

**THE HIGH COURT
JUDICIAL REVIEW**

[2014 No. 263 J.R.]

BETWEEN

JAMES O'REGAN

FIRST APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY & OTHERS

NOTICE PARTIES

MICHAEL O'DRISCOLL (A MINOR)

SECOND APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY & OTHERS

(NOTICE PARTIES)

[2014 No. 264 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)

[2014/384JR.]

LOUISE MCCUTCHEON

FOURTH APPLICANT

AND

TAXING MASTER, ROWENA MULCAHY AND OTHERS

(NOTICE PARTIES)

[2015 No 685JR]

JUDGMENT of Mr. Justice White delivered on 5th September 2018

1. The court has already delivered judgment on the substantive issue on 16th November, 2017. Subsequently, the court heard an application for costs on 11th April, 2018, and reserved its ruling.
2. There are four separate judicial review proceedings in being, with a complicated history. When all proceedings were referred to this Court for hearing on 13th of December, 2016, it was agreed by the parties that the issue of possible mootness or if there were exceptional circumstances even if the proceedings were moot, would be determined by the court as a discreet issue. That application was heard on 23rd March, 2017, and judgment was delivered on 16th November, 2017.
3. There are six separate matters where the issues of costs arise.
 - (i) Costs of the discreet hearing on mootness of 23rd March, 2017.
 - (ii) The judicial review proceedings, James O'Regan, applicant and Taxing Master Rowena Mulcahy 2014/263JR.

- (iii) The judicial review proceedings Michael O'Driscoll (a minor) suing by his mother and next friend, Breda O'Driscoll, applicant and Taxing Master Rowena Mulcahy, respondent [2014 No. 264 J.R.]
 - (iv) Judicial Review proceedings Nicola Lambert, applicant and Taxing Master Rowena Mulcahy, respondent, [2014 No. 384 J.R.]
 - (v) Judicial review proceedings, Louise McCutcheon, applicant v. Taxing Master Rowena Mulcahy, respondent, [2015 No. 685 J.R.]
 - (vi) Costs of the costs hearing of 11th April, 2018.
4. As the judicial review proceedings did not go to full hearing, the court has already set out in paras. 43 and 44 of the judgment of 16th November, 2017, some of the issues it would consider in exercise of its discretion on costs.
5. The submission on behalf of the Applicants in respect of all four sets of proceedings that an event has occurred, namely that the proceedings are moot, and thus costs must follow the event is incorrect. That has already been stated by the court at para. 43 of its judgment of 16th November, 2017, when it stated as follows: -
- "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."
6. The court has considered the Supreme Court decision of *Cunningham v. President of the Circuit Court and Director of Public Prosecutions* [2012] IESC 39, a decision of Clarke J. of 21st June, 2012. The decision of the Respondent to complete the taxation of costs in *O'Regan, O'Driscoll and Lambert* arose as a result of the court hearings before the President of the High Court on 9th and 10th June, 2015. I have already referred to this matter in the judgment on the substantive issue on 16th November, 2017, and have decided that during that hearing the Respondent did not concede that the issues were finalised. It was her understanding at that time that the concerns about her reputation would be dealt with in the course of the further hearings on the judicial review even though she had decided to tax the costs without prejudice to those issues. The *McCutcheon* proceedings became moot because her term of office had expired. In those circumstances, the Respondent did not unilaterally bring about the circumstances where the judicial review proceedings were moot and therefore the *Cunningham* case does not have application to the issues before the court.
7. The court will deal with each application for costs individually. It is not open to the court to determine the matters in issue arising on these judicial review proceedings. It is sufficient, however, for the court to identify the nature of the justiciable dispute, determine if the proceedings were vexatious or unnecessary and whether a real issue of a prima facie nature arose to be determined by the court.

The hearing of 23rd March 2017.

