at paras. 2 – 32 the reasons for the disallowance of VAT as recoverable as between party and party in this case. In essence, the costs were awarded to the notice party which is a VAT registered entity and, as such, bears the onus, pursuant to Order 99, rule 1(6) RSC of showing that VAT 'is not otherwise recoverable'. The notice party has not done so."

Submissions of the Parties

9. Mr. Pearse Sreenan, S.C., on behalf of the solicitor, submitted to the Court that it was entirely clear that the solicitor was awarded costs as a notice party acting on behalf of instructing clients. He relies, in particular, on the above passage from the Taxing Master's report for the Court wherein the Taxing Master refers to costs being awarded to the notice party which is "VAT registered" as clearly establishing that the Taxing Master was of the view that the solicitor was not acting on behalf of instructing clients at the time.

10. Mr. Andrew Walker, B.L., on behalf of DePuy International Limited, submits that at para. 31 of the Taxing Master's ruling on 19 October 2018, set out at para. 7 above, the Taxing Master clearly accepted the solicitor as a notice party was acting on behalf of instructing clients. He submits, however, that the issue that has arisen in relation to VAT arose due to the failure of the solicitor to establish that the VAT "is not otherwise recoverable".

Consideration of Issues

11. The first issue which I have to consider is whether or not the Taxing Master reached the conclusion that the solicitor, as a notice party, was either acting on behalf of the firm or for instructing clients. The terms of para. 31 of the Taxing Master's ruling on objections, detailed above, makes it clear that the Taxing Master does accept that the solicitor was acting for clients. This does not however appear to be consistent with what the Taxing Master stated in his report to the Court wherein he referred to costs being awarded to the notice party which is a "VAT registered entity." The solicitor's firm is clearly a VAT registered entity but the instructing clients are not. The clear implication of this being that it was the view of the Taxing Master that the solicitor, at the time, was not acting on behalf of clients.

12. I am fully satisfied that, when joined as notice party and in making various submissions to the court, the solicitor was acting for the various instructing clients. I reach this conclusion for the following reasons:-

(i) If the solicitor was not acting for clients, then he had no "*locus standi*" to make submissions to the court concerning ADR. There is no suggestion that the solicitor was acting as an *amicus curiae*.

(ii) Both the transcript of the hearing before Cross J. on 23 March 2018 and the subsequent order of the court make it clear that, at the relevant time, the solicitor was acting for instructing clients.

(iii) In taking instructions from various clients, the solicitors request the client to sign an authority authorising the solicitor to take such steps as are appropriate to protect the client's interest. Further, prior to the order of 16 December 2015 of Cross J., there was correspondence exhibited whereby the solicitor was keeping various clients up-to-date on the various developments concerning the ADR.

Conclusion

13. By reason of the foregoing, I am satisfied that, when joined as a notice party, the solicitor was acting on behalf of clients and that it was in that capacity that Cross J. made the order for costs as set out in the order of 16 December 2015. I will hear counsel as to what consequential orders arise.