[2019] IEHC 495

THE HIGH COURT

[2001 No. 379 P]

BETWEEN

ANNE POWER

PLAINTIFF

AND

PATRICK KAVANAGH

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of June, 2019

1. The within motion has been brought by the defendant in these proceedings for an order dismissing the summons to tax dated 23rd October, 2017 issued by the plaintiff on the grounds of delay. This judgment is concerned with a preliminary issue that arose prior to the hearing of the motion proper, the issue being whether or not the court has jurisdiction to entertain this application at all.

2. In brief summary, the plaintiff was involved in a road traffic accident on the 17th February, 1998 in which she suffered personal injuries. She instituted proceedings against the defendant in this court which were ultimately settled on the 14th November, 2005 by the defendant's insurance company, Axa Insurance. A final order of the court was made on that day which records:

> "This action being called on for hearing before the court this day at Kilkenny
>
> Whereupon and on hearing what was offered by counsel for the respective parties
>
> And it appearing that a settlement has been reached herein
>
> By consent IT IS ORDERED that the plaintiff's costs including reserved costs be taxed that the defendant do pay the said costs when taxed and ascertained and this action be struck out of the list."

3. For reasons which are not particularly material to the preliminary issue, the plaintiff's solicitors did not deliver a bill of costs to the defendant's solicitors until almost twelve years later on the 27th September, 2017 and followed this up with a summons to tax on the 23rd October, 2017. The matter appeared in the Taxing Master's list for the first time on the 13th December, 2017 when it was adjourned to the 28th February, 2018. It was further adjourned on the latter date to the 4th May, 2018 and on the previous day, the 3rd May, 2018, the defendant's solicitors intimated for the first time that they proposed bringing the within application. This motion was issued on the 8th October, 2018.

4. In moving this application, the defendant primarily relies upon the delay jurisprudence commencing with the seminal judgment of the Supreme Court in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459. In particular, the defendant places significant reliance upon a judgment of this court (Hogan J.) in *Harte v. Horan* [2013] 2 IR 291. The facts of that case were quite similar to those arising in the present. The plaintiff was involved in a road traffic accident and brought a personal injuries claim which was ultimately settled and ruled by a final order of the court on the 11th July, 2001.

5. The summons to tax was issued on the 20th January, 2012, some ten and a half years later and the defendant sought to have the taxation struck out on the grounds of delay. Hogan J. applied the *Primor* principles in holding that the delay was both inordinate and inexcusable and further that the balance of justice favoured the defendant, whom he held to have been prejudiced by the delay.

6. It is important to note that in that case, neither party raised the issue of the court's jurisdiction to entertain the application. Notwithstanding that, the court had a concern that the application might in substance amount to an application for an order of prohibition against the Taxing Master. However, the court's concern appears to have been that, in that event, it was appropriate that the Taxing Master should be put on notice of the application which was done and the Taxing Master indicated that he would abide by the decision of the court. Hogan J. dealt with the matter in this fashion (at p. 295):

> "At the original hearing of this application I expressed concern that this application would amount in substance to an application for an order of prohibition directed towards the Taxing Master. Given that in such circumstances it was appropriate that the Taxing Master should have notice of any such application, I directed that he be put on notice of application. The Taxing Master has since confirmed by letter dated 10th July, 2013 that once his position had been properly outlined to the court – namely, that before embarking on the taxation of costs, he wished to be fully addressed on the relevant law governing the application – he would abide by the decision of this court."

7. Accordingly, it seems that what was of concern to the court in the latter passage was not whether or not the court had any jurisdiction to embark on the proposed procedure but rather since the Taxing Master could by analogy with a prohibition application be affected by the application before the court, he should be put on notice.

8. It seems to me therefore that the issue of whether or not the court had jurisdiction to entertain the application was one that was neither raised nor argued by the parties or the court nor was it determined by the court. The case therefore effectively proceeded on the basis that it was assumed on all sides that the court did have such jurisdiction.

9. That is very much in contrast with the present case where at the outset of the hearing, counsel for the plaintiff indicated that the plaintiff was taking strong issue with the court's jurisdiction to hear this application and it was accordingly fully argued before me by counsel on both sides.

10. Mr. Treacy S.C. on behalf of the plaintiff contended that the court could not entertain this application being as it was *functus officio* following the final order of the 14th November, 2005 and the only basis upon which the court could intervene was by the defendant applying for prohibition by way of judicial review within the time limited in that behalf by O.84 of the rules, being three months from the issue of the summons to tax. Counsel argued that this meant that an application for judicial review had to be made by the 23rd February, 2018.

11. Counsel for the defendant, Mr. Keating B.L. relied upon *Harte v. Horan* as authority for the proposition that the court did have jurisdiction to entertain the application and further submitted that the plaintiff was estopped from raising this point having not done so before the morning of the hearing or at any stage when the matter was before the Taxing Master and the issue of delay was raised.

12. With the exception of *Harte v. Horan*, all of the jurisprudence dealing with dismissal for delay relates to proceedings before the court, that is to say, an action that is in being and has not come to a final conclusion. When the court makes a final order, that is the conclusion of the proceedings absent liberty to apply. Once the court is *functus officio*, it cannot revisit the matter in the context of the same proceedings. This is clear from the judgment of this court (Keane J.) in *De Silva v. Rosas Construtores* [2017] IEHC 365.