8. In that discreet issue, there has been an event where an order for costs should follow. The Respondent was unsuccessful in the arguments put forward to the court on her behalf, thus the costs of that discreet application will be awarded to the consolidated Applicants in the judicial reviews. The costs are confined to the hearing on 23rd March, 2017, the preparation for same and attendance for the reserved judgment. It does not cover any of the pleadings in the original individual judicial review applications.

O'Regan v Mulcahy Rec No 2014No263JR.

9. The court has considered the pleadings in the action. It does not accept the submission of the Respondent that these proceedings were improperly brought or premature and unnecessary. The court is satisfied that there was a *prima facie* dispute between the parties on the issue of the methodology of the approach to the taxation of these costs and the issue of delay and obviously a subsequent issue which developed on the decision of the Respondent to recuse herself. It was not necessary in the affidavits grounding the application for judicial review to refer specifically to the provisions of s. 27 of the Court and Court Officer's Act 1995, or the decision of the Supreme Court in *Sheehan v. Corr* delivered on 15th June, 2017. The fact that Mr. O'Sullivan Solicitor and Mr. Fitzpatrick Legal Costs Accountant agreed to provide a breakdown of the global fees charged by counsel and a breakdown of the solicitor's instructions fees did not preclude a challenge by way of judicial review to the propriety of that demand by the Respondent. The Applicant did not have a responsibility to refer to the original taxation before Taxing Master O'Neill and the subsequent decision of the Applicant through a solicitor to object to Taxing Master O'Neill dealing further with this matter and an application being made to transfer to the Respondent. The allegations made by the Applicant relate to the period of time in which the Respondent had seisin of the taxation matter. The court accepts that the Applicant did not stand up the allegations of wrongdoing by the Respondent, and accepts that some of the wording in the grounding documentation filed on behalf of the Applicant was intemperate. There was a genuine justiciable dispute which was open to be determined by way of judicial review. From my examination of the papers, it was open to the trial judge to decide the issue either in favour of the Applicant or the Respondent on the merits. The matter did not proceed to hearing so the appropriate and fair order to make is one of no order as to costs.

(ii) Michael O'Driscoll, a minor suing by his mother and next friend, Breda O'Driscoll v. Taxing Master Rowena Mulcahy [2014 No. 264 J.R.]

10. The court has considered the pleadings. The same situation arises in this application as did in the *O'Regan* application. The court is satisfied that there was a genuine justiciable dispute between the parties and the matters referred to by the court in the *O'Regan* decision apply in this decision also. The nature of the dispute was specifically identified in the affidavit of Stephen Fitzpatrick sworn on 30th April, 2014, which deals with issues of methodology and delay. It was open to a court if this application was heard in full to decide the matter either in favour of the Applicant or the Respondent. The judicial review proceedings were not ultimately determined and the fair order to make is one of no order as to costs. The fact that the Law Society joined the proceedings as an *amicus curiae* is not relevant to the determination of the issue of costs.

