

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 961 JR]

BETWEEN

D. M. P. T.

APPLICANT

**AND
TAXING MASTER CHARLES A. MORAN
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

**AND
C. T. AND THE HUMAN RIGHTS COMMISSION**

NOTICE PARTY

Judgment of Mr. Justice McGovern delivered on the 31st day of July, 2006

1. This is an application for judicial review pursuant to an order of the High Court made on the 3rd November, 2004, giving leave to apply for the reliefs set forth therein and on the grounds specified in the said order.
2. Matrimonial proceedings took place between the Applicant and the first named Notice Party following which orders for costs were made against the Applicant in favour of the first named Notice Party on the 6th December, 2001, by the High Court and on the 15th October, 2002, by the Supreme Court. These orders required the Applicant to pay costs to the first named Notice Party such costs to be taxed in default of agreement. The costs were taxed before the first named Respondent following a hearing conducted on various dates between the 14th October, 2003, and the 8th July, 2004. On the 8th July, 2004, the Taxing Master made a decision by way of oral pronouncement and declined to give reason. The Applicant wishes to contest the ruling of the Taxing Master by way of appeal to the High Court but claims he is constrained by the provision of O. 99 r. 38 of the Rules of the Superior Courts which require him to first make application to the Taxing Master by way of bringing in objections. He says that the review of taxation provided for under O. 99 r. 38 of the Rules of the Superior Courts is in effect an appeal and he objects to the Taxing Master being involved in what he claims is an appeal against the order of the Taxing Master.
3. Part V of O. 99 of the Rules of the Superior Courts deals with the review of taxation. Order 99 r. 38 (1) to (3) provide as follows:

"38.(1) Any party who is dissatisfied with the allowance or disallowance by the Taxing Master of the whole or part of any items (including any special allowance) may, before the certificate is signed, but not later than fourteen days after the completion of the adjudication by the allowance or disallowance of the entire of the items in the bill of costs deliver to the other party interested therein, and carry in before the Taxing Master his objections in writing to such allowance or disallowance, specifying therein by a list in a short and concise form the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the Taxing Master to review the taxation in respect of the same. The Taxing Master may, if he shall think fit, and upon the application of the party entitled to the costs issue pending the consideration of such objections an interim certificate of taxation for or on account on [sic] the remainder of the items in the bill to which no objection has been taken and also for that part of the bill of costs in dispute which the Taxing Master may in his discretion consider reasonable. Such further certificate as may be necessary shall be issued by the Taxing Master after his decision upon such objections.

(2) Upon such application the Taxing Master shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if so required by any party, he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. The Taxing Master may, if he thinks fit, tax the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation.

(3) Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may within twenty-one days from the date of the determination of the hearing of the objections or such other time as the Court or the Taxing Master may allow, apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just. The Taxing Master may if he thinks fit on the application of the party entitled to the costs pending the determination of the review by the Court issue a certificate of taxation or a second interim certificate of taxation concerning any items no longer in dispute other than those specified in the notice of motion to review. All interim certificates of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid and save as provided by this rule, the Taxing Master shall not be at liberty, after a certificate is signed, to review his taxation or amend his certificate, except to correct a clerical or manifest error before process for recovery or payment of the costs."
4. The issues which arise at this judicial review are:
 - (i) In making O. 99 r. 38(1) to (3) did the Superior Courts Rules Committee act ultra vires?
 - (ii) Did the Taxing Master err in law in failing to give reasons for his decision of 8th July, 2004, on requests being made therefore?
5. The Applicant claims that rule making bodies such as the Superior Courts Rules Committee do not enjoy any inherent power to make rules. They are confined within the parameters conferred by legislation. The legislation authorising the making of the Rules of the Superior Courts is s. 36 of the Courts of Justice Act, 1924, s. 68 of the Courts of Justice Act, 1936 and ss. 14 and 48 of the Courts (Supplemental Provisions) Act 1961. It is claimed that the power given to the Rules Committee is a limited one and does not extend beyond regulation matters that are properly ones of practice and procedure. See *the State (Lynch) v. Ballagh* [1986] I.R. 203 and *the State (O'Flaherty) v. O'Flóinn* [1954] I.R. 295, *Thompson v. Curry* [1970] I.R. 61 and *Rainey v. District Justice Delapp* [1988] I.R. 470.
6. The Applicant claims that there is no statutory power vested in the Rules Committee to create a right of appeal to the Taxing

Master against his own decision and that such a right could only be conferred by express legislative enactment having regard to the provisions of Article 15.2.1 of the Constitution.