13. There, a final order of the court was made without liberty to apply and the plaintiff's solicitors subsequently sought by motion payment of a reasonable sum on account of costs. Keane J. refused the application on the basis that as he was *functus officio* following the making of a final order, he had no jurisdiction to make the order sought. He said (at p. 7):

> "The plaintiffs point to the supervisory jurisdiction of the High Court over the office of the Taxing Master. Yet, as they acknowledge, that jurisdiction is exercised through the medium of judicial review proceedings under O. 84 of the RSC; see, for example, *State (Gallagher, Shatter & Co.) v de Valera (No. 2)* [1991] 2 IR 198 and *Gannon v Flynn* [2001] 3 IR 531. It is also exercised, where appropriate, through the review of taxation procedure under O. 99, r. 38 of the RSC. The additional and novel jurisdiction for which the plaintiffs now contend – one exercisable where a taxation has 'stalled' (whatever precisely that might mean) or where the Taxing Master considers it appropriate – would, if recognised, be an ancillary, rather than supervisory, one *vis a vis* the Taxing Master."

14. In arriving at the conclusion that he could not revisit the terms of a final order in the absence of liberty to apply, Keane J. followed the judgment of the Supreme Court in *Belville Holdings Ltd v. Revenue Commissioners* [1994] 1 ILRM 29 where Finlay C.J., delivering the unanimous judgment of the court, adopted the statement of principle in the earlier judgment of Romer J. in *Ainsworth v. Wilding* [1896] 1 Ch. 673 (at 677):

> "So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
>
> (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under Order 28 rule 11;
>
> (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended."

15. The foregoing seems to run counter to the defendant's contention in the present case that the court, after the pronouncement of a final order in proceedings, has some ongoing function or jurisdiction to intervene in the taxation process where, as here, it is said that there has been delay. It seems to me that, as Keane J. suggests, this would be a novel jurisdiction for which there is no authority with the sole exception of *Harte v. Horan* which did not to my mind decide the point in issue here.

16. Insofar as that decision necessarily implies a jurisdiction of the kind contended for by the defendant, I would respectfully disagree with it. That does not imply any criticism of the court. A somewhat analogous situation arose in my judgment in *Noone v. The Residential Tenancies Board* [2017] IEHC 556. The issue to be decided was whether the High Court had jurisdiction to enlarge the time for bringing an appeal to the High Court from a determination order made by the respondent. In an earlier case, *Keon v. Gibbs* [2015] IEHC 812, Baker J. extended the time to bring such an appeal without any consideration of whether the court had jurisdiction to do so.

17. Neither party raised the point but rather proceeded on the assumption that the court did have such jurisdiction and merely addressed the merits which is what the court was concerned with. This gave rise to a similar difficulty to the present case on which I commented at para. 13:

> "In our adversarial system, litigation is party led. The court is normally asked to reach a decision based on competing arguments advanced by the opposing parties. Where those parties are legally represented at any rate, the court will normally proceed on the assumption that in opting between opposing arguments, the parties have themselves fully researched and considered the
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> applicable legal principles. In the normal course of events, the court will not consider issues that have not been raised by the parties nor as a general rule does it have the resources to do so."

18. In the result, I concluded that the court had in fact no jurisdiction to extend the time. I also considered that if the earlier authority was in conflict with my judgment, I would respectfully decline to follow it on the basis that the principles set out in the judgment of Clarke J. (as he then was) in *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 were engaged. The same considerations apply here.

19. In the present case, the proceedings were brought to a conclusion by the making of a final order on the 14th November, 2005. Thereafter it seems to me that the court's jurisdiction was spent save and insofar as legislation and the RSC provide for a limited supervisory jurisdiction to review a decision of the Taxing Master. Section 27 (3) of the Courts and Courts Officers Act, 1995 expressly empowers the High Court to review the decision of the Taxing Master. However, that power is limited in nature and is confined to situations where the court is satisfied that the Taxing Master has erred as to the amount of the allowance or disallowance of any item of costs so that the decision is unjust.

20. Thus the jurisdiction is, as Keane J. pointed out, supervisory rather than ancillary in relation to costs. All of the delay jurisprudence is concerned with the progress of litigation to its final conclusion, that final conclusion being the making of a final order. The processes that follow thereafter exist for the purposes of giving effect to the final order of the court but the court retains no residual jurisdiction in relation to those processes save and insofar as expressly provided for by primary or secondary legislation, including the RSC.

21. That of course is not to say that a party aggrieved by unfairness in those processes is left without remedy.

22. The essential complaint of the defendant here is that there is a want of procedural fairness in the taxation process by virtue of

the delay that has occurred and the consequent alleged prejudice to the defendant. These are of course classic judicial review grounds for seeking to prohibit the continuation of the process. The court is routinely concerned with the prohibition of both civil and criminal processes on grounds of unfairness arising from delay. It would have been open to the defendant, and might still possibly be open, to apply for an order of prohibition against the Taxing Master in circumstances such as these.

23. The court's judicial review jurisdiction is of course more than ample to deal with the complaints made by the defendant in this case.

24. With regard to the estoppel point raised by the defendant, it is not entirely clear to me what conduct the plaintiff is alleged to have been involved in that was relied upon by the defendant to his detriment such as might give rise to such estoppel. However, even if that point were well founded, I cannot accept that such an estoppel could confer jurisdiction on the court. It either has it or it has not.

25. For these reasons, I am satisfied that the court does not have jurisdiction to entertain the defendant's application herein which must therefore be dismissed.