Neutral Citation Number: [2011] IEHC 408

THE HIGH COURT

JUDICIAL REVIEW

2010 1587 JR

BETWEEN

PATRICK TAAFFE

APPLICANT

AND

JUDGE McMAHON, THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered the 28th day of October, 2011

This judgment deals with the issue as to whether or not this Court has jurisdiction to measure costs in uncontested *habeas corpus* or judicial review proceedings where, following the granting of leave, the respondents in any given case indicate that no opposition will be raised to the making of a *habeas corpus* order or the quashing by way of *certiorari* of some order of the District or Circuit Court.

It is contended on behalf of the applicant that the Court has no jurisdiction to measure costs in the absence of an agreement to that effect, save by reference to a proportion of a taxed sum.

The State for its part contends that the Court does indeed possess such a jurisdiction and that it is one which may be properly exercised in cases of this nature, thereby avoiding unnecessary inconvenience and additional expense to the State and, by obvious implication, the taxpayer.

This is a recurring issue and the parties have requested that the Court give some guidance on the matter.

It is perhaps important to stress that the respondents emphasise that the Court is being asked, and will only be asked, to measure costs where the legal issue involved is net and where the matter has been quickly resolved without the necessity for any contested hearing. It is submitted on behalf of the State that, in such circumstances, the trial judge is in a particularly good position to assess the net legal issue involved, the work carried out by the parties involved in the proceedings, and the fact that the matter has been resolved quickly by the Director of Public Prosecutions. It has also been pointed out that the kind of case where the Court is being invited to measure costs are cases where the only pleadings filed generally involve a single grounding affidavit and, in the case of a judicial review, a short statement of grounds. The cases in which such a request is advanced are, in general, cases where a simple technical error has been made and where, it is argued, it would be both undesirable and disproportionate if the expense of a full taxation process was undergone thereafter.

The judgment also is confined to cases where resort has not been had to the Attorney General scheme which is generally available to applicants who bring *habeas corpus* applications as well as judicial review applications that are concerned with criminal matters where an applicant is unable to discharge his legal costs.

FACTS

In this case the first named respondent issued a bench warrant for the arrest of the applicant for his non-appearance before the District Court on 10th November, 2010. The applicant had been released on station bail to appear before the District Court on that date charged with a public order offence. However, prior to that date, the applicant's mother made contact with the prosecuting garda to explain that the applicant was scheduled to be in Rome on the date in question. The applicant's solicitor deposes that it was agreed between the applicant's mother and the prosecuting garda that the case could be adjourned on consent once the applicant had a legal representative in court on 10th November, 2010.

However, on 10th November, 2010, notwithstanding the presence of counsel on behalf of the applicant in court, Judge McMahon stated that the accused should have been present and that there was no excuse for his absence. He then proceeded to issue a bench warrant. All of this occurred before the prosecuting garda gave evidence. Counsel for the applicant did not see a certificate of arrest, charge and caution being handed into court.

The applicant came to the attention of An Garda Síochána in respect of a different matter at a subsequent time and was brought to a garda station. He was then detained on foot of the bench warrant, the subject matter of these proceedings. He was then remanded in custody to appear before Judge McMahon on 13th December, 2010.

On that date, counsel for the applicant indicated to the court that the bench warrant which had been executed would be subject to judicial proceedings. Counsel clarified to the court that the reason why this course was being adopted was because of the agreement made between the prosecuting garda and the accused's mother. Judge McMahon was dissatisfied with this explanation and requested that the prosecuting garda attend before court in that same day. The prosecuting garda was unable to do so, but it was indicated to the court, through his garda sergeant, that he had told the applicant's mother that he would not seek the issue of a bench warrant once the applicant had legal representation in court on 10th November, 2010.

Leave to bring the present judicial review proceedings was granted by the High Court (Peart J.) on 20th December, 2010.

The grounds upon which relief was sought were:

> *"(1) the decision of the respondent dated 10th November, 2010 to issue a bench warrant for the arrest of the applicant*

was made in breach of the rules of natural and constitutional justice in that it was explained to the respondent that the applicant's non-attendance was as a direct result of a communication from the prosecuting garda, Ronan Judge, representing that the charges against the applicant would be adjourned once the applicant was legally represented in court on the date of the first appearance, 10th November, 2010.

