THE HIGH COURT

[2012 No. 2012/9535P]

BETWEEN

JOSE MONTERIRO DA SILVA, NUNO PERDRO GONCALVES LOPES, DAVID SARAIVA MATIAS, ANTONIO BARBOSA MOREIRA, JOSE FRANCISCO OLIVEIRA DA SILVA, JORGE DA SILVA LUIS, JOSE TEXEIRA GONCALVES, ANTONIO JORGE OLIVEIRA BESSA, FRANCISCO DA COSTA FERRIERA, JOSE LUIS FREITAS LIMA

PLAINTIFFS

AND

ROSAS CONSTRUTORES S.A., CONSTRUCOES GABRIEL A.C. COUTO S.A. & EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. trading under the style and title of RAC CONTRACTORS and/or RAC EIRE PARTNERSHIP

DEFENDANTS

Judgment of Mr Justice David Keane delivered on the 1st June 2017

Introduction

1. The plaintiffs move for an order pursuant to Order 99, rule 5 (1) of the Rules of the Superior Courts, as amended ('the RSC'), directing payment to them by the defendants 'of a reasonable sum on account of costs…within such period as specified by the court.'

2. The application is unusual, if not unprecedented.

3. I gave judgment in the action and two related ones on 18 March 2016; [2016] IEHC 152. The three cases then adjourned to 8 April 2016 to enable the parties to consider the judgment. On the adjourned date, I heard argument on the form of order appropriate to reflect the terms of the judgment and, significantly, on the issue of costs. In addressing the costs issue, the plaintiffs prayed in aid the usual rule under O. 99, r. 1 (4) of the RSC that costs should follow the event. I reserved my ruling, delivering it one week later on 15 April 2016; [2016] IEHC 195.

4. Following upon that ruling, I made a final order in each of the three cases on the same date. In each, I ordered that the defendants were to pay the plaintiffs' reasonable legal costs of the action when taxed and ascertained in default of agreement, to include any reserved costs and the costs of discovery, with no stay on that part of the order in the event of an appeal. Thus, for the purposes of O. 99, r. 5 of the RSC, I dealt with the issue of costs at that stage of the proceedings.

5. Neither the plaintiffs nor the defendants sought 'liberty to apply' and no such liberty was granted in the final order.

6. I am given to understand that the defendants have appealed aspects of the judgment in each case to the Court of Appeal and that a date has been fixed for the hearing of those appeals.

The present application

7. On 24 April 2017, the plaintiffs issued the present motion. It is grounded on an affidavit sworn by the plaintiffs' solicitor on the same date.

8. From the affidavits exchanged between the parties, the following facts are not in dispute. On or about 17 June 2016, the plaintiffs served a bill of costs on the defendants in each action. The taxation was first listed before the Taxing Master on 15 July 2016. On 26 and 27 September 2016, the Taxing Master heard submissions on Counsel's fees, and directed that the plaintiffs' solicitors furnish additional time sheets to the defendants in respect of their professional fees. On 29 March 2017, the Taxing Master issued an interim ruling on the fees due to the plaintiffs' accountants and interpreters and the matter was adjourned to 15 May 2017, the first of four consecutive days set aside for dealing with the taxation of the plaintiffs' solicitors professional fees.

9. That was the position when the present motion issued on 24 April 2017.

10. Precisely what occurred when the matter came back before the Taxing Master on 15 May 2017 is unclear. The defendants' solicitor swore an affidavit on 18 May 2017 in which he avers that he has been advised by the defendants' legal cost accountant that, after the taxation had been at hearing for half a day, the plaintiffs' solicitor and legal cost accountant successfully applied for an adjournment to await the outcome of a pending appeal to the Supreme Court against the decision of the Court of Appeal in the case of *Sheehan v Corr* [2016] IECA 168. The plaintiffs' legal cost accountant swore an affidavit on 19 May 2017, in which he avers that the Taxing Master was not satisfied to conclude the taxation, pending the determination of that appeal, implying that the Taxing Master adjourned the taxation *ex proprio motu*.