7. The Appellant argues that once the Taxing Master makes his decision on costs he is *functus officio*. It is also contended that a requirement to appeal to a decision maker himself against his own decision is not in accordance with fair procedures and that in permitting this the rules do not comply with either the substance or the appearance of fair procedures. The Applicant also maintains that the requirement to appeal to the Taxing Master against his own decision is a disproportionate interference with his constitutional right to seek access to the High Court to review the underlying decision.

8. The second basis of the Applicant's challenge to the Taxing Master is his failure to give reasons for his decision on the 8th July, 2004, having been requested to do so. While the Applicant accepts that there is some authority for the proposition that the Taxing Master is not required to give reasons it is contended that this must yield to the overriding constitutional consideration that reasons are a feature of natural and constitutional justice and a component of the right to a fair trial of civil proceedings.

9. Finally it is argued by the Applicant that even if the rules were *intra vires* they violate the principles of fair procedures in that the existence of an internal right of appeal would violate the rule against pre-judgment.

10. The Respondents defend the position of the Rules Committee and urges that the making of O. 99 r. 38 (1) to 38 (3) were not *ultra vires*.

11. They argue that O. 99 rules 38(1) to (3) do not create a right of appeal to the Taxing Master against his own decision. Rather they form part of the overall process of taxation provided for in O. 99 and that this process is only completed and finalised when a certificate of taxation has been granted and not before then.

12. When one reads O. 99 r. 38(1) it is clear that pending the consideration of objections he can issue an interim certificate of taxation. The rule concludes with the sentence "*...such further certificate as may be necessary shall be issued by the Taxing Master after his decision upon such objections.*" These words are indicative of an ongoing process that has not been completed. Order 99 r. 38(2) provides that upon an application making objections under r. 38(1) the Taxing Master shall

13. shall reconsider and review his taxation "*... and he may receive further evidence in respect thereof...*". This can be compared to the normal appeal procedure where further evidence is generally not admissible. For example on an appeal to the High Court from the Circuit Court an affidavit is required setting out the nature of the evidence and the reason why it was not submitted to the Circuit Court. The High Court has a discretion as to whether to admit such fresh evidence. But it would not be the norm to have fresh evidence heard in an appeal situation so it seems to me that the giving of the Taxing Master power to receive further evidence on the review of taxation is again indicative of a process which is not complete and is to be distinguished from an appeal.

14. The Respondents contend that the process of taxation is only completed upon the issue and signing of a certificate of taxation. Order 99 rule 38(1) provides that the review procedure must be initiated before the certificate is signed, that is before the taxation process had been completed. In the case of *McEniry v. Taxing Master Flynn* (Unreported judgment High Court 6th May, 1998) McCracken J. noted that the time period for seeking an order for certiorari ran from the date of the certificate of taxation. If the review of taxation provided for in O. 99 r. 38(1) to (3) is an integral part of the taxation process before the Taxing Master then the process is not an appeal. I am persuaded, for the reasons above, that the process is not an appeal but part of the ongoing review to be carried out by the Taxing Master. It is worth noting that the provisions of O. 99 r. 38 are similar to those contained in the 1986 rules and the 1905 rules.

15. Reference to O. 99 r. 33(3) is also helpful. This rule states:

"(3) On the completion by the Taxing Master of the adjudication on the bill of costs the solicitor shall take up the certificate of taxation within a period of 21 days or such further period as the Court or the Taxing Master may allow. In the event of either party seeking a review of any item in the bill of costs by the Taxing Master, or seeking a review by the Court, the relevant period shall operate from the date of the completion of the hearing of such review."

