# THE COURT OF APPEAL

## UNAPPROVED
## NO REDACTION NEEDED

**Neutral Citation Number [2021] IECA 195**
**Record Number 2020/107**

**High Court Record Number: 2018/875JR**

**Noonan J.**

**Murray J.**

**MacGrath J.**

**BETWEEN/**

**L.M.**

**APPELLANT/APPLICANT**

**-AND-**

**NIALL ROONEY COUNTY REGISTRAR OF WATERFORD**
**SITTING AS COUNTY REGISTRAR OF CORK**
**(SITTING AS TAXING MASTER)**

**RESPONDENT/RESPONDENT**

**-AND-**

**A.M.**

**RESPONDENT/NOTICE PARTY**

**JUDGMENT of Mr. Justice Noonan delivered on the 14th day of July, 2021**

**1.** This appeal is brought by Mr. M. from the judgment of the High Court (Meenan J.) of the 31st January, 2020 and the associated order dated 13th March, 2020 whereby he refused Mr. M. leave to seek judicial review.

**Background**

**2.** For the purposes of this judgment, it is unnecessary to detail the extraordinarily lengthy background to the underlying family law proceedings, which now span almost two decades. Some small insight is given to that background in an affidavit sworn by Colm Burke, the notice party's solicitor, on the 30th January, 2019 where at that stage, the proceedings had continued for 17 years and taken upwards of 135 days in court, by any standards a remarkable statistic, and one since exceeded.

**3.** As an adjunct to the earlier judicial separation and divorce proceedings heard by the Circuit Court, Ms. M. issued an equity civil bill in 2014 seeking an order for partition and sale of certain lands which had been the subject of a prior property adjustment order in the family proceedings. The lands in question were situate in Ballinhassig, Co. Cork and comprised parcels contained in two folios. On the 14th April, 2015 the Circuit Court in Cork made an order for sale of these lands with the proceeds to be equally apportioned between the parties. Mr. M. appealed that decision to the High Court which dismissed the appeal on the 26th January, 2016 and affirmed the order of the Circuit Court.

**4.** It then transpired that one of the parcels of land had been sold by Mr. M. some years earlier, a fact not previously disclosed to the court or Ms. M. Some days later on the 29th January, 2016, the High Court granted a *Mareva* injunction restraining Mr. M. from dealing with the proceeds and directing him to pay them into court. On the 25th January, 2017, the court made an order for distribution of the proceeds directing that a sum of

€75,000 be retained in court from Mr. M's share pending the taxation of Ms. M's costs in the partition suit.

**The Taxation**

**5.** The taxation was carried out by the respondent on the 24th and 25th June, 2018 over the course of two full days ending, as noted by the trial judge, at 20:00hrs on the 25th.

**6.** Mr. M. represented himself throughout at the taxation. Ms. M. was represented by Mr. Burke. A month later, on the 24th and 25th July, 2018, the respondent prepared the certificates of taxation and at the request of Mr. M., subsequently on the 2nd August, 2018 provided a statement of his reasons in respect of the taxations both concerning the Circuit Court hearing and the appeal to the High Court. At no stage during this time frame did Mr. M. raise any issue concerning the process adopted by the respondent in which he had participated fully. Nor did he raise any complaint about any perceived unfairness to him in the course of that process. Most importantly, Mr. M. did not seek to appeal the certificates of taxation, as was his right.

**The Application for Judicial Review**

**7.** Instead, on the 24th October, 2018, Mr. M. filed a statement of grounds in support of an application for leave to seek judicial review, the third such application brought in this litigation. In the statement of grounds, Mr. M. seeks an order quashing the certificates of taxation and seeking to have the taxation remitted for rehearing before another County Registrar. He seeks presumptive orders directing how such future taxation should be carried out. The application for leave was moved *ex parte* in the normal way before the High Court on the 12th November, 2018 and as a result, the court directed that the application for leave be made on notice to the respondent and Ms. M.

**8.** Mr. M. identifies 13 grounds upon which relief is sought and I think it is fair to say that the primary ground relied upon is that the respondent failed to adopt the procedure governing taxation provided for by O. 99, r. 38 of the Rules of the Superior Courts (RSC), as it then applied, which allowed for a preliminary determination by the Taxing Master followed by the bringing in of objections to those determinations. Accordingly, in the High Court, the Taxing Master follows a two-stage process which requires him or her to give reasons for the initial determinations to enable the opposing party to consider those reasons before bringing in objections – see *D.M.P.T. v Taxing Master Moran* [2015] 3 I.R. 224.

