

**THE HIGH COURT**

**[2019/717 JR]**

**BETWEEN**

**JOHN O'CONNELL**

**APPLICANT**

**AND**

**THE TAXING MASTER (PAUL BEHAN)**

**AND**

**THE COURTS SERVICE**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY; THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 9th day of September, 2020.**

1. The Applicant, Mr. O'Connell, seeks leave to apply for judicial review in the following terms:-

- "a) A Order of Certiorari setting aside the Ruling of July 12th 2019 of the Taxing Master.
- b) A Order of prohibition restraining the Taxing Master from further partaking in the Taxing of Costs of the Order between the Parties in this matter.
- c) A Order/Declaration that Order 99 rules 38 (1) (2) (3) are Ultra Vires and void requiring the Applicant to proceed way of Appeal/ Objections to the Ruling of the same Taxing Master prior to making a application to the High Court.
- d) A Order/Declaration that the above provisions are contrary to the Applicants Rights pursuant to the Constitution/ Rights to Fair Procedures the breach of the requirement of National/ Constitutional Justice. Breach of the Right to a Fair and Public Hearing by a Independent and impartial Decision Maker, pursuant to Article 6 of the Convention ECHR and/or a Unfair/ Unjust Restrictions on the Right of a Effective Remedy contained in Article 13 of the Convention.
- e) Damages/ Costs/ Out of Pocket Expenses for Breach of Duty. For Breach of Constitutional Rights, European Charter of Rights/ Conventions Section 3 (2) of the Act of 2003/ Statutory Breach of Duty."

2. These reliefs are sought on the following grounds:-

- "a) That the Order 99 rules 38 (1) (2) (3) are Ultra Vires/ Void. In requiring the Applicant to follow this process by way of Appeal/ Objections to his Rulings of July 12th 2019 to the same Taxing Master prior to making a Appeal to the High Court.
- b) The Rule 38 (1)(2)(3) of Order 99 are contrary to the Applicants Rights under the Constitution. (1) Right to Fair Procedures, Article 40.3. In relation that the Applicant must apply to the same Master by way of Appeal/Objections of the Ruling 12th July 2019. The Applicant believes that this is a Breach of the requirement of

Natural / Constitutional Justice. The process of Order 99 Rule 38 (1)(2)(3) for the Application to follow prior to an application to the High Court in this matter are a unfair/ unjust impediment to the Applicants access to the High Court contrary to Article 40.3/ Article 34 of the Constitution. Breach of Rights to a Fair Hearing by a impartial Court pursuant to Article 6 of the Convention/ and a unreasonable restriction on the Right of a Effective Remedy conflicting to Article 13 of the Convention.

- c) The Applicant was not afforded Reasons or allowed a Copy to view or examine the Evidence/ Master's Notes/ DARR, notwithstanding a requirement to accurately set out his Ruling. The Taxing Master wrongfully failed to give a sufficient explanation/reasons contrary to Article 40.3 of the Constitution and / Article 6 of the European Conventions.
  - d) The Taxing Master failed/refused to use previous Taxing Masters procedures when referring to disputes making the DAR immediately available to clarify matters.
  - e) The Taxing Master failed to put on Notice at any time to the Applicant during the Taxing Hearings that his family including himself carried out services of Taxing Accounting for the Defendants over decades. He also failed to inform the Applicant that the 2 Tax Cost Accountants for the Defendants at the Hearing were fellow directors of the Firm Behan's Cost Accountants, to a objective observer such observer would believe that the adjournment/ delays/ decisions in Taxing the Bill of Costs was to facilitate the family's Tax Cost Accountancy long running Client to put a stay on the Taxing Process, the non-rescue of the Taxing Master decision are grounds for objective/ or perceived bias or unfairness for the above reasons, failing to disclose the 2 close relationships to the Applicant( Conflict of Interest) the Taxing Master has acted improper toward the Applicant."
3. In overview, the proposed judicial review seeks to challenge the validity of a Decision of Taxing Master Behan made on the 12th of July 2019 by which the Taxing Master refused to recuse himself from further involvement in the taxation of costs awarded to Mr. O'Connell in earlier proceedings taken by Mr. O'Connell against BATU. Strangely, the Decision to be challenged was not put before the Court by Mr. O'Connell and was only made available to me as a result of a direction made by me at the conclusion of the hearing. I will return to this unusual feature of the application for leave later in this judgment.
  4. The procedural history of the application for leave is important. When the matter was first before the Court on the 10th of October 2019, it was ordered that the application be on notice to the intended Respondents. The application was adjourned to the 24th October 2019 so that the Respondents could appear on that date. On the adjourned date, submissions were made by the intended Respondents to the effect that the proceedings were fundamentally flawed, in that the counterparty to the taxation process (BATU) was not joined as a party to the intended judicial review. Mr. O'Connell was given the opportunity to mend his hand. He did not do so. Mr. O'Connell told me that he did not

follow this submission, not least because he could not hear what was being said in court on the adjourned date. However, this does not explain why he did not seek to join BATU to these intended proceedings either in response to correspondence from the Chief State Solicitors Office, or in response to the very clear submissions made to me at the hearing for leave. Had Mr. O'Connell sought even then to adjourn the application for leave in order to reconstitute the intended proceedings, I would have given this very serious consideration (taking into account what might have been said on behalf of the proposed Respondents); no such application to reconstitute the intended proceedings was ever made by Mr. O'Connell.