16. It is hard to see how this rule would have been worded in that fashion if the completion of the process took place prior to the review. The Respondents refer to the case of *Castleisland Cattle Breeding Society Ltd. v. The Minister for Social and Family Affairs* (Unreported judgment of Supreme Court 15th July, 2004). In that case a procedure was created under s. 263 of the Social Welfare (Consolidation) Act, 1993 allowing the Chief Appeals Officer to revise any decision of an Appeals Officer if it appeared that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts. Geoghegan J. held that s. 263:

"...does not appear by its terms to be conferring a double appeal. What seems to be envisaged is that the chief appeals officer may go through the materials which were before the appeals officer and check whether there was any error in law or on the fact's...essentially it is a revising rather than an appellate procedure."

17. While I think this case is somewhat different on the facts it does offer an example of a revision procedure although it seems to be confined checking whether there was any error in law or on the facts.

18. The Taxing Master is a "*Principal Officer of the High Court*". He is not a judge. The procedures for review of taxation do not in my opinion constitute an appeal and I therefore hold that the Superior Courts Rules Committee is not precluded from conferring the procedure of review of taxation upon him.

19. While the Applicant contends that there was a breach of fair procedures in the review of taxation provided for in the rules, this is dependent on whether or not the review is an appeal. I was referred to the decision of *Corrigan v. Irish Land Commission* [1977] I.R. 317 by Counsel for the Applicant. I accept the Respondent's contention that the procedure at issue in the Corrigan case is not analogous to that at issue in these proceedings. In that case Henchy J. stated at page 327/328:

"A person in a judicial or quasi-judicial capacity in a matter which is otherwise within his jurisdiction may be disqualified from hearing that matter by reason of actual or presumed bias on his part. However, before such disqualification can take place, there must be a "real likelihood" of bias..."

20. There is no evidence in this case that the issue of bias arises. While the Applicant referred to the judgment of Kenny J. in the *Corrigan* case it was a dissenting judgment and in any event his conclusion that "*the Commissioners who signed the certificate may*

have knowledge of matters which may not be mentioned during the hearing of the objection" is not relevant to the facts of this case.

21. The Applicant also claims that his right of access to the High Court has been interfered with by the necessity to go through a review procedure before the Taxing Master. In my opinion the rules relating to review of taxation do not exclude the Applicant from access to the courts. It was clear that the Applicant has access to the courts by way of judicial review proceedings and also by way of a separate review by the High Court. It is the review in the High Court which is an appeal.

22. The Taxing Master did not give a reason for his decision. He is not required to do so on his initial assessment of the costs issue but it is clear that if a party brings in objections and is so required by any party "*...he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.*" Therefore, if objection is taken by a party to his taxation that party can require reasons from the Taxing Master for his decision. That provision seems to me to accord with fair procedures. In *McEniry v. Taxing Master Flynn*, (Unreported judgment High Court 6th May, 1998) McCracken J. considered whether the rules of natural justice or fair procedures required that the Taxing Master should give reasons for an initial decision prior to any review. He referred to *Anheuser Busch Inc. v. Comptroller Patents, Designs and Trademarks* [1987] I.R. 329 and noted that in that case the reasons were required to enable the Applicant to consider whether to appeal the decision of the Respondent to the High Court. McCracken J. stated:

"That does not arise in the present case. Indeed, the rules themselves in O. 99 r. 38 provide for the giving of reasons on a review, which would be for exactly that purpose. However, in the present case I cannot see how the applicant can make the case that natural justice required that reasons be given to him."

23. In *O'Mahoney v. Ballagh* [2002] 2 I.R. 410 the Court held that there was not a duty to provide reasons at an interim stage of a decision making process in criminal proceedings.

24. Having heard submissions and reviewed the authorities opened by the parties I hold that the Superior Court Rules Committee was not acting *ultra vires* and that the Taxing Master did not err in law in failing to give reasons for his decision on 8th July, 2004. I also hold that the procedures in the Rules of the Superior Courts for a review of taxation are not contrary to fair procedures.

25. Accordingly I refuse the relief sought by the Applicant.