Neutral Citation Number: [2010] IEHC 24

THE HIGH COURT

COMMERCIAL

2007 2078 P

BETWEEN

IVANO CAFOLLA

PLAINTIFF

AND

OSSIE KILKENNY, JERRY O'REILLY,

LYTTLETON ENTERPRISES LIMITED

AND

CONEFORTH TRADING LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 5th day of February 2010

This case is a review of taxation in respect of three major items of a bill of costs. The first three defendants are the paying parties and they have challenged the awards made by the Taxing Master in respect of the solicitors' instructions fee and the brief fees of senior and junior counsel who acted for the plaintiff.

The action began with the issue of a plenary summons on the 16th March, 2007 and it was admitted to the Commercial Court where it proceeded according to a tight schedule. The case did not go to a hearing in the end because the defendants made a series of concessions leading ultimately to their consenting to an order in terms sought by the plaintiff. Also by consent, the Court ordered the costs of the action to be paid to the plaintiff when they were taxed and ascertained.

The background to the case was a plan to acquire and develop Tolka Park in Drumcondra, Dublin for residential purposes. The plaintiff, Mr Kilkenny and Mr O'Reilly were shareholders in the fourth defendant, Coneforth Trading Ltd. It was necessary in order to perfect the title to the property to secure the lessee's interest in a 99 year lease of the land that was known as the "Donnelly Interest." This was done by agreement with the owners but the interest was actually transferred to Lyttleton Enterprises Ltd and not Coneforth. The primary relief claimed by the plaintiff in the action was a declaration that Lyttleton held the Donnelly interest in trust for Coneforth. He made this claim as minority shareholder in Coneforth against the company and the majority shareholders who denied his allegations. This type of proceeding is known as a derivative action and it presented substantial difficulty because the plaintiff was endeavouring to prove as against the company and its controllers that the company's interests were being damaged. Notwithstanding these obstacles, the plaintiff pursued his claim and succeeded. He then proceeded to recover the costs against the first, second and third defendants who had been ordered to pay them.

The case was unusual, complex and difficult but it was concluded with great expedition. The plaintiffs' solicitors received initial instructions in mid-November, 2006, the plenary summons was issued on the 16th March, 2007 and the orders granting the relief sought by the plaintiff and his costs were made on the 4th December, 2007.

Taxation of costs followed the usual procedure. There was an original hearing and award, the defendants put in objections and after a further hearing the Taxing Master came to his decision and gave a written ruling rejecting the objections that the defendants had made and he incorporated his decision and reasoning in a 24-page report to this Court. This is the important document on which this review is based.

The three items in dispute are as follows:-

1. The instructions fee was claimed by the plaintiff's solicitors at €620,000 and the Master awarded €550,000;

2. Senior counsel's brief fee was marked at €100,000 and the Taxing Master allowed €75,000;

3. Junior counsel's fee of €65,000 as marked was reduced to €50,000.

The defendants (by which I mean the three paying defendants) object to these allowances on four grounds which Counsel, Mr Declan McGrath, summarised as follows:

1. The Taxing Master did not examine the nature and extent of the work that was done by the solicitors and counsel to justify the fees claimed and did not relate the amount allowed to time, labour and expertise;

2. He overvalued the money and property in the case;

3. He did not make any reduction for the concession of liability that was made 2½ weeks before the date of trial;

4. The fees allowed were grossly disproportionate to those of the defendants' solicitors and counsel and the Taxing Master was wrong to reject such comparison.

The plaintiff rejected these arguments. Mr Andrew Fitzpatrick, his Counsel, argued that the Master carried out his task in accordance

with the relevant legislation and the Rules of the Superior Courts and that he followed the precepts laid down in the cases decided by this Court. He rebutted the specific complaints listed above and contended that the defendants had failed in an essential requirement, namely, to specify the correct allowances for the disputed costs. Overall, he said that there was no injustice done to the defendants.

In order to succeed, the defendants have to establish that the Taxing Master erred as to the amount of one or more of the above allowances so that his decision was unjust. The jurisdiction to review the taxation is contained in s. 27(3) of the Courts and Court Officers Act, 1995 which limits the capacity of the court to interfere with a decision of the Taxing Master to allow or disallow an item or items of costs to cases where the court is satisfied that the Master was in error as to the amount of an allowance resulting in injustice. Section 27 is as follows except that I have highlighted certain parts for greater clarity:

> "27.—(1) On a taxation of costs as between party and party by a Taxing Master of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges
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> (2) On a taxation of costs as between party and party by a Taxing Master of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master (or County Registrar as the case may be) considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part.
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> (3) The High Court may review a decision of a Taxing Master of the High Court and the Circuit Court may review a decision of a County Registrar exercising the powers of a Taxing Master of the High Court made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the Taxing Master, or the Circuit Court is satisfied that the County Registrar, has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master or the County Registrar is unjust."

The section prescribes a new approach for the Taxing Master in assessing costs. Whereas previously the main focus in a taxation was on comparisons with other cases, particularly when it came to major items such as instructions' and brief fees, s. 27(1) and (2) of the Act now focus on the work that was done in a case by solicitors, barristers and expert witnesses and mandate the Taxing Master to examine the nature and extent of their work in order to evaluate the claims in the bill of costs. The section has been examined in a series of cases and the law can be considered to be settled in this area. The consensus is that the Master must assess the nature and extent of the work which is the subject of the item of claim in the bill of costs. This applies to the work of a solicitor giving rise to his claim for his instructions fee and also the work of counsel. In *Superquinn Ltd v Bray UDC* (No 2) [2001] IR 459 at 480 Kearns J said:

> "It seems to me that in the aftermath of the Act of 1995, any ruling of the Taxing Master must of necessity, set out in some detail an analysis of the work and the reasoning which leads to the determination made in respect of solicitor's instruction fees and counsel's fees, particularly having regard to the powers and responsibilities imposed on the Taxing Master by s. 27(1) and (2), and on the court by s. 27(3), given that the Court may be called upon to review taxation."

Charleton J in *Mahony v KCR Heating Supplies* [2007] 3 IR 633 said at para [11] that the section "establishes the touchstone for the manner in which costs are to be assessed." He continued at [12]:

> "Up to that time, the use of comparisons with the amounts awarded in such things as counsel's brief fees, refreshers and solicitors' instruction fees had been a paramount consideration. As Kearns J explains, the Act of 1995 made a determination of the actual work done in any case the primary consideration. Of course, heedlessly pursuing work for its own sake, which is of no benefit to the case, or engaging expert witnesses who have nothing to offer the case, cannot add to the bill which the losing party is obliged to pay, as unnecessary work may be discounted. This process of examining the solicitor's files, however, is part of the process of examining the nature and extent of the work done in a case."

At para [16] the judge commented on the importance of the taxation system.

> "Those procedures are necessary as it is vital to control the costs of litigation. When litigation becomes too expensive it can operate as a fetter on the constitutional right of access to the courