[2018] IEHC 280

THE HIGH COURT

2017 No. 48 JR

Between:

AHMED HUSSAIN

Applicant

– and –

TAXING MASTER ROWENA MULCAHY

Respondent

– and –

J.M. BURKE SOLICITORS

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 17th May, 2018.

I

Moot Judicial Review Proceedings

(i) Background.

1. On 23rd January, 2017, Mr Hussain commenced judicial review proceedings against Taxing Master Mulcahy. Those proceedings concerned certain actions of the Taxing Master in the course of a particular taxation process. On the same day that the judicial review proceedings were commenced, the Taxing Master retired. The effect of that retirement is that all of the reliefs sought in the original judicial review proceedings will be met by the fact that a new taxation process is intended to commence before a new Taxing Master, without need for the application of any of the discretionary reliefs that had been sought of the court in the judicial review proceedings. In short, the judicial review proceedings were barely issued when they were moot through no fault of any of the parties to the judicial review proceedings.

(ii) Costs.

2. When it comes to the allocation of costs of proceedings that become moot in this manner, the court recalls the observation of Clarke J. in *Cunningham v. President of the Circuit Court* [2012] IESC 39, para. 4.7:

> "[A] *court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."*

3. There are no significant countervailing factors in the within proceedings: they became moot as a result of a factor outside the control of the parties. So the court does not see any basis on which there could properly be an order as to costs in the moot judicial review proceedings.

II

Notice of Motion of 13th June, 2017

(i) Overview.

4. Within the context of the moot judicial review proceedings, a notice of motion has issued which seeks related reliefs 1 & 2, related reliefs 3 & 4, and certain ancillary reliefs. The court will deal with the two sets of related reliefs in reverse order.

(ii) Reliefs 3 & 4.

5. Reliefs 3 & 4 are as follows:

> *"3. An Order remitting the balance of these proceedings before either of the newly appointed Taxing Masters on the basis that the wasted taxation of costs before the Respondent and the costs of the further taxation be measured by the Taxing Master in accordance with Order 99, Rule 29(13) of the Rules of the Superior Courts 1986 as amended.*
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> *4. An Order affirming that Order 99, Rule 29(13) of the Rules of the Superior courts will continue to apply to the costs already incurred by the Applicant."*

6. As regards relief 3, what the applicant appears to be seeking (in the context of a fresh motion in the context of moot proceedings) is that the costs of the taxation process before Taxing Master Mulcahy be carried forwards into what are de novo taxation proceedings, with the costs (it seems of the moot proceedings) to be measured by the relevant Taxing Master.

7. The court has indicated above how the costs of the moot proceedings would fall by law to be allocated. However, both reliefs 3 and 4 appear in any event to be predicated on a fundamental misunderstanding of what is now about to occur: if there is not to be a continuation of the existing taxation (in which case the costs incurred before Taxing Master Mulcahy would continue), then there will be (and the court understands that there is to be) a *de novo* taxation hearing with no connection to the previous hearing in terms of costs or otherwise. There cannot be a rolling-up of costs in the manner contemplated.

8. For the reasons stated, reliefs 3 and 4 are necessarily declined.

(iii) Reliefs 1 & 2.

A. Overview and Conclusion.

9. By way of related reliefs 1 & 2, Mr Hussain seeks the following, again in the context of the moot judicial relief proceedings:

> *"1. An Order directing Ireland and the Attorney General to indemnify the Taxing Master in respect of the costs of these proceedings.*
>
> *2. If necessary, an Order making Ireland and the Attorney General a party to the proceedings for the purposes of an Order as to costs."*

10. For the reasons set out hereafter, there is no question of a liability arising on the part of Taxing Master Mulcahy and thus (a) no liability in respect of which the desired indemnity could attach, and (b) no need for the joinder order sought. It follows that related reliefs 1 and 2 fall respectfully to be declined.