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11. The issue of costs in this judicial review is more complicated and less straightforward than those in O'Regan and O'Driscoll. The Respondent submitted to this Court on 11th April, 2018 that no taxation had taken place, that it appeared before her but was adjourned because of queries raised by the Defendant in the original professional negligence proceedings and that in the intervening period between the adjournment and the adjourned date the Respondent recused herself generally from dealing with these matters and that the Applicant was not entitled to relief. It was further submitted that Taxing Master O'Neill the other Taxing Master was asked not to take the case by the solicitor for the Applicant and that Taxing Master O'Neill could have easily taxed the costs when it was transferred into his list by the Respondent and thus the Applicant brought the situation down on her own head with completely unnecessary judicial review proceedings. The Respondent further submitted that the judicial review proceedings were an engineered piece of litigation against the Respondent where her decision to recuse was not challenged and where there was another Taxing Master who could hear the taxation and that they simply should have gone in to Taxing Master O'Neill's list for hearing.
12. Mr Mc Garry on behalf of the Applicant in replying submissions briefly referred to the Lambert case by stating "after the Taxing Master sought to recuse herself generally and again we take issue with the way that is phrased". There is that letter which says "I am no longer going to deal with any of Mr. O'Sullivan's cases or any cases in which Mr. Fitzpatrick is the cost accountant" that is the import of the letter so "don't be coming anywhere near me anymore with any of your cases". So obviously that was a matter of concern. One of the reliefs claimed in the Lambert case, for example is a declaration that Nicola Lambert the Plaintiff in that case was entitled to have her costs taxed. So that is the issue in relation to the recusal."
13. The court has considered all of the relevant pleadings in this application for judicial review which are set out in the schedule to this ruling. On considering the transcript of 31st January, 2014 the Respondent had started to hear this matter and it was not just adjourned without any deliberation. At that time the Respondent had seisin of this matter and was at hearing although the hearing had not been finalised.
14. An issue had arisen at the hearing which caused concern to the Applicant's solicitor and his legal cost accountant Mr. Fitzpatrick. It prompted Mr. O'Sullivan to write to the senior counsel that he instructed in the professional negligence proceedings Mr. John P.M. White S.C. and Mr. White replied to Mr. O'Sullivan on 6th February, 2014. By letter of the 13th February, 2014 Mr. O'Sullivan passed this letter to the Taxing Master's office. This matter is referred to in the affidavit of Stephen Fitzpatrick sworn on the 5th July, 2014 grounding the application for judicial review when he states "the first named Respondent required that I should advise her of the reasons why senior counsel had directed certain reports and witnesses". In order to be able to deal with this request I was compelled to seek an adjournment to obtain the information required by the said Respondent. Mr. Fitzpatrick duly exhibited the letter from Mr. White S.C. in his affidavit on the *ex parte* application for leave. The letter of recusal of the 1st July, 2014 seems to have been a bald refusal

stating that Taxing Master Mulcahy had recused herself from taxing the bill of costs and the matter had been transferred into Master O'Neill's list. The court does accept however that in correspondence of the 30th June, 2014 incorrectly marked as 30th May, 2014 the Registrar of the Taxing Master's office had written to Denis O'Sullivan and Co. solicitors in respect of the O'Driscoll and O'Regan cases setting out reasons for her further recusal in those cases stating:

"In the light of statements that were made by Denis O'Sullivan and on his behalf in affidavits that were sworn to ground an application for judicial review and in the light of the contents of an article concerning Taxing Master Mulcahy that was published in the Sunday Times newspapers on 1st June, 2004 Taxing Master Mulcahy considers that it would not be possible for her to adjudicate on the costs to be allowed to Denis O'Sullivan and Co. solicitors in this or in any other matter. Accordingly, Master Mulcahy has recused herself from taxing the objections brought in by the solicitor for the costs in this taxation".

Mr. O'Sullivan referred to this recusal in his affidavit of 5th July, 2014 grounding the application for judicial review at paras. 7,8, 9, and 10. He stated that he replied to the letters received in the O'Regan and O'Driscoll cases indicating that he did not want the Respondent to recuse herself. Mr. Fitzpatrick in his affidavit of 5th July, 2014 also referred to the recusal at paras. 4 and 5 of his affidavit and alleged that he had been effectively blacklisted from appearing before the Respondent. The Applicant was in error in not making sure that the draft statement of grounds and the amended statement of grounds were specifically amended to deal with the recusal. Mr. McGarry on behalf of the Applicant has stated that the ground directing the Respondent to complete the taxation was sufficient to argue the principle of the Respondent recusing herself. That may well be the case but it certainly would have been much preferable if the grounds had been specifically amended to deal with that issue.