(2)Further or in the alternative, the respondent erred in law and exceeded his jurisdiction in issuing the said bench warrant without receiving into court prima facie evidence that an offence had been committed by the applicant."

On 13th April, 2011, the respondents having previously indicated in open court that they would not oppose the making of an order granting the relief sought, the issue of costs was then discussed. Counsel for the respondent indicated that an open letter had been sent to the applicant's legal advisers offering a sum of €4,000 plus VAT towards their costs. The court was informed that this offer had been rejected.

Counsel for the applicant argued that the court had no jurisdiction to deal with costs in this way. He also objected to the way in which the DPP was bringing cases in this manner before certain judges.

The matter having been put back for further consideration and discussion between the parties, a second open letter was forwarded to the applicant's solicitor with an offer of €5,000 plus VAT which was also rejected.

The matter eventually returned to my Court on 18th July, 2011 when I invited the parties to submit submissions in writing as to the extent of the Court's jurisdiction.

THE LAW
Section 14 (2) of the Courts (Supplemental Provisions) Act 1961, provides that the jurisdiction of the High Court should be "*exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by the Rules of Court*".

The framework within which costs are dealt with by the Superior Courts is set out in Order 99 of the Rules of the Superior Courts which have been amended on several occasions, most recently by S.I. 12 of 2008.

Insofar as relevant, Order 99 now provides:-

"1 Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by the Rules:

1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

2) …

3) Subject to subrule (4A) the costs of every action, question and issue tried by a jury shall follow the event unless the court, for special cause, to be mentioned I the order, shall otherwise direct.

4) Subject to subrule (4A) the costs of every issue of fact or law raised upon a claim or counterclaim shall unless otherwise ordered follow the event.

4A) The High Court or the Supreme Court upon determining any interlocutory application, shall make an award of costs save where it is not possibly justly to adjudicate upon liability for costs on the basis of the interlocutory application.

1A

1) Notwithstanding subrules 3) and 4) of Rule 1

a) The Supreme Court …

b) The High Court, in considering the awarding the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgement or tender offer in lieu of lodgement may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other parties (or those other parties) claim, counterclaim or application.

c) …

2. In this rule, an "offer in writing" includes any offer in writing made without prejudice save as to the issue of costs.

...

5. (I) Subject to subrule (4A) of Rule 1, costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an order for the payment of costs may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded.

(2) In awarding costs, the Court may direct:

(a) that a sum in gross be paid in lieu of taxed costs, or

(b) that a specific portion of the taxed costs be paid, or

(c) that the taxed costs from or up to a specified stage of the proceedings be paid.

(3) At any stage of the proceedings, the Court may require the parties to produce to the Court and exchange with one another estimates of the costs respectively incurred by them, for such period as the Court may direct, and particularised in such manner as the Court may direct."

SUBMISSIONS OF THE PARTIES

Counsel on behalf of the applicant submits that O. 99, r. 5 (2) makes it clear that if a court proposes giving a direction that a sum in gross be paid by one party to another party on foot of an application for costs, such sum in gross is paid "in lieu of taxed costs". In other words, the sum in gross is paid in substitution for or instead of taxed costs. The sum in gross therefore is intended to be in substitution for taxed costs without the necessity for going through the process provided for in O. 99 for the taxation of costs.

Counsel thus argued that it is not the case that the sum in gross is calculated by the court at some hypothetical level without regard to the level at which costs would tax, but, on the contrary, the said sum in gross is intended to be a sum equivalent to the sum at which costs would be expected to tax. He submitted that it is clear from O. 99, r. 10 (2) that such costs as are required to be taxed on a party on party basis are such costs as were necessary or proper for the attainment of justice or in enforcing or defending the rights of the parties costs or being taxed. If a sum in gross is to be awarded in lieu of such taxed costs, it is clear that that sum too must be calculated on the basis that it covers such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party in whose favour the costs order is made.