B. Rationale for Conclusion as to Reliefs 1 & 2.

1. Judicial Immunity.

11. It is long-settled law that judges enjoy personal immunity from suit when acting in the course of their judicial function, which immunity exists equally in respect of orders for costs. (See, *inter alia*, in this regard *Desmond v. Riordan* [2000] 1 IR 505, 507; *Kemmy v. Ireland* [2009] 4 IR 74, 85 and *O.F. v. Judge Hugh O'Donnell & ors* [2012] 3 IR 483, 501 and the recent consideration by Hogan J. in *Kilty v. Judge Cormac Dunne & Campion Property Consultants Ltd* (Unreported, Court of Appeal, 22nd March, 2018)). Notwithstanding the now extensive Irish authority in this area, perhaps the best-known statement of judicial immunity and the rationale for same remains that of Lord Denning MR in *Sirros v. Moore* [1975] QB 118, 132 (as endorsed by Flood J. in *Deighan v. Ireland* [1995] 2 IR 56, 62):

> *"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in* Garnett v. Ferrand *(1827) 6 B. & C. 611, 625:*
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> > *'This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.'*
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> *Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low. Lord Tenterden C.J. spoke them in relation to a coroner. They were reinforced in well-chosen language in relation to a county court judge by Kelly C.B. in* Scott v. Stansfield *(1868) L.R. 3 Exch. 220, 223; and to a colonial judge by Lord Esher M.R. in* Anderson v. Gorrie *[1895] 1 Q.B. 668, 671."*

12. A useful additional point to note in this regard is that contained in the observation by Palles C.B. in *R. (King) v. Justices of Londonderry* (1912) 46 ILTR 105, para. 20 (as endorsed by the Supreme Court in *State (Prendergast) v. Rochford* (Unreported, Supreme Court, 1 July, 1952), *McIlwraith v. Judge Fawsitt* [1990] 1 IR 343 and *Miley v Employment Appeals Tribunal* [2016] IESC 20), that *"According to the principles that the Courts have been acting upon for years, as a rule magistrates ought not to be obliged to pay costs unless they were acting in some way that was not bona fide, or unless they took it upon themselves to put forward and support a case that was wrong in point of law."*

2. Extension of Immunity.

13. Whether judicial immunity may be extended to persons or bodies exercising a quasi-judicial function has been addressed on several occasions by the Irish courts. Notable cases in this regard are *Casey v. Private Security Appeals Board and Private Security Authority* [2009] IEHC 547 (followed in *Hussein v. The Labour Court & anor* [2012] 2 IR 704; see also *Walsh v. Property Registration Authority* [2016] IECA 34 in this regard) and *Smith v. Considine & anor* [2017] IEHC 22. In *Smith*, a county registrar was held to be a quasi-judicial officer within the court officer and thus to be treated analogously to a judge. (The court understands *Smith* is under appeal). In *Casey*, the court held that the respondent was a quasi-judicial body with an analogous position to a judge, with it being appropriate that it should be treated as immune from costs where it acted without *mala fide* and without impropriety. A taxing master, it seems to the court, falls likewise to be treated: s/he performs a function of a judicial nature in respect of legal costs and is attached, pursuant to the Courts (Supplemental Provisions) Act 1961 (Eighth Schedule, Section 3), to the High Court, the Supreme Court and the High Court respectively. It follows that a taxing master enjoys judicial immunity from costs in her or his capacity as a statutory officer of the court exercising a function of a judicial nature.

3. Immunity of State.

14. The Crown prerogative of immunity from suit did not survive Independence (*Byrne v. Ireland* [1972] 1 IR 241). It follows that the State may be sued in tort for damages arising out of the actions of its agents. However, the judicial branch of government occupies a special position in this regard. In this context, the court respectfully associates itself with the following observations of McMahon J. in *Kemmy*:

> *"In* Byrne v. Ireland*...the Supreme Court held that the State could be sued for damages in tort and rejected the argument that the State had inherited the Crown's common law immunity from liability. As Budd, J. at p. 297 put it 'the State is not above the law of the Constitution but was subject to it'. The court observed that since the Constitution expressly provided for immunity for specific organs of the State in specific circumstances, this strongly implied that the Constitution did not intend to confer other immunities. Walsh J. held at p. 264 as follows:-*

