

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 263 J.R.]

BETWEEN

JAMES O'REGAN

FIRST APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY & OTHERS

NOTICE PARTIES

[2014 No. 264 J.R.]

MICHAEL O'DRISCOLL (A MINOR)

SECOND APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY & OTHERS

(NOTICE PARTIES)

[2014 No. 384 J.R.]

NICOLA LAMBERT

THIRD APPLICANT

AND

ROWENA MULCAHY AND THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL AND ANOTHER

(NOTICE PARTIES)

[2015 No. 685 J.R.]

LOUISE MCCUTCHEON

FOURTH APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY AND OTHERS

(NOTICE PARTIES)

[2015 No 685 JR]

JUDGMENT of Mr. Justice White delivered on 16th November, 2017

1. This application relates to four separate judicial review proceedings on the taxation of costs in medical negligence proceedings.
2. The reliefs sought in each judicial review application are broadly similar. In *O'Regan*, the leave order was granted on 1st May, 2014. the Applicant sought an order of mandamus that the first named Respondent shall without further delay adjudicate on the allowances to be made on the taxation proper and conclude the taxation of costs on foot of an order of the High Court of 20th May, 2011, in proceedings entitled *James O'Regan (Plaintiff) v. Faud Aftab & Health Service Executive (Defendants)*, Record No. 2009/3931P. A declaration was sought that the Applicant was entitled to have the costs awarded to him by order of the High Court taxed pursuant to statute and the rules of this honourable court within a reasonable time, and in the manner and form prescribed by statute and the rules of this honourable court, and that there has been a breach of the Applicant's said right.
3. The grounds upon which the relief was sought were:-
 - (i) The first named Respondent's failure to conduct the said taxation in accordance with the requirements of O. 99, RSC 1986 and the established practice of the Taxing Master's Court and the taxation of costs.
 - (ii) The delay in the conclusion of the said taxation is in breach of the Applicant's rights under Article 40.3 of the Constitution, Article 6.1 of the European Convention on Human Rights and s. 3(1) of the European Convention on Human Rights Act 2003.
4. The reliefs sought in *O'Driscoll* were the same except they related to an order for costs of the High Court of 20th February, 2013, in proceedings between *Michael O'Driscoll (a minor suing by his mother and next friend, Breda O'Driscoll) v. The Health Service Executive* [2010 No. 10916P]. The leave order was granted on 1st May, 2014.
5. In *Lambert*, leave was granted on 7th July, 2014, seeking similar reliefs on similar grounds in respect of an order for costs of 8th October, 2013, *Nicola Lambert v. Health Service Executive* [2012 No. 3358P].
6. *Louise McCutcheon* was granted leave to bring an application for judicial review on 7th December, 2015, seeking:-
 - (i) An order of *mandamus* directing and requiring the Respondent to fix a date for the hearing of, and to conclude the

taxation of costs on foot of the order of the High Court of 11th March, 2014, in proceedings entitled *Louise McCutcheon v. Andrew Curtin, South Infirmary Victoria University Hospital and Johnson & Johnson (Ireland) Ltd* [2010 No. 6097P].

(ii) A declaration that the Applicant is entitled to have the costs awarded to her by order of the High Court taxed within a reasonable time and alleging a breach of the applicant's said right.

(iii) A declaration that the delays in the taxation of the applicant's costs are in breach of Article 40.3 of the Constitution, Article 6.1 of the European Convention on Human Rights and s. 3(1) of the European Convention on Human Rights Act 2003.

7. The grounds upon which relief was sought was similar to the other three judicial review applications.

8. In each application there is a dispute about the factual chronology of the process of taxation and the judicial review proceedings.

9. In the first application the taxation of costs and ruling on objections were completed on 12th October, 2015. The Applicant subsequently issued a motion to this Court to review the final orders on taxation and ruling on objections.

10. In the second application the taxation and ruling on objections were completed on 12th October, 2015. The Applicant has issued a motion to this Court seeking to review the final order on taxation of costs.

11. In the third application the taxation of costs and ruling on objections were finalised on 2nd November, 2015.

12. The fourth Applicant's taxation of costs had not been finalised as of the date of hearing before this Court on 23rd March, 2017. The first Respondent has ceased to hold the office of Taxing Master.

13. The Applicants in all four judicial review applications have submitted that they are now moot, as the taxation process in the first three applications has concluded, and in the fourth application the taxation cannot be concluded by the first Respondent.

14. There is dispute between the parties on what transpired at hearings of this Court in respect of the first three applications on 9th and 10th June, 2015, before the then President, Kearns J., and on 30th June, 2016, in respect of all four applications before Noonan J.

15. All four applications were listed for hearing before this Court on 14th December, 2016. It was agreed between the parties that this Court would have to determine the consequences of the court hearings on 9th and 10th June, 2015, and 30th June, 2016, and to decide if the applications are moot, and if they are moot, are there exceptional circumstances which would allow the hearing of outstanding issues which the Respondent wishes to have litigated.

The hearings before the President on 9th and 10th June, 2015

16. The first three applications came before the President for hearing on 9th June, 2015, he stated:-

"Before proceedings get underway, I should perhaps indicate that I am aware that time was sought from this Court and talks between the parties have taken place. The court would be disposed to postpone commencing this case until two o'clock in the context of encouraging the parties to see if differences, however, intractable they may appear to be can be resolved before things are said that cannot be unsaid, so to speak and this case will last, it seems to me some considerable time.....I would therefore encourage the parties in the strongest possible terms to persevere with and hopefully bring these discussions to a fruitful conclusion if that was possible."

Discussions continued between the parties until the following day, 10th June, 2015, when Mr. McGarry on behalf of the three Applicants informed the court that discussions had taken place but they were not able to agree to resolve everything."

17. On 10th June, 2015, the President was anxious to ensure that the taxation of the costs in the three applications were finalised and an indication was given that this could be completed by either before the end of July 2015, or the end of September 2015.

18. The President then stated:-

"The court is strongly of the view that this remedy first in terms of the actual citizens who are entitled to have their costs tax be undertaken. I am told that can be done and I am told that the Taxing Master who is the Respondent here is willing to do it and the Plaintiff's advisers are willing that she should do it. There are obviously other matters that will have to be addressed in the aftermath of that exercise insofar as matters in the background are concerned and assertions that have been made but I think they are more easily dealt with against the background of this matter having been concluded than they are now."

He went on to state:-

"I mean nobody is going to shut out anybody from saying what they want at a later stage. I can understand a strong sense of injustice being felt on both sides of this divide."

19. The matter was then adjourned to 13th October, 2015, and further for mention to 3rd November, 2015, when the Applicants in the first three applications contended the matters were now moot save for the issue of costs. The Respondent disputed this and contended outstanding matters had to be listed and accordingly the President allocated a hearing date of 15th March, 2016.

20. The conclusion this Court draws from those hearings is that the Court was anxious that the underlying central issue in the dispute the taxation of costs be finalised but that there were other issues outstanding to be dealt with. There was no ruling by the court on any of these occasions that the applications were moot, and the first three Applicants could not have been in any doubt from those hearings, that the Respondent wished to have outstanding issues particularly about her reputation determined by the court.

21. The fourth Applicant applied for judicial review and the leave order was granted on 7th December, 2015.

22. On 2nd February, 2016, the Deputy Master then listed the fourth application with the other three judicial review applications on 15th March, 2016. All four matters appeared on the list on 15th March, 2016, but were not reached and were adjourned to 30th June,

2016.

The Hearing before Noonan J. on 30th June, 2016

23. The Applicants contend that at this hearing, the Respondents accepted that the first three applications were now moot. This is disputed by the first Respondent.

24. At that hearing, Mr. McGarry on behalf of the Applicants told the court that there had been a measure of agreement and stated they had been in court on a number of occasions over the last year and in the first three cases, the taxations have been concluded and as a result their position was that those applications were moot that is *Lambert, O'Driscoll* and *O'Regan* and he understood from talking to Mr. Butler, counsel for the first Respondent that he had accepted that was the case and the only issue between the parties in relation to those three applications was the issues of costs.

25. It was conceded by the Applicants that the fourth case of *Louise McCutcheon* was a more recent case and was still current and the proposal was that this case would be proceeded with and that the court would determine all of the issues and determine the costs issue at the end of hearing in the *McCutcheon* case.

26. Mr. Butler in reply did not acknowledge to the court that the applications were moot except that he stated that it was in the interest of all the parties that the cases were disposed of without any further difficulty but he raised objection to a particular affidavit that had been sworn by the fourth Applicant exhibiting a statement from the other Taxing Master, Master O'Neill.

27. In the fourth application, the court permitted cross examination of each Taxing Master on their affidavits and adjourned the matter for hearing to 13th December, 2016. There was no acceptance by Mr. Butler on behalf of the first Respondent that she was agreeable to deal with the first three applications on the basis of costs only. I accept that that was the understanding of Mr. McGarry on behalf of the first three Applicants. The court concludes there was no finding by Noonan J. nor an acceptance by the first Respondent that the first three applications were moot and that the only issue outstanding was that of costs.

28. The responsibility rests on this Court to decide if the applications before the court are moot and if so are there circumstances allowing the outstanding issues which the first Respondent wishes to litigate to proceed to full hearing.

The Law

29. Both the applicant and respondent have helpfully provided written submissions to the court on the legal principles that apply to the issues in dispute. There is no dispute between the parties as to what principles apply and I will summarise those principles which are helpfully set out in two judgments of the Supreme Court in *Lofinmakin & Ors v. Minister for Justice, Equality and Law Reform & Ors* [2013] 4 I.R. 274 and a subsequent Supreme Court decision of *O'Brien v. Tribunal of Inquiry into Payments to Mr. Charles Haughey and Michael Lowery (Mr. Justice Michael Moriarty)* judgment of the Supreme Court of 12th July, 2016, [2016] IESC 36:-

30. In *Lofinmakin*, Denham J stated, at paras 13 to 22

16. "As has been cited by this Court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38, the dictum of the Supreme Court in *Borowski v. Canada* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated:-

"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercised its discretion to depart from it."

In this case the issues are moot, and applying the general rule of the Court, the appeal would not be heard.

Discretion

17. There are exceptions to this general rule, when the Court will hear and determine issues in a moot appeal. Such exceptions have been described in *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328, in *Okunade v. The Minister for Justice, Equality and Law Reform and Ors* [2013] 1 I.L.R.M. 1, and in *Irwin v. Deasy* [2010] IESC 35.

18. In *Irwin v. Deasy*, Murray C.J. said:-

"In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance the court may in the interests of the due and proper administration of justice determine such a question."

19. In some cases an exception may arise if the issue determined in the High Court affects many other cases. Thus, in *O'Brien v. PIAB (No. 2)* [2007] 1 I.R. 328, Murray C.J. pointed out:-

"Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the Court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant."

20. An exception to the general rule may also arise if it is a test case, and if many other cases have been adjourned pending the decision of the case before the Court.

21. The issue of mootness was analysed by Clarke J. in *Okunade*. In that case the issue was, as he stated, "strictly speaking moot". However, it was a test case. Clarke J. stated:-

"5.3 This case had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined. That designation occurred at a time prior to the issue becoming moot by virtue of the decision of Cross J. In those unusual circumstances the Minister was

anxious, and the court agreed, that this appeal should be heard notwithstanding the fact that the issue had, by the time the appeal actually came on for hearing, become moot. The unusual set of circumstances outlined above formed the basis for that decision. In addition it seemed to the court that any case in which this issue might arise was likely to become moot in a relatively short period of time for the issue concerns the proper approach that should pertain pending the hearing of a leave application. Every case of this type will, therefore, become moot when the leave application is heard. The problem which emerged in this case, being that arrangements for an expedited appeal had been set up with a date set but that the issue became moot by virtue of the hearing and determination of the leave application before that date was reached, has a significant risk of occurring in any other case. In those special and unusual circumstances this court felt that it was appropriate to hear the appeal notwithstanding its mootness."

22. The fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category. The foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors such as arose in *O'Brien v. Personal Injuries Assessment Board and Okunade*."

31. The undoubted situation is the relief sought by the Applicants in the first three applications that of *mandamus* to ensure that each order for costs was taxed is moot. Counsel for the Applicants have informed the court there is no requirement to proceed to seek declarations as originally sought in the statement to ground the application for leave or in the leave order.

32. On the fourth application, the Applicant has contended as the first Respondent is no longer the Taxing Master, no effective relief can be granted in those proceedings as she no longer has a statutory responsibility to tax that Applicant's costs.

33. The first Respondent has argued that because of the ruling by the then President of the High Court, Kearns P., on 10th June, 2015, there are outstanding issues to be determined and the proceedings are not moot and on the fourth application those issues have to be determined also..

34. As a matter of practicality, these applications are moot, as the substantial relief sought by the Applicants in the first three applications, that is the taxation of their costs has been concluded. In the fourth application the first Respondent no longer has any statutory function to tax the fourth Applicant's costs and those proceedings in terms of the substantive relief sought are moot. The Respondent contends that in the fourth application because the declaratory relief is outstanding even though the first Respondent cannot complete the taxation of costs that issue remains a live issue in the case.