The Law

11. Order 99, rule 5 of the RSC provides, in material part:

> '[C]osts 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.'

12. *Practice Direction HC71 – Payment on account of costs pending taxation* states as follows:

> 'In view of the long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B (5).
>
> I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case in which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.
>
> This practice direction shall come into effect on Monday, 24th April 2017.'

Discussion
13. The present application relies upon the rule and the practice direction just quoted. To that end, the plaintiffs' solicitor has provided an undertaking in the terms stipulated in the practice direction.

14. The defendants submit that the Court is *functus officio* and has no jurisdiction to amend or alter the final order that it made on 15 April 2016. In advancing that argument they rely on the principles identified in three Supreme Court cases: *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29; *The Attorney General v Open Door Counselling Ltd (No. 2)* [1994] 2 IR 333; and *G.McG. v D.W. (No. 2)* [2000] 4 IR 1.

15. While each of those three cases provides authority for the same broad principle, the one most apposite is *Belville.* It was an appeal to the Supreme Court from a decision of the High Court on an appeal by way of case stated from a decision of the Revenue Appeal Commissioner. The Appeal Commissioner ('the Commissioner') had stated a case for the High Court on his decision in an appeal by a taxpayer company, Belville Holdings Ltd ('Belville'), against two assessments to corporation tax raised against it by the Revenue Commissioners ('the Revenue'). The question raised was whether the Commissioner had been correct in law to hold that certain notional fees due to Belville must be accounted for against certain losses in respect of which it was claiming tax relief. The High Court answered that question in the negative on the basis that, while it was correct to take those notional fees into account, the actual notional fees fixed by the Commissioner were not justified.

16. Beyond an answer to the question raised, neither the Revenue nor Belville sought any further order from the High Court at the conclusion of those proceedings. More than a year later, Belville wrote to the Revenue Solicitor demanding a tax refund in accordance with the answer that the Court had provided *i.e*. that the notional fees fixed by the Commissioner were incorrect and, hence, had been wrongly set off against the losses in respect of which Belville was entitled to tax relief. The Revenue Solicitor replied that it was the Revenue's intention to move an application to the Court for an order pursuant to s. 428 (6) of the Income Tax Act 1967, remitting the underlying tax appeals to the Commissioner for a further determination. However, that step was never taken and, subsequently, Belville brought a motion for judgment in summary proceedings against the Revenue. The High Court then made an order in those summary proceedings, amending its order in the original case stated proceedings by remitting the matter to the Commissioner for a further determination of Belville's original appeal against the tax assessments. Belville appealed that order to the Supreme Court. The Supreme Court allowed the appeal.

17. Having noted the terms of O. 28, r. 11 of the Superior Court Rules ('the slip rule'), Finlay CJ (Blayney and Denham JJ concurring) adopted (at 36-7) the following statement of principle in the 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 the power to rectify it under O. 28, r. 11;
> >
> > (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.'

18. Finlay CJ went on to observe (at 37):

> 'I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached.'

19. The plaintiffs argue that they are not asking the Court to revisit or vary the contents of the final order that it made in these proceedings on 15 April 2016. But, as the decision in *Belville* makes clear, that is precisely what they are asking the Court to do. The present application cannot properly be described as a standalone one any more than the application in *Belville* could. The argument that the plaintiffs make here – that directing the payment of a reasonable sum on account of costs would be in some sense independent of the order on costs already made in the final order in the proceedings – was implicitly rejected in *Belville,* where the Supreme Court did not accept that directing the remittal of Belville's original appeal to the Appeal Commissioner for a further determination could be viewed as in any sense standing apart from the final order that the Court had already made in those proceedings.

20. 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.