**9.** Mr. M.'s essential complaint is that the respondent followed a one-stage process and therefore he was deprived of an opportunity to bring in objections and thus, of fair procedures. There are what appear to be two subsidiary grounds raised, first being that the respondent considered matters which were *res judicata* concerning earlier proceedings between the same parties, which I take to be a suggestion that he considered irrelevant matters, and secondly that there was objective bias in the manner in which the taxation process was conducted.

**10.** The application was heard by Meenan J. on the 20th June, 2019. Prior to that, Mr. M. issued a motion on the 14th May, 2019 seeking to amend his statement of grounds by including a challenge to the constitutionality of s. 27 of the Courts and Court Officers Act, 1995 which provides for certain powers of the Taxing Master of the High Court. His application was unsuccessful. No appeal was brought. Following the hearing, arising out of references to certain documents, the trial judge directed that Mr. M. be furnished with the relevant additional documents and gave him liberty to deliver further written

submissions on those documents. Mr. Burke duly swore a supplemental affidavit on the 17th July, 2019 exhibiting the relevant correspondence.

**11.** However, instead of following the course directed by the trial judge, Mr. M. issued another notice of motion in August 2019 seeking a range of reliefs including discovery, disclosure of documents, leave to file further submissions and adduce additional evidence. That application was heard by the trial judge on the 30th August, 2019 and was refused. Mr. M. did not appeal the refusal although it would appear that he purports to do so now. He is however, now well out of time to bring such an appeal.

**Judgment of the High Court**

**12.** The trial judge delivered a detailed written judgment on the 31st January, 2020. One aspect of the judgment was concerned with whether Mr. M. should be granted an extension of time within which to apply for leave and the judge concluded that he should extend the time. There is no cross-appeal in respect of that determination.

**13.** The judge concluded that there was nothing in the evidence adduced before him to suggest that the taxation was conducted otherwise than entirely fairly and that the correct procedures were followed. He noted that Mr. M. had been furnished well in advance of the hearing with all relevant documentation and was afforded every opportunity to make any submissions he wished to. However, the trial judge identified the fundamental difficulty with Mr. M.'s leave application as a confusion on his part between the rules applicable to taxation in the Circuit Court and those relevant to the High Court exercising its original jurisdiction. Since the decision in *D.M.P.T.* referred to the latter, it was in the view of the trial judge irrelevant to this application. Having identified the appropriate test for the grant of leave to seek judicial review, the trial judge went on to conclude that the appellant had not established any arguable case and he refused the application.

**The Appeal**

**14.** In his notice of appeal, the appellant purports to appeal not just the judgment and order of the 31st January, 2020, but also the order to which I have referred of the 30th August, 2019 and two other orders of the 25th and 23rd of July, 2019. This court cannot entertain the latter purported appeals which are long since out of time and in circumstances where no application has been made by Mr. M. to extend the time for appealing those orders.

**15.** The essential ground of appeal is that the trial judge was in error in considering that the then current O. 99, r. 38 of the RSC was not applicable to the respondent in this case. There is also a complaint that the trial judge refused to allow Mr. M. to effectively reargue his case and introduce new evidence after the hearing had concluded but before judgment was delivered. The court cannot have regard to that contention as that order was not appealed within the time permitted. Many of Mr. M.'s other complaints relate to the refusal of his motion in August 2019. There is also a complaint that the trial judge failed to give reasons for his decision, but this is not elaborated upon and is impossible to understand given that a written judgment was delivered addressing all relevant issues.

**16.** In his notice of appeal, Mr. M. seeks to impermissibly broaden the scope of his claim by introducing matters and argument never agitated in the High Court and thus cannot be considered *de novo* by this court. In addition, he seeks declarations of unconstitutionality of a number of statutory provisions including s. 27 of the Courts and Court Officers Act, 1995, sections of the Legal Services Regulation Act, 2015, S. 9 of the Family Law (Divorce) Act, 1996 and s. 31 of the Land and Conveyancing Law Reform Act, 2009. None of these reliefs were sought in his original statement of grounds. He

similarly seeks declarations of incompatibility of these statutory provisions with the ECHR.

**17.** Notably absent from Mr. M.'s very extensive affidavits, pleadings and legal submissions is any reference to his right of appeal from the respondent's determination or how he has been in any way prejudiced by that determination. In particular, he does not identify any item of costs which were subject to taxation with which he disagrees or which were inappropriately or wrongly calculated.

**18.** As I have said, the fundamental contention underpinning this application is that O. 99, r. 38 applies to a taxation of costs by a County Registrar. It provides in relevant part:

> "(1) Any party who is dissatisfied with the allowance or disallowance by the Taxing Master of the whole or any 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…
>
> (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….