Further or alternatively, counsel on behalf of the applicant argued that it is open to a court in directing that costs be paid to direct that a "specified proportion" of taxed costs be paid. It is this latter provision which, in conjunction with rule 3, can lead to a restricted order for costs being made. Thus, construing O. 99, rules 5 (2) (a), (b) and (c) together, necessarily leads to the conclusion that if a court is of the view that only a specified proportion of taxed costs should be paid, the court is in addition entitled to invoke (a) and direct that a sum in gross be paid in lieu of that specified proportion of the taxed costs. Likewise, if a court is of the view that taxed costs up to a particular point of the proceeding should be paid, the court may proceed and award a sum in gross in lieu of taxed costs up to that particular point in the proceedings.

By way of example, if the court formed the view that a partially successful plaintiff should be awarded 50% of his costs against a defendant, the court may, in lieu of directing that the defendant do pay to the plaintiff 50% of such sum as is taxed by the taxing master, order that a sum in gross be paid as an estimate of what the end result of the taxation process might be. Counsel argued that it was not open to a court in such circumstances to determine in the first instance that a partially successful claimant is entitled to 50% of his costs and then to award a sum in gross in lieu of 50% of the taxed costs, which sum would bear no relationship to the sum which would in fact result from the taxation process. It was submitted that a successful applicant can not be deprived from his costs for anything other than proper or lawful considerations. That being so, the costs of a judicial review should follow the event unless the court, for special cause, to be mentioned in the order, shall otherwise direct.

On behalf of the respondents it was submitted that none of the amendments to the rules effected by S.I. 12 of 2008 altered the provisions of O. 99 (5) (2) (a) which provides that:-

"In awarding costs, the court may direct …

(a) that a sum in gross be paid in lieu of taxed costs."

While the applicants had suggested that the purpose of this rule is to allow the court to fix a sum without going through the process for taxation and that the gross sum is intended to be equivalent or proportionate to the sum at which costs would be expected to tax, there was nothing in the wording of the section to suggest this was the case and the applicants were endeavouring to read words into the section that are not there. The words "*in lieu*" mean instead of. They do not convey any notion of equivalence or proportionality. If that had been the purpose of this section then it would have said that "*an equivalent sum in gross be paid in lieu of taxed costs" or "a proportion of sum in gross be paid in lieu of taxed costs*". In fact, the rules as amended contained no such provision.

The whole purpose of measuring costs was to avoid the expense, delay and aggravation involved in protracted litigation arising out of a taxation. The respondents readily acknowledged that the discretion in the trial judge requires to be exercised judicially and that the judge so engaged is required to give proper consideration to all relevant factors.

In the United Kingdom, the Court of Appeal upheld a judge's discretion to summarily measure costs in lieu of taxation in *Leary v. Leary* [1987] 1 All E.R. 261, finding that the trial judge was entitled to exercise his discretion under the equivalent of O. 99, r. 5 to award a fixed sum in lieu of taxed costs. The court had gone further in that case to say that the power to measure costs was not confined to "modest and simple cases", nor was the judge required, before making the award, to conduct an enquiry in the nature of a "preliminary taxation" in which there was a detailed investigation of the figures.

Counsel for the respondents argued that the provisions of O. 99 are identical to the pre-1999 England and Wales equivalent rules.

The applicant's submissions which sought to invoke O. 99 (5) (2) (b) which provide that "*a specific portion of the tax costs be paid*" is an entirely separate provision which allows a judge to award 50% of costs as taxed. Self evidently, that provision requires a taxation of costs in default of agreement. However, there is nothing in that provision which delimits the scope of O. 99 (5) (2) (a). Indeed the words "*in lieu*" in O. 99 (5) (2) (a) make it clear that the rule is seeking to do something different and is an alternative to the concept of taxed costs.

Counsel submitted that there was nothing ambiguous about O. 99(5) (2) (a) that somehow requires it to be circumscribed by reference to O. 99 (5) (2) (b) or O. 99 (5) (2) (c). The whole purpose of O. 99 (5) (2) (a) is to give courts as much flexibility as possible with regard to how they can address an issue as to costs. In interpreting these three different provisions of O. 99 (5) (2) it was to be noted that the word "*or*" appears between the different provisions, clearly suggesting that O. 99 (5) (2) (a) stands to be interpreted entirely on its own merits.

There could be no reality in the suggestion that the applicants were somehow in danger of being "deprived" of costs. If the court believed that a fixed sum was appropriate there was no deprivation as the court was allowing a sum on the basis of what it considered to be appropriate and just on the facts of the case.

