THE HIGH COURT

2013 No. 6175 P

IN THE MATTER OF C.E.D. CONSTRUCTION LIMITED (IN LIQUIDATION)

BETWEEN:

C.E.D. CONSTRUCTION LIMITED

Plaintiff

– and –

FIRST IRELAND RISK MANAGEMENT LIMITED

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 17th October, 2017.

1. The dispute that is the subject of the above-titled proceedings was settled between the parties on 4th February, 2016. Pursuant to the terms of settlement and the related, perfected court order of the same date, the costs of the action were to be paid by First Ireland to CED Construction on the basis of a one-day hearing. It is alleged that despite various attempts being made, *inter alia*, by the respective parties' cost accountants, the parties have been unable to agree the amount of the costs payable. So, pursuant to notice of motion dated 3rd July, 2017, CED has sought an order on account of costs pursuant to Practice Direction HC71 of the High Court, dated 28th March, 2017. That Practice Direction provides as follows:

> *"In view of 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 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."*

2. It does not appear from the court's reading of the Rules of the Superior Courts 1986, as amended ('RSC'), that there is, in fact, an O.99, r.1B(5), the reference to which in Practice Direction HC71 must surely be to O.99, r.5.

3. What is O.99, r.(5) and what does it provide? Order 99, rule (5) is a rule of the superior courts, which rule is established by secondary legislation, specifically the Rules of the Superior Courts (Costs) 2008 (S.I. No. 12 of 2008), a statutory instrument made, pursuant to primary legislation, by the Superior Courts Rules Committee with the concurrence of the Minister for Justice, Equality and Law Reform. That statutory instrument provides in para. 1(iii) for the substitution for the then r.5 of, *inter alia*, the following:

> *"5.(1) Subject to sub-rule (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****…".*

[Emphasis added].

4. As the High Court observed in *Philpott v. Irish Examiner Limited* [2016] IEHC 62, para. 8:

> *"The great strength of the common law is that so many judges have said so much; the great weakness of the common law is that so many judges have said so much. Either way, to borrow from Sati, there comes a time for everybody when words and reason become a great weariness. To add more to the plain words of statute, to afford those words a meaning other than what ordinary English requires, seems to this Court to be unnecessary."*

5. The same is true of statutory instruments, which fall to be afforded due deference by the courts as legislation. The court reads the phrase "*after the conclusion of the proceedings*", as inserted into the RSC by S.I. No. 12 of 2008 , to mean precisely what it says, no more and no less. Proceedings have patently concluded when, for example, a perfected order has issued and the court has become *functus officio*. So the rule on its own terms expressly provides that costs may be dealt with after this point. The rule does not establish as a pre-requisite to the exercise of this jurisdiction that liberty to apply should have been sought before final orders were made. And while the rule may represent a departure from the rulings of the Supreme Court in, *inter alia*, *Belville Holdings Ltd v. Revenue Commissioners* [1994] 1 ILRM 29, *Attorney General v. Open Door Counselling Ltd (No 2)* [1994] 2 IR 333, and *McG v. DW (No. 2)* [2000] 4 IR 1, absent some deviation from superior law (and no such deviation is contended to present) there is no reason why lawmakers may not, via the medium of primary and/or secondary legislation, depart from past law.

6. The court has been referred to the judgments of the High Court in *In Re DePuy International Ltd* (Unreported, High Court, Cross J., 22nd February, 2017) and *Da Silva v. Rosas Construtores SA* (Unreported, High Court, Keane J., 1st June, 2017), with the earlier of which judgments the within judgment, respectfully, more closely accords.

7. Mention was made at the hearing of the within application that there may no longer be those "*long delays in the taxation of costs*" to which Practice Direction HC71 refers. However, a practice direction is ultimately but a supplemental embellishment upon or protocol to the rules of court. Practice Direction HC71 seeks to draw the attention of practitioners in any event to the potential entailed in O.99, r.5, which potential pertains, notwithstanding the continuation or otherwise of any factual premise on which Practice Direction HC71 is based.

8. Having regard to the foregoing, the court considers that it is open to it to make the order sought of it at this time. However, the court respectfully declines so to do. The reason for its so declining is well-stated in the following averments in an affidavit sworn by Mr Leavy, a solicitor acting for First Ireland:

> *"2. I say that I received a letter dated 26 May 2017 from JT Flynn & Co., the solicitors on record for the Plaintiff. The letter alleges that despite various attempts being made by the Plaintiff's Cost Accountant with the Defendant's Cost*

Accountant, no resolution has been found and that the Plaintiff is seeking an order for part payment of the costs prior to taxation in conjunction with Order 99 Rule 5….

3. I furnished a copy of the aforementioned letter to Paul Conlon of Behan & Associates, Legal Cost Accountants for the Defendant. I have been advised by Mr Conlon that despite lengthy negotiations with the Plaintiff's solicitor and Legal Cost Accountant, no agreement could be reached between the parties….It became clear, following discussions between Mr Conlon and the Plaintiff's Solicitor on 2 March 2017 that negotiations would not resolve the matter and that taxation would be required. Mr Conlon was advised by Mr Flynn on 2 March 2017 that he was proceeding to issue a Summons to Tax. Despite correspondence passing between Mr Conlon and the Plaintiff's Cost Accountant…during the intervening period, no Summons to Tax was in fact issued over a three-month period. The Summons to Tax issued on 5 May 2017 and is returnable for 21 June 2017. I note that this is six days after the Plaintiff's proposed application.

4. I say that if the Plaintiff had issued a Summons to Tax in March 2017, as they had indicated, then this taxation would have concluded by now and the delay has been caused by inaction on their part for over three months. I should also point out that the Bill of Costs was only served in November 2016 and subsequently an inspection of the files was carried out by Mr Conlon on 14 December 2016. Following this inspection, Mr Conlon had discussions with the Plaintiff's Legal Cost Accountant and raised a number of issues which required the Plaintiff's instructions. I say that in January 2017, the Plaintiff's Legal Cost Accountant advised Mr Conlon that he was still awaiting instructions. By letter dated 20 February 2017, two months after Mr Conlon's initial discussion on costs, a counter-proposal against the instructions fee was put to him which he responded to on 21 February 2017 and again sought clarification in respect of the VAT issue. The Plaintiff's solicitor subsequently advised Mr Conlon on 2 March 2017 that the matter would be proceedings to taxation. Mr Conlon subsequently received correspondence from the Plaintiff's Legal Cost Accountant on 16 March 2017 when figures were put to him which greatly differed from those suggested by the Plaintiff's solicitor during the course of their conversation on 2 March 2017. Mr Conlon responded by letter dated 22 March 2017, pointing this out and confirming that he had been advised on 2 March 2017 that the Plaintiff was proceeding to taxation. The Summons to Tax did not issue until 5 May 2017."

9. There is no especial delay presenting in a taxation process which sees a party receive a return date within six weeks of issuance of a Summons to Tax. The responsibility for any delay previous thereto rests with CED.

10. All of the foregoing being as it is, the court does not, for the reasons aforesaid, consider that this is an application in which the order sought (which can be made) should now be made. The order sought is, therefore, respectfully refused.