> *'The State must act through its organs but it remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution. In support of this it is to be noted that an express immunity from suit is conferred on the President by Article 13, s. 8, subs. 1, and that a limited immunity from suit for members of the Oireachtas is contained in Article 15, s. 13, and that restrictions upon suit in certain cases are necessarily inferred from the provisions of Article 28, s. 3, of the Constitution.'*
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> *I have no difficulty in accepting these statements as accurate expressions of the law subject to one proviso. Because of the express recognition in the Constitution itself that the judiciary is independent in the exercise of its judicial functions and is subject only to the Constitution itself and the law, the position of the judiciary, as the judicial organ of the State is different from the other organs that is, the executive and the legislature. In relation to the liability of the judiciary, and the liability of the State for the wrongs of the judges, following from its constitutional independence, I am of the view first, that the State is not vicariously liable for the wrongs of the judges in exercising their judicial functions and second, that the judges have immunity from suit in respect of failures in the discharge of their functions.*
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> *…*
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> [I]*t is clear that the administration of justice can only be exercised by the judiciary, and its administration is free from any interference by any other person, including the legislature or the executive. It is also clear that this is very different from the duty which a servant (employee) has towards his master (employer) and who must carry out his master's orders at all times. Importantly, under the Constitution, the judge does not receive his power or authority from the State but from the people, is independent in the exercise of his functions and is free from interference from the State, particularly from the other organs of government. The only limit or control on the judge is to be found in the Constitution itself or in the law.*
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> *…*
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> *For the above reasons it is wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the Master/Servant terminology developed for the purposes of imposing vicarious liability for tortious acts or omissions. Accordingly, in my view, the State cannot be vicariously liable for the errors which a judge may commit in the administration of justice. This conclusion holds in respect of errors which may be described as errors within jurisdiction, and of a fortiori to errors which are outside the judge's jurisdiction, including those committed, mala fides, for which of course, in extreme cases, the judge may lose his personal immunity.*
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> *…*
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> [I]*t is my view that in any event the immunity which the law confers on the judiciary personally in such situations applies also for the benefit of the State when an attempt is made to make it directly liable for the wrong of the judge in such circumstances. I am of the view that many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for State immunity in cases such as those before this Court. Indeed it is my view that not to extend the immunity to the State in the present circumstances would represent an indirect and collateral assault on judicial immunity itself.*
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> *…*
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> *From the above exposition it is clear that the independence of the judiciary is a fundamental value in western democracies. The immunity from suit for the judiciary is a necessary corollary of this set of values. This immunity has developed in the common law context where the starting point on the liability of the state was expressed in the absolute rule that "the king can do no wrong". To make the state liable now for the wrongs of the judiciary would in effect represent a late indirect challenge on the personal immunity of the judiciary. The jurisprudence on the matter is too well settled to permit any such oblique subversion."*

15. As Flood J. succinctly notes in Deighan, at 63 "*Vicarious liability cannot arise unless there is primary liability*". So unless liability can attach to a judge personally, no vicarious liability can attach to the State. As the court has concluded above that a taxing master enjoys judicial immunity from costs in her or his capacity as a statutory officer of the court exercising a function of a judicial nature, and as there is no contention that Taxing Master Mulcahy acted in bad faith or with impropriety, there is simply no basis on which liability (whether in costs or otherwise) could present in the performance of her functions as taxing master in respect of which (i) she would be directly liable or (ii) Ireland could be vicariously liable. Thus there is no reason or basis for either the indemnity or the order for joinder which Mr Hussain has asked the court to make. As is clear from McMahon J.'s closing remarks in the above-quoted extracts from his judgment in *Kemmy*, to seek to impose on Ireland some form of liability for the wrongs of the judiciary (and by extension taxing masters) would be to commence down a dangerous path, in effect permitting a "*late indirect challenge*" on the personal immunity of the judiciary (and the immunity of taxing masters). As McMahon J. observes, "*The jurisprudence on the matter is too well settled to permit any such oblique subversion."*

III

Conclusion

16. For the reasons set out above, all of the reliefs sought of the court by Mr Hussain at this time are respectfully declined.