35. This Court cannot compel the Applicants to seek declaratory relief when they do not wish to proceed with the application for those declarations because in their submission the reliefs they were seeking, the taxation of costs has been achieved in the first three applications and the first Respondent in the fourth application cannot fulfil the relief as sought.

36. The first Respondent has submitted that if the proceedings are moot, the court should nevertheless determine the other issues in dispute in the public interest as was envisaged when Kearns P., made his ruling on 10th June, 2005.

37. The Respondent has submitted that the exceptional circumstances which arise are points of law of exceptional public importance which should be determined. These are as follows:-

(i) Is a Taxing Master entitled under s. 27 of the Court and Court Officers Act 1995, to require a breakdown of a global fee claimed as a solicitor's general instructions fee. Is it sufficient for a solicitor to simply set out in narrative form, the work undertaken in an action. As a result of s. 27 of the Court and Court Officers Act 1995, and O. 99 of the Rules of the Superior Courts is a Taxing Master not just entitled to but obliged to inquire into the nature and extent of the work done. This is an issue of general public importance which will continue to apply if the High Court on the motion to review of some of the applications remits the costs back to the Taxing Master for review of taxation and this goes to the interpretation of s. 27 of the Act and O. 99 of the Rules of the Superior Courts as to whether solicitors are entitled to insist on a practice that puts in a global instructions fee and refuses to break it down even if requested by the Taxing Master to do so. The first Respondent submitted that it was demonstrated that it is a matter of public interest as the Law Society applied to be joined in these proceedings as an *amicus curiae*.

(ii) The next issue which the first Respondent wishes to have determined as an exceptional circumstance is whether the alleged delay that occurred in these cases amounts to an infringement of the constitutional rights or Convention rights of the Applicants.

(iii) The third issue which the Respondent contends is of general importance is the entitlement of a Taxing Master to recuse himself or herself on their own motion. It was submitted that this was a matter of public importance which would have to be addressed in due course as it applies not just to these cases but cases in the future.

38. This Court is not dealing with a review of a specific taxation of costs. The taxation of costs is a speciality as when costs are not agreed this determination is reserved to a specialist office that of the Taxing Master of the High Court.

39. Specific legal and practice principles apply to those taxations, and those principles are always enunciated in the context of an actual bill of costs being reviewed. The matter is complicated by legislative change. It would not be appropriate for this Court to enter into a determination on judicial review proceedings initiated for the purposes of procuring an order for taxation, to examine principles applying to the methods of taxation of costs. Apart from the argument of public importance, it would be impractical for this Court to try and determine those issues in a vacuum without reference to specific arguments on any actual bill of costs. This issue would be more suitably dealt with in the context of a motion to the High Court to review a Taxing Master's order on costs. Because of ongoing legal developments including legislative reform, I cannot see how this issue can come within the exception of the general rule that proceedings are moot when the decision will not have the effect of resolving the controversy affecting the rights of the parties.

40. On the second issue which the Respondent argues is of public importance, if the alleged delay in this case amounted to any infringement of the Applicants constitutional rights or Convention Rights, the court's view is that there are already many decisions of the Superior Courts including the Supreme Court on the principles that apply to delay in the determination of legal proceedings. This is not a reason for departing from the general principle on moot cases.

41. Finally, on the issue of the right of a Taxing Master to recuse himself or not on his or her own motion, that does not in the Court's opinion have the necessary element of public importance to have it considered and determined once the primary issue between the

parties is moot.

42. For those reasons, the Court determines that the four applications before the court are moot and there are no issues of exceptional public importance or other reasons that the court would consider any other issues arising in dispute between the parties.

43. It is not the case as the Applicants contend that an order for costs follows the decision that the applications are moot and exceptional circumstances do not apply.

There are live issues which have to be determined by the court in finalising any order for costs. The propriety of bringing the applications in the first place, the nature of the allegations made by the Applicants, the conduct of both the Applicants and the Respondent will be an issue.

44. It was indicated by the Court in the course of exchanges between the court and counsel during the hearing on 23rd March, 2017, that all those issues will have to be argued before the court in determining the application for costs. The issue of costs is very much in dispute and will have to be determined by the court after submissions by both parties which unfortunately may be a lengthy matter.