5. The application for leave came before me on the 10th February last. On that day, I was informed by Mr. O'Connell that he had notified BATU of the application and that he had been told in response that BATU was "not taking part in this judicial review". In fact, the correspondence from Arthur P. McLean (solicitors for BATU) of the 5th February 2020 reads as follows:-

"Mr. O'Connell, thank you for your letter of the 3rd of February received this morning. I note that you will be moving your application seeking leave for judicial review proceedings this Monday the 10th of February. Given that our client BATU is not a party to the proceedings, it has no part to play but we may well attend for the purpose of a watching brief. Regards Colm Hickey."

This communication does not suggest that BATU had made a decision not to take part in the proposed judicial review. It merely records the obvious fact that BATU had not been joined as a party to those proceedings.

6. In addition, a solicitor from Arthur's P McLean made himself known to me at the hearing, which he attended but only on foot of a watching brief.
7. The three complaints made by Mr. O'Connell, and grounding his application for leave, are:-
  - i) Order 99, Rules 38 (1), (2) and (3) violate certain provisions of Bunreacht na hEireann.
  - ii) The Taxing Master failed to give reasons, and did not make his notes, the DAR or other information/evidence available to Mr. O'Connell.
  - iii) The Taxing Master should have recused himself from this taxation process, and should have informed Mr. O'Connell of alleged conflicts of interest on the Master's part.
8. Mr. Binchy, Counsel for the intended Respondents, made two submissions in respect of the application for leave.
9. Firstly, he submitted that the review process provided for by Order 99, Rule 38 had already been challenged on grounds which were in effect identical; this challenge had

failed. In that regard, Mr. Binchy relied on the judgment of Laffoy J. (with whom Murray, Hardiman, O'Donnell and Dunne JJ agreed) in *D.M.P.T. v. Moran* [2015] 3 I.R. 224.

10. I accept that submission. On that authority, I do not believe that Mr. O'Connell has an arguable case in law that he is entitled to an order in the terms of Reliefs (c) or (d) which he seeks in this proposed judicial review. Having now seen the Decision of the 12th of July 2019, I would also observe that this Decision did not result from the review process provided for by Order 99, Rule 38. Any infirmity in that review process did not result in the impugned Decision. In addition, while Mr. O'Connell now seeks an order that the review provisions are *ultra vires* and void, it is clear from the documents which Mr. O'Connell chose not to put before the Court that it was Mr. O'Connell himself who sought to invoke the review procedure which he now challenges. While these issues were not argued before me, and therefore do not form part of the basis of my decision, I do think it appropriate to note them in this judgment. While Mr. O'Connell did argue that the judgment in *Moran* did not relate to allegations of bias, the provisions are the same; the use of these provisions in respect of a recusal application may or may not be appropriate, but it was Mr. O'Connell's request that the process proceed by way of 'Objections/Appeal' to be considered by Taxing Master Behan.
11. Secondly, Mr. Binchy argues that the proposed judicial review is improperly constituted in that BATU, a party with a very real interest in the outcome, has not been joined in any capacity. This objection applies to all of the reliefs sought by Mr. O'Connell in the intended action.
12. It is difficult to see any good reason why Mr. O'Connell has not joined BATU as a party to this intended judicial review.
13. It must be remembered that the Orders sought by Mr. O'Connell in these intended proceedings all relate to the taxation of costs as between himself and BATU. While Mr. O'Connell submits that the dispute as to recusal is really one between him and the Taxing Master, BATU is at least as much an interested party in the outcome of these proceedings as would be the Taxing Master and the Courts Service. Indeed, the Chief State Solicitor (acting on behalf of the Taxing Master and the Courts Service) made it plain in correspondence of the 17th of December 2019 that these proposed respondents would not take part in the intended proceedings in any substantive way. The letter stated as follows:-

"For the avoidance of doubt and for reasons set out in case law below it is not proposed for the Taxing Master or the Court Service to intervene in the substantive matter the subject of proceedings served. In the absence of allegations of *male fides* and or impropriety on behalf of the Taxing Master or Court Service, the *legitimus contradictor* should be the parties in the underlying taxation matter i.e. some or all of the defendants in the originating proceedings 2002/13328P."
14. While Mr. O'Connell's attack on the validity of Order 99 Rules 38 (1), (2) and (30 would be resisted by the third to fifth respondents in the usual way, the position clearly taken by

the first and second respondents was that the other issues would properly be argued between Mr. O'Connell and BATU.