(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 termination 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…"

**19.** The Rules of the Circuit Court (RCC) expressly provide for the procedure to be followed by the County Registrar with regard to the taxation of costs. It is different from the procedure to be followed under O. 99 by a Taxing Master of the High Court. The main difference is, as Mr. M. points out, that in the High Court, taxation is indeed a two-stage process but in the Circuit Court, there is only one stage. There are many instances to be found in the Rules of the Circuit Court, and indeed of the District Court, of procedures which are simpler than their equivalents in the RSC, consistent with the fact that the Circuit and District Courts are courts of local and limited jurisdiction.

**20.** The power of the County Registrar to tax costs is provided for in O. 18 of the RCC which provides: -

"6. The County Registrar shall have power, when directed by the Judge or empowered by these Rules, to tax all Bills of Costs, including costs as between solicitor and client, and shall certify the amount properly due thereon. In every case he shall measure the costs by fixing a reasonable sum in respect of the entire Bill or any particular item therein.

7. Any party dissatisfied with any certificate, ruling or decision of the County Registrar, may, within 10 days from the date of such certificate or within 10 days from the date of perfection of such ruling or decision, apply to the Judge by motion

> on notice to review such certificate, ruling or decision, and the Judge may thereupon make such order as he thinks fit."

**21.** The "Judge" referred to is the judge of the Circuit Court. Also relevant is O. 66, r. 6 which provides: -

> "All costs directed to be taxed shall be taxed by the County Registrar (who for that purpose shall have all the powers of a Taxing Master of the High Court) subject, as to every item, including outlay and counsel's fees, to an appeal to the Court notice of which shall be given within 10 days from the conclusion of the taxation."

**22.** Mr. M. appears to apprehend that because the County Registrar is given the same powers as a Taxing Master of the High Court, he must be subject to the same procedures. That logically does not follow. The RCC expressly confer on the County Registrar the powers of a Taxing Master of the High Court while at the same time providing for the procedure the County Registrar is to follow. Clearly therefore, the mere fact that the County Registrar is invested with the powers of a Taxing Master does not imply that he is subject to the same procedures. Nor can O. 67, r. 16 of the Circuit Court Rules be prayed in aid which provides: -

> "16. Where there is no Rule provided by these Rules to govern practice or procedure, the practice and procedure in the High Court may be followed."

**23.** That has no application to the taxation of costs which is explicitly provided for in the RCC as I have explained.

**24.** The RSC do however expressly provide for the taxation of costs in Circuit appeals so that O. 61, r. 12 provides:

> "12. The costs of [Circuit] appeals, when referred for taxation, shall be taxed by the appropriate County Registrar (who shall for this purpose have all the powers of a Taxing Master). … Any application for the review of a taxation effected under this rule shall be by notice of motion to the High Court sitting in Dublin …"

**25.** So, an appeal from a taxation by the County Registrar of Circuit Court costs *simpliciter* lies to the judge of the Circuit Court. An appeal however, from a decision of the County Registrar on a taxation of the costs of a Circuit appeal lies to the High Court sitting in Dublin. None of that affects the procedure to be followed by the County Registrar in taxing costs nor can it on any basis somehow import the provisions of O. 99 into the functions of the County Registrar.

**26.** In advancing his primary argument, the appellant places significant reliance on the judgment of the High Court in *Crown Chemical Company (Ireland) Ltd v Cork County Council* [1984] I.L.R.M. 555. There, the applicant brought a malicious injury claim against the council arising from fire damage to a building occasioned by arson. The issue of malice was contested before the Circuit Court and the applicant succeeded on liability, with the quantum aspect, presumably by agreement, to be determined by arbitration. The ultimate award, which was in the amount of approximately £115,000, was appealed to the High Court on Circuit sitting in Cork on all issues. and a compromise was reached which appears to have been about half the amount awarded. As Gannon J. noted, this seems to have been based on a recognition of the risks faced by both sides on the complex issue of malice.

**27.** The County Registrar taxed the applicant's bill of costs. The applicant claimed for the costs of four expert witnesses who gave evidence in the Circuit Court, a fire expert, two engineers dealing with different aspects of the claim and a quantity surveyor. The

disbursements to these witnesses totalled £10,393.07. The swingeing nature of the reductions imposed by the County Registrar is apparent from the fact that the total allowed for these four witnesses was £1,650.48 and it is unsurprising that the applicant appealed to the High Court. The issue for determination by the court was whether the County Registrar had applied the correct criteria to his assessment of these items. Gannon J. reviewed the relevant authorities and concluded that the County Registrar's assessment was erroneous in principle. He therefore remitted the four items to the County Registrar to be re-taxed on the basis of the directions given in the judgment.