15. A serious error was made in the affidavit of Denis O'Sullivan in paras. 9 and 10 which Mr. O'Sullivan swore as an officer of the court. He gave misleading information about the position of Taxing Master O'Neill. This was clarified in an affidavit sworn by Ann Spaine solicitor on behalf of the Chief State Solicitor on the 5th November, 2014 in the Lambert proceedings seeking to have the Minister for Justice, Ireland and the Attorney General removed from the proceedings. Ms. Spaine exhibited a letter from Taxing Master Declan O'Neill of 3rd November, 2014. It is clear from that letter that paras. 9 and 10 of the affidavit of Mr. O'Sullivan were inaccurate. As these matters were subsequently entered for hearing and came before the President of the High Court Mr. Justice Kearns and subsequently Mr. Justice Noonan and subsequently myself there was an onus on Mr. O'Sullivan to swear another affidavit setting out the exact position.
16. Taxing Master O'Neill does not refer to any direct approach to him in Lambert although Mr Sreenan in his submissions to the court has submitted that Taxing Master O'Neill was directly approached by Mr. O'Sullivan and asked not to take on the case, I do not know if

that is the situation. Taxing Mater O'Neill does not refer to this in his letter of 3rd November 2014.

17. This Court is of the opinion that there were two justiciable issues in this judicial review. The first one specifically raised by Mr. White S.C. when he stated in his letter of 6th February, 2014 as follows: -

“That is why the rule has existed for as long as I can remember that when Senior Counsel has directed reports from experts and having considered those reports has decided on the witnesses to be called, it is not open to the defendants to second guess his judgment at taxation. In those circumstances, Senior Counsel’s opinion would be litigated in a forum which was not qualified to decide whether his professional judgment as a specialist in the type of litigation in question was right or wrong. Moreover, witnesses would have to be called to support or challenge his professional judgment since Legal Cost Accountants are in no way qualified to express an opinion in relation to a matter of which they have absolutely no knowledge.

It would be equally undesirable if defendants had to open up their files to show what reports they had obtained and the basis upon which witnesses were directed by their Senior Counsel and how the decision was made to call some as witnesses and not others. If the steps in the litigation which the plaintiff’s Senior Counsel advised should be taken were allowed to be challenged as being right or wrong, justifiable or unjustifiable, then basic fairness would require that the defendants would have to open their own files and advices of counsel to scrutiny and comparison. Since defendants typically refuse to disclose even the fee note of their senior counsel as they have done in this case while vigorously challenging that of the plaintiff’s counsel, it is highly unlikely that this process would appeal to them.”

18. The decision of the Respondent to recuse herself was also a justiciable issue. The article in the Sunday Times was indeed a nasty article as it did challenge the integrity of the Respondent. The information did emanate from the Freedom of Information letter of 22nd May, 2014, requested by Mr. O’Sullivan and sent to him by Miriam O’Flanagan of the Courts Service and the article referred to cases in which Mr. O’Sullivan and Mr. Fitzpatrick were involved and which were the subject of judicial review proceedings. Mr. O’Sullivan in his affidavit has sworn that he was not the source of any information provided to the Sunday Times. However, the court can only go as far as to state that the decision of the Respondent to recuse herself in the light of these matters was not a vexatious issue but it certainly was a justiciable issue as to whether she was entitled to do so or not, particularly when the solicitor on behalf of the Applicant make clear that she should proceed to tax the costs.
19. While the judicial review papers filed on behalf of the Applicant were seriously deficient, the court is still of the view that there were justiciable issues which the court has outlined where it would have been open to a trial judge under the general statement of grounds with some leniency to deal with those matters.

The Applicant is not entitled to the costs of this judicial review as a trial judge could have taken the view that the Respondent was entitled in the view of the circumstances which I have outlined to recuse herself and to seek from senior counsel reasons why expert witnesses were directed. Out of an abundance of caution, I do not consider it would be fair to award costs against the Applicant in this case for the reasons that there were substantial judicable issues which could possibly be litigated and in the circumstances I again make no order for costs.

Louise McCutcheon, applicant and Taxing Master Rowena Mulcahy, Respondent [2015 No. 685 J.R.]

20. The court has considered all the relevant pleadings in this judicial review application.

21. In the submissions to this court on 11th April, 2008, on the *McCutcheon* case, Mr Sreenan on behalf of the Respondent stated as follows: -

“It is even worse because in *McCutcheon*, the fourth set of proceedings was engineered in circumstances where they applied to Taxing Master O’Neill to recuse himself, even though he was prepared to hear the matter. They got him to recuse himself in a formal decision in the knowledge that Taxing Master Mulcahy, the only remaining Taxing Master had already recused herself, and then decide that they will seek to *mandamus* Taxing Master Mulcahy. It is bizarre in my respectful submission.”