DECISION

At the outset I think I can safely say that no judge of the High Court would willingly undertake the function of being the regular arbiter of the appropriate costs to be awarded in any given case. Some judges undoubtedly find the notion abhorrent in itself,

whereas others may feel that after any lengthy period of service on the bench, a judge becomes to some extent detached and remote from monetary values and from prevailing levels of costs and expectations of practitioners in that regard.

However, these considerations are of very limited assistance in resolving the present issue. While judges should not be expected to act as bean counters in deciding the various aspects of any claim for costs, there are many simple and uncomplicated cases which lend themselves to easy assessment of costs in terms of work done, time taken and effort expended. The kind of case under consideration here falls very much into that category. If the trial judge feels that he is capable of making an educated estimate of what is fair on a measurement of costs, why should he not proceed to measure a sum for costs if the alternative is a lengthy, protracted and costly taxation?

Order 99 (5)(2)(a) clearly contemplates that judges have power to measure costs. A reluctance or failure on the part of judges to exercise that jurisdiction, notably in the present circumstances of financial crisis in this country, could in my view be regarded as a failure to exercise judicial responsibility. Far from being unqualified to perform this role, most judges, in simple and straightforward cases such as this, are well capable, both from their own experience as practitioners and from their experience on the bench, of making an appropriate assessment. Indeed, exposed as they are to the current realities of financial hardship experienced by so many litigants appearing in front of them in court, it may well be that a judge in 2011 is better equipped than most to estimate what is fair and reasonable in a simple and uncomplicated case.

The Master of the High Court, under O. 63, r. 6 has jurisdiction to direct payment of a sum in gross in lieu of payment of costs to be taxed. In *Mitsubishi Electric Europe B.V. v. Design Air Ltd*. [2006] 1562 S the Master engaged in an exercise whereby he set out principles by which costs should be assessed and proceeded to apply these principles to the thirteen cases before him. I have no reason to believe that this exercise has been the source of disquiet or, still less, the subject matter of any appeal. The Master has continued to measure and fix the costs of various interlocutory motions when requested to do so.

The High Court has itself been prepared to measure costs in a number of straightforward judicial review and article 40 applications in recent times (see *Rostas v. Governor of Mountjoy Prison* [2010] 641 SS; *Connors v. Judge Dunne & The DPP* [2010] 275 J.R.; *Bao v. Governor of Cloverhill Prison* [2010] 2230 SS; *O'Brien v. Connellan & DPP* [2009] 1053 J.R.).

While no judge of the High Court would see himself or herself as possessing expertise in costs equivalent to that of a taxing master, I am of the view nonetheless that a judge of the High Court is certainly capable of having due regard to the matters set out at O. 99, r. 37 (22) (ii) of the Superior Court Rules which detail the relevant matters which must be considered by the taxing master when considering a sum to be allowed on any item of taxation as follows:-

> *"(a) the complexity of the item or the cause or matter in which it arises and the difficulty or novelty of the questions involved;*
>
> *(b) the skill, specialised knowledge and responsibility required of and the time and labour expended by the solicitor;*
>
> *(c) the number and importance of documents (however brief) prepared or perused;*
>
> *(d) the place and circumstances in which the business involved was transacted;*
>
> *(e) the importance of the cause or matter to the client;*
>
> *(f) where money or property is involved, its amount or value;*
>
> *(g) any other fee and allowance payable to the solicitor in respect of other items in the same cause or matter but only were work done in relation to these items has reduced the work which would otherwise have been necessary in relation to the item in question."*

There will of course be cases where the sheer complexity of the issues arising on costs will discourage any judge from attempting to measure costs. This may arise where expert evidence is involved or where the issues are of a complex financial nature such as those which frequently arise in the Commercial Court. No such difficulties arise in the present case or in the kind of case of which this case is representative.

As I am quite satisfied that O. 99 (5) (2) (a) confers the necessary jurisdiction for me to do so, I propose to measure costs in both the instant case and in a number of other cases of the same type presently pending before the Court for the same purpose.

However, I will allow a period of 28 days from this judgment to allow the parties consider their respective positions before doing so. This time can be utilised either to agree costs or to prepare an appeal to the Supreme Court.