Neutral Citation Number: [2005] IEHC 203

THE HIGH COURT

[2002 No. 14269P]

BETWEEN

JAMES KENNY

PLAINTIFF

AND

THE PROVOST FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN TRINITY COLLEGE

DEFENDANTS

JUDGMENT of Quirke J. delivered on the 17th day of June, 2005.

This is an application made by the plaintiff pursuant to Order 99, rule 38(3) of the Rules of the Superior Courts, 1986 for an order reviewing a ruling and decision of the Taxing Master made on 27th July, 2004.

The decision concerned two bills of costs which came before the Master for hearing on 16th December, 2003. The bills were taxed by the Master on 1st April, 2004. On the 19th April, 2004, the plaintiff submitted objections to the allowances made by the Master.

The objections were heard by the Master on 26th May, 2004. The Master made a final ruling and decision on 27th July, 2004.

In summary the ruling and decision of the Master was that:

(1) Costs awarded to the defendants by the President of the High Court by Order dated 7th November, 2003, (claimed on behalf of the defendants in the amount of €77,188.96), should be allowed in the amount of €40,533.83 and,

(2) Costs awarded to the defendants against the plaintiff by order of the Supreme Court dated 20th June, 2003, (and claimed in the amount of €93,542.88), should be allowed in the amount of €42,480.91.

FACTUAL BACKGROUND

1. By Order of the High Court (McKechnie J.) dated the 15th December, 2000, the plaintiff was refused leave to seek relief by way of judicial review against An Bord Pleanála and Others (including the defendants).

An application by the plaintiff to the court for a certificate of leave to appeal was rejected.

2. On 7th November, 2002, the plaintiff issued the proceedings which are the subject of this application. He sought relief against the defendants and Dublin City Council including:

> *"An order directing the re-hearing of the plaintiff's judicial review application and in particular the evidence relating to the location of the said boiler houses".*

The proceedings recited the order and the judgment of the High Court (McKechnie J.) made and delivered on 15th December, 2000, and claimed *inter alia* that … *"the Developers misled the Court in making its submission in the terms outlined by Counsel and in so doing caused his Lordship to reach a decision which he otherwise might not have done …".*

A Statement of Claim was delivered on 20th January, 2003, elaborating upon the claim and seeking the same relief.

An application made on behalf of the defendants to strike out the proceedings as being frivolous vexatious and an abuse of process was refused by the High Court (Finnegan P.) on the 2nd April, 2003.

On the 13th May, 2003, it was ordered by the High Court (Finnegan P.) that the costs of the motion to dismiss should be deemed "costs in the cause".

3. On the 20th June, 2003, an appeal by the defendants against the order of the High Court dated 2nd April, 2003, was allowed by the Supreme Court which ordered that the plaintiff's claim against the defendants in the proceedings should *"... be struck out as disclosing no reasonable cause of action ... and ... that the ... defendant to recover against the plaintiff the costs of this appeal when taxed and ascertained ..."*

4. By Order of the High Court (Finnegan P.) dated 7th November, 2003, the defendant was awarded *"... the costs of this action (to include the costs of the said Motion) when taxed and ascertained ..."* from the plaintiff (subject to a stay of execution for three months from that date).

5. Bills of Costs in respect of both the High Court and Supreme Court proceedings were drawn and presented to the Master for his consideration.

6. By letter 16th April, 2004, the plaintiff submitted objections to the Taxing Master who made his decision and ruling on 27th July, 2004.

THE LAW

The power of this court to review a decision of the Taxing Master of the High Court is governed by the provisions of s. 27(3) of the Courts and Courts Officers Act, 1995 which provides *inter alia*:

> "*The High Court may review a decision of a Taxing Master of the High Court ... made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the Taxing Master..... has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master ... is unjust".*