22. He went on to submit as follows: -

“One way or the other, the relevant point is that in full knowledge of the fact that Taxing Master Mulcahy had recused herself from dealing generally with cases involving Mr. O’Sullivan and Mr. Fitzpatrick as the cost accountant, in the light of the Irish Times article and that that decision had not been *certiorated*, so that she had recused herself and would not be available to deal with *McCutcheon*. Mr. O’Sullivan brings about a situation where he objects to the only Taxing Master who can deal with the case and asks him to recuse.

Then having successfully got him to recuse himself he then goes off and gives an ultimatum to Taxing Master Mulcahy on 8th May, 2015, that if she does not fix a date an application will be made for *mandamus*. Then leave to apply for judicial review is obtained on 7th December, 2015.

So it is very hard to see Judge in terms of the conduct of the parties, which is one of the matters that you asked us to address in the context of the costs application that might be made, it is very hard to see how that conduct withstands scrutiny. That you bring about a situation, arrange a situation in which you object to the only Taxing Master available to you and then you get back to somebody who has already made a decision recusing herself and whose decision you have not sought to quash and you seek to compel her. It is a relief that the Court could simply not grant. They could never have got that relief without successfully quashing her decision to recuse herself in the first place.”

23. The leave application was grounded on an affidavit sworn by the Applicant, Louise McCutcheon, on 4th December, 2015. Her solicitors were Denis O'Sullivan & Company. This application was made at a time when the three other judicial review applications, *O'Regan*, *O'Driscoll* and *Lambert* had already been listed for hearing before the President, Mr. Justice Kearns on 9th and 10th June, 2015 and by way of encouragement from the President to settle the differences in the proceedings, the Respondent had agreed to tax those costs without prejudice to other issues in the case. The cases were pending hearing at the date of the leave application.
24. The application was also made at a time when the solicitor, Denis O'Sullivan, for the Applicant was aware of the affidavit of Ann Spaine sworn on 5th November, 2014, exhibiting the letter from Taxing Master Declan O'Neill of 3rd November, 2014. The Applicant's solicitor, Mr. O'Sullivan, was aware at the date of the application of Ms. McCutcheon that the Respondent had as far back as 30th June, 2014, and 1st July, 2014, attempted to recuse herself on those three other judicial review applications. While Ms. McCutcheon could not be deemed to be aware of these other judicial review applications, Mr. O'Sullivan was. He had a duty as an officer of the court to bring this to the attention of Humphreys J. who granted leave on 7th December, 2005.
25. Objectively I can only speak for myself in this matter. if I was conducting an application *ex parte* for leave to bring judicial review proceedings where a matter in issue was the subject of judicial proceedings already in being waiting to be determined, that is whether it was appropriate or not that the Taxing Master had recused herself in other judicial review proceedings, I certainly would have expected that that information would have been brought to my attention before I would decide to grant an *ex parte* order for leave to seek judicial review. It is inexcusable that this matter was not brought to the attention of Humphreys J. It may have been brought to his attention orally but it was certainly not put on affidavit.
26. The submission made by Mr Sreenan on behalf of the Respondent to this Court on 11th April, 2018, was not answered. No reason was advanced by the Applicant in response to his submissions which I have outlined.
27. This judicial review application was vexatious and bound to fail and the Respondent is entitled to her costs of this application against the Applicant. It should be borne in mind unless there is any confusion that there does not seem to have been any court hearing on notice in relation to this application. The court hearings before Kearns P related to the other three judicial review matters. Subject to any submission the parties wish to make it does not seem to have been a part of any application before Noonan J. on 30th June, 2006 or before myself on 13th December 2016.
28. There will be six separate orders drawn, and I will give the parties an opportunity to make submissions on the costs of the costs hearing of 11th April 2018.