21. The plaintiffs argue that an application for an Order under O. 99, r. 5 of the Rules could be made to any judge of the High Court after the conclusion of the proceedings, and that it is merely 'preferable' to bring such an application before the judge 'most familiar with the facts of the particular case and best able to assess the level of interim payment appropriate', *i.e*. the judge who determined the case. They do not cite any authority for that argument. The suggestion that a litigant might apply under O. 99 to a judge other than the one who has dealt with the proceeding concerned in relation to any aspect of the costs of and incidental to that proceeding, in any circumstance other than one of absolute necessity, runs counter to the most basic conception of the requirements of that rule and, indeed, of the proper administration of justice. I gather that the plaintiffs were directed to bring the present application before me by the Central Office on behalf of the Chief Registrar. I am satisfied that that was the only proper course to adopt and it is deeply unsettling, to put it no further, that anyone might ever have thought otherwise.

22. Next, the plaintiffs invoke the following passage from *Halsbury's Laws of England* (5th edn, 2015) vol 12A, para 1602:

> 'The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the

> court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of a working out of the judgment, or to vary the terms of the order except possibly on proof of a change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it.' (footnotes omitted)

23. By reference to these principles, the plaintiffs submit that liberty to apply is inherent in the Order made by the Court on 15 April 2016 and that the Court has jurisdiction to make an Order under O. 99, r. 5 on that basis. The plaintiffs' submission overlooks the fact that the Order of 15 April 2016 was a final order. Thus, it was one that required an express reservation of 'liberty to apply' to the parties, or any of them, in order to permit any subsequent application to be made to this Court in those proceedings. No such liberty was sought by the plaintiffs (or the defendants), nor was any such liberty granted, as the terms of the Order confirm.

24. Finally, the plaintiffs rely on two aspects of the recent decision of Cross J in *In re Depuy International Limited,* (unreported, High Court, 22 February, 2017). The first is the acknowledgment that there is (or, certainly in February of this year, was) a significant problem with the taxation of costs system. That problem was attributed to two factors. First, there was then only one Taxing Master, rather than the usual complement of two. Second, it was suggested that the decision of the Court of Appeal in *Sheehan v Corr*, already cited, had resulted in each individual taxation of costs taking longer than was previously the case. Hence, Cross J recorded his impression that the taxation system had 'stalled'. I understand that the Supreme Court heard the appeal in *Sheehan v Corr* in February of this year and that a second Taxing Master was appointed in April. Accordingly, I am not in a position to express any view concerning whether, as the plaintiffs contend, the taxation of costs system remains stalled.

25. The second aspect of the decision in *Depuy* upon which the plaintiffs rely is the conclusion (at para. 24) that the express wording of O. 99, r. 5 of the Rules is sufficient to permit an order to be made 'after the determination of a case', directing a party to pay a portion of another party's costs prior to taxation subject to any appropriate guarantee of fairness, and the further conclusion (at para. 28) that there is a direct power under O. 99, r. 5 to make an order 'at any stage' in the proceedings, on a case by case basis, directing such a payment.

26. I am in respectful agreement with both of those conclusions. However, neither is germane to the issue I must decide, which is whether an order can be made under O. 99, r. 5 of the Superior Court Rules in proceedings after a final order has been made, absent liberty to apply.

27. Order 99, rule 5 provides that costs may be dealt with by the Court 'at any stage of the proceedings or after the conclusion of the proceedings', which Cross J interpreted as permitting such an order to be made 'after the determination of a case.' It is worth remembering that the proceedings at hand concluded, meaning that the case was determined, when I gave judgment on 18 March 2016. The question of costs was addressed in a subsequent ruling delivered on 15 April 2016, after the conclusion of the proceedings (or, differently put, after the determination of the case). The Order made on 15 April 2016 was a final order. No party sought 'liberty to apply' and no such liberty was granted. Accordingly, the Court is *functus officio.*

Conclusion
28. The application is dismissed.