It is now well settled that this subsection is to be construed as requiring that unless it has been proved that the Taxing Master, in his or her decision, has so erred in principle that the decision which results is *"... unjust"* this court should not intervene (See *Smyth v. Tunney* [1999] 1 I.L.R.M. 211; *Tobin v. Toomey Services Limited v. Kerry Foods Limited* [1999] 1 I.L.R.M. 428 and *Bula Limited and Others v. Flynn* (Unreported, High Court, 7th March, 2000).
In *Superquinn v. Bray UDC and Others* (Unreported, High Court, 5th May, 2000), Kearns J., referring to the "*shift of emphasis"* created by the enactment of s. 27 (3) of the Act of 1995, confirmed (at p. 23) that the effect of the shift is to require the court to exercise *" ... a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice."*
Asking (at p. 24) *"When does an error become 'unjust'?"*, he replied:
"It seems to me that, in exercising its powers of review under Section 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge."
It is appropriate for the Taxing Master to have regard to evidence as to comparators when undertaking the taxation of costs (see *Doyle v. Deasy* (Unreported, High Court, Ó Caoimh J., March 21st, 2003)).
Instruction fees for solicitors should take into account three criteria that is,
(a) the expertise demonstrated by the solicitor concerned;
(b) the amount of work actually done by that solicitor and;
(c) the degree of responsibility undertaken by the solicitor.
The appropriate fee for Counsel is *"what the hypothetical counsel competent to do the case and not being in a position to expect a special or fashionable fee would be prepared to accept as his brief fee"* (see *Best v. Wellcome Foundation Limited (No. 3)* [1996] 3 I.R. 378, at p. 392).

THE PLAINTIFF'S CLAIM

In these proceedings the plaintiff claims that the Taxing Master misdirected himself and erred in principle in drawing costs on a basis which was too wide and which embraced aspects of the proceedings beyond what he described as *" ... a simple strike out motion where costs should be minimal"*.
He contends that the Taxing Master declared himself to be under an obligation to *"tax what is before me ..."*. The plaintiff has construed that apparent remark by the Taxing Master as meaning that the Master considered himself to be under an obligation to measure all of the costs incurred by the defendants and to allow those costs against the plaintiff.

DECISION

When summarised, the plaintiff's claim can be reduced to a single contention.
He claims that the Master ought to have treated the proceedings which were the subject of the orders of the High Court and Supreme Court as a *"little motion"*.
He argued that the Master erred in principle by considering and taking into account what were described in the Master's ruling as *"the facts"* and *"background to present proceedings"*.
I cannot accept the plaintiff's contention.
I think it is important to note that in the proceedings the plaintiff alleged irregularity in earlier proceedings. He sought *"an order directing the re-hearing of the ... judicial review application ..."*.
The defendants applied to the High Court (and subsequently the Supreme Court) for an order striking out the plaintiff's claim as comprising an abuse of process.
The application was of considerable gravity. It could not have been heard and determined without consideration by the High Court (and subsequently the Supreme Court on appeal) of all of the issues which had come before the High Court, (McKechnie J.), in the earlier proceeding. It could not have been heard without consideration of all of the further issues which arose in the plenary proceedings. It was necessary for the defendants to adduce substantial and comprehensive evidence by way of affidavit from Messrs Tom Merriman and George Boyle in support of the application. The plaintiff delivered an affidavit running to some 29 pages.
The Supreme Court apparently decided the issue upon the ground that fraud had not been pleaded by the plaintiff (or alternatively had not been pleaded with sufficient particularity). That fact did not restrict the defendants to the recovery of costs confined to the determination of that specific issue.
The defendants were awarded *" the costs of the action to include the costs of the Motion.."* in the High Court and *" the costs of the appeal when taxed and ascertained..."* in the Supreme Court. They were and are therefore entitled to recover from the plaintiff all costs which they had reasonably incurred for the purpose of meeting the allegations and arguments advanced by the plaintiff against them.
The analysis of the costs incurred was conducted by the Taxing Master in a manner which was fully compliant with the provisions of s. 27 of the Courts and Courts Officers Act, 1995.
He had regard to the appropriate criteria to be taken into account when assessing the instruction fees for the solicitors on behalf of the defendants.
He applied the appropriate criteria when assessing the brief fees to be allowed in respect of Counsel on behalf of the defendants.
He considered a number of comparators in respect of the instruction fees, brief fees and other costs incurred both in the

High Court and in the Supreme Court properly and in accordance with appropriate practice and principle.
The plaintiff claims the proceedings comprised no more than a *"little motion"*.
I do not accept that contention. The relief sought and granted governed and determined the entire proceedings. The High Court (and the Supreme Court on appeal) decided the motion and the proceedings on that basis.
I can find no error of principle or reasoning in the Taxing Master's determination.
The costs allowed have been calculated carefully and have been justified in a reasoned fashion.
It follows from the foregoing that the decision of the Taxing Master is affirmed and the relief sought by the plaintiff is declined.