15. The assertion that BATU, as the counter party to Mr. O'Connell in the taxation process, was the *legitimus contradictor* in the proposed judicial review is strongly supported by the Decision of the 12th of July 2019, and the 'Objections/Appeal' document lodged in response to that Decision by Mr. O'Connell. As I have noted on a few occasions, these relevant documents were not exhibited by M. O'Connell at any stage in the application for leave, including when this application was originally before the Court on an *ex parte* basis. The Decision shows that, far from being a matter essentially between Mr. O'Connell and Taxing Master Behan, the issue as to recusal was heavily contested by BATU. The Decision of the Taxing Master followed a hearing on the 2nd of May 2019. According to the Decision, all parties were notified of the hearing on that date and that the purpose of the hearing was to consider the question of bias on the part of the Taxing Master; again according to the Decision, Mr. O'Connell had made written submissions on this issue (which he had raised) but he decided not to attend the hearing and so notified the Taxing Master and BATU's solicitors in April 2019. BATU was represented at the hearing by Counsel, a solicitor and a costs accountant; this team made comprehensive submissions (recorded at paragraphs 23 to 36 inclusive of the Decision), including references to three Irish authorities on the question of bias. Subsequent to the Decision, the role of BATU in this dispute about recusal was properly recognised by Mr. O'Connell when he served his Notice of Objections/Appeal on BATU's solicitors. It is not accurate, to put it mildly, for Mr. O'Connell to have suggested to me that the question as to recusal was really between him and Taxing Master Behan, and therefore by implication not one involving BATU. Both as a matter of principle and a matter of fact, the potential recusal of the Taxing Master was of real interest to BATU.
16. As Mr. O'Connell has consciously chosen not to join necessary parties to this intended judicial review, I must determine whether (for that reason alone) leave should not be granted.
17. In *G v. D.P.P.* [1994] I.R. 374 the Supreme Court (Finlay C.J.) set out five matters that an applicant must establish (in a *prima facie* manner) in evidence before leave to seek judicial review should be granted.
18. Two of these are particularly relevant.
19. Firstly, Mr. O'Connell had to establish that the facts averred in the affidavit 'would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.'
20. Secondly, Mr. O'Connell must establish that 'on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. Even if the facts alleged by Mr. O'Connell are proven, I do not believe that Mr. O'Connell has an arguable case that he is entitled to the reliefs he claims in the absence of BATU being a notice party to these proceedings. I have been referred to no authority that suggests that final orders could be

made in favour of Mr. O'Connell without the proposed judicial review being one brought with BATU on full and formal notice of this action. It may be, of course, that BATU would itself apply to be joined as a notice party and would succeed in that application; however, the fact that there is a procedural device which could remedy the inadequacies in the judicial review brought by Mr. O'Connell does not mean that I should overlook the deliberate decision not to join a necessary party. The possibility that the fundamental deficiency in the proposed judicial review may, in the fullness of time, be rectified on the application of another party does not mean that I should grant leave to bring review proceedings which are quite flawed. I am especially influenced by the fact that this flaw in the proposed proceedings was notified to Mr. O'Connell both in correspondence and at the hearing before me. Mr. O'Connell has told me that he did not understand what was said in Court on the original adjourned date, and I therefore place no importance on that episode, but he has not suggested that he did not understand the import of the letter of the 17th of December 2019 or the gist of the submissions to me on the issue of the failure to join BATU.

21. I also take into account the concluding general comments of Finlay C.J. on the question of the grant of leave (at page 378 of the Report):-

“These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an *ex parte* application.”

22. If I am wrong in finding that these proposed proceedings fall foul of the express principles set out above, I would exercise my discretion to refuse leave as Mr. O'Connell has failed to join a necessary party to this intended action; he was expressly warned of this objection to the grant of leave, and was given every opportunity to name BATU as a notice party. No good reason is given for his decision not to do so. In those circumstances, I would not grant leave to seek judicial review where those proceedings are incompletely constituted.
23. In exercising my discretion against Mr. O'Connell, I would also take into account the fact that he did not put before the Court the Decision and the documents subsequent to the Decision; these were clearly relevant and important documents for the purpose of deciding whether leave should be granted. Not only were they not included in the evidence of Mr. O'Connell, but (as I have already indicated at paragraph 15 of this judgment) Mr. O'Connell made a submission which was not consistent with the documentation which he decided not to include in his application for leave. In addition, Mr. O'Connell's description of the attitude of BATU to these proceedings was not accurate; this inaccuracy was only discovered when the letter of the 5th of February 2020 was actually provided to the court.
24. I therefore refuse the application for leave to seek judicial review.