THE COURT OF APPEAL
CIVIL

NO REDACTION NEEDED

Court of Appeal Record No. 2020/275
High Court Record No. 2019/717J

Whelan J.
Murray J.
Pilkington J.

BETWEEN

JOHN O'CONNELL

APPLICANT/APPELLANT

- AND –

THE TAXING MASTER (PAUL BEHAN)

- AND -

THE COURTS SERVICE

- AND -

THE MINISTER FOR JUSTICE, LAW AND EQUALITY; THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 6th day of October 2021

1. In my judgment of 1 July 2021 ([2021] IECA 186), I explained why the applicant had failed to establish any error in the decision of the trial Judge not to grant the applicant's

application for leave to seek judicial review of a ruling of the first respondent refusing to recuse himself from further involvement in the taxation of costs in certain proceedings between the applicant and the Building and Allied Trades Union. I reached the same conclusion insofar as the applicant had sought to challenge to the *vires* of Order 99 Rules 38(1), (2), and (3) of the Rules of the Superior Courts. Whelan J. and Pilkington J. agreed with that judgment.

2. I also said in that judgment that it was my provisional view that, the appeal having been dismissed, the costs of the third to fifth named respondents should be borne by the applicant. The applicant has disputed this and instead urges the Court to make an order for costs in his favour or to make no order for costs. He says that he was successful on an issue, in particular insofar as he had contended that there was no order by the High Court to put a party on notice and this Court has set out that the applicant can join a notice party after the leave stage, or it is not obliged to have all parties on notice at the leave stage. He says that this Court has '*accepted that it was the Courts office of the Taxing Master that directed the Appellant and accepted his payments for a transaction towards a objection/appeal when the Court of Appeal has confirmed that this matter could not progress under this Rule 99'*.

3. The applicant argues that the appointment of a decision maker, the Taxing Master, with connections and conflicts of interest in this area of the Courts Service raises serious concern and is a matter of public importance and that this has created bias. He states that his appeal is justified on the basis that it is only the public and litigants who provide any scrutiny as to the decision-making process by the Minister for Finance as to these types of appointments. The Minister, it is further contended, has a duty of care to ensure that these public appointments be carried out for not just litigants but the entire industry.

4. The third, fourth and fifth respondents apply for an order for the costs of the appeal to be adjudicated in default of agreement, expressing their agreement with the provisional view I had adopted in my judgment. They state that the outcome of the appeal could not be clearer and that in light of the unequivocal nature of the Court's decision, that they have been entirely successful in their opposition to the appeal. They cite the judgment of *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 and the principles derived there from the costs regime provided for under s. 169 of the Legal Services Regulation Act 2015. They say that there are no special reasons to depart from the normal rule in these circumstances.

5. I am in agreement with the respondents and their submissions. In my judgment of July 1 I found that the trial Judge was correct to refuse leave to challenge the *vires* of Order 99 Rule 38(1), (2) and (3) given that the only credible basis on which he could complain of those provisions had been conclusively determined by the Supreme Court in *DMPT v. Taxing Master Moran* [2015] IESC 36, [2015] 3 IR 224. I further decided that the failure of the applicant to take steps to formally involve BATU in the proceedings was one part of a sequence of procedural failures which, when viewed together, more than justified the trial Judge's decision to refuse in his discretion to grant the relief claimed. These included the failure to put the impugned decision before the court in circumstances where (as I also explained) the terms of that decision presented significant obstacles to his obtaining the relief he claimed. In fact, I concluded upon consideration of that decision that the applicant had failed to surmount the threshold required to obtain leave to seek judicial review.

6. It is clear from the foregoing that the applicant was not successful on any issue. It was not disputed that there was no order by the High Court to put a party on notice. The fact

that I explained that an applicant for leave to seek judicial review can join a notice party after the leave stage is neither here nor there : what was relevant was that in this case the trial Judge was entitled in his discretion to refuse leave to seek judicial review *inter alia* because this had not been done. Nor is there any issue of public importance such as would justify the court in departing from the normal rule : I found that having regard to the matters explained by the Taxing Master in his decision (which it must be repeated was never addressed by the applicant in the High Court), the applicant had failed to establish an arguable case of bias. Finally, in my judgment I made no decision as to how or why the applicant perceived that he was required to agitate an issue of bias under those provisions of the Rules he sought to impugn. I would observe that the relevant provisions are quite clear in specifying when an application for review must be made to the Taxing Master.

7. For these reasons it is my view that the Court should make an order for costs against the applicant in favour of the respondents. A stay should be placed on that costs order in the event of an application for leave to the Supreme Court. Whelan J. and Pilkington J. are in agreement with this ruling and the order I propose.