**28.** In his judgment at p. 3, Gannon J. briefly refers to the procedure adopted by the County Registrar in dealing with these items:

> "In relation to these claims for disbursements the county registrar on taxation made substantial disallowances to which objections were made and against the disallowances made by the county registrar on the hearing of these objections this application comes before the court."

**29.** Although it appears that a procedure was adopted by the County Registrar in that case of allowing objections after an initial determination, on what basis this was done is not identified in the judgment.

**30.** However, the sentence in the judgment on which the appellant specifically relies is to be found on p. 1:

> "The applicants were awarded their costs and these fell to be taxed by the County Registrar pursuant to Order 61 rule 12 of the Rules of the Superior Courts <u>but in accordance with the provisions of Order 99 of those rules</u>." (my emphasis).

**31.** This, the appellant says, is authority for the proposition he advances that in taxing the costs in this case of both the Circuit Court and High Court, the County Registrar was bound to follow the procedure in O. 99, r. 38 of the RSC. I cannot accept that contention. First, in referring to O. 99, it is clear from the context that this can only be understood as a reference by Gannon J. to the costs of the High Court on Circuit. This is clear from the preceding reference to O. 61, r. 12 which expressly deals with appeals only.

**32.** Insofar as the court says the taxation was to be conducted in accordance with O. 99 (rather than O. 99 r. 38 specifically), this could be construed as a reference to the fact that the County Registrar is imbued with the powers of a Taxing Master to be found in O. 99, a fact recognised by the RCC as I have noted. If on the other hand it is to be read as stating that a County Registrar is required on taxing the costs of a Circuit appeal to adopt the procedure contained in O. 99, r. 38, I must respectfully disagree with it. In fairness however to Gannon J., this comment is merely one made by way of introduction to the issues that arose in that case which did not involve the correctness of the procedure concerning objections followed by the County Registrar. As such, the observation was clearly made *obiter*.

**33.** I am therefore satisfied that there is no basis for Mr M.'s contention here that the County Registrar was obliged in conducting the taxation in respect of either the Circuit Court or the appeal to adopt the procedure contained in O. 99, r. 38.

**34.** As identified by the trial judge, the threshold to be crossed for any applicant seeking leave to apply for judicial review is recognised as being that identified by Finlay C.J. in *G. v. DPP* [1994] 1 IR 374 as being: -

> "(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit…

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

**35.** As I have explained, I am satisfied that the application for judicial review in this case is fundamentally misconceived and based on an erroneous construction of the relevant rules by the appellant. In my judgment, the case advanced by the appellant does not meet even the low threshold identified in *G v. DPP*. I therefore agree entirely with the judgment of the trial judge. There was no evidence before the High Court which supported the suggestion that there was unfairness of any kind in the approach of the County Registrar to the taxation in this case. Insofar as there is an allegation of bias against him and indeed the trial judge on this appeal, that regrettably is a common charge levelled by litigants in person against judges and other decision makers who decide issues against such litigants.

**36.** The fact that a case is decided in a certain way is often interpreted by the litigant in person as a failure by the decision maker to properly consider the litigant's arguments on the premise that the tribunal must therefore be biased. That of course is no more than a

mere assertion falling far short of demonstrating bias on even a *prima facie* basis. There is nothing here that approaches an arguable ground that there was bias, actual or objective, on the part of either the respondent or the trial judge. Similarly, the suggestion that matters which were *res judicata* were improperly considered is not understood. The respondent appropriately outlined the extensive history of the matter, some of which was introduced by Mr. M. himself but there is no attempt to explain how that was somehow improperly factored into the measurement of costs for the items claimed.

**37.** I agree with the observations of the trial judge about the conduct of this litigation by Mr. M. Given the extraordinary history to which I have alluded, it is impossible to avoid the conclusion that Mr. M.'s relentless pursuit of litigation against Ms. M. is not motivated by a genuine desire to vindicate his rights but rather to weaponise litigation as an instrument of oppression again her. In my view, it should not be permitted to continue.

**38.** I would therefore dismiss this appeal. As Ms. M. had been entirely successful in this appeal, my provisional view is that she is entitled to her costs. If Mr. M. wishes to contend for any different order, he will have 14 days to make submissions in writing, not to exceed 1,000 words and Ms. M. will have a similar period to respond. In the event that such submissions are made and do not result in a different order to that proposed, the unsuccessful party may be liable for any additional costs incurred.

**39.** As this judgment is delivered electronically, Murray and MacGrath JJ. have indicated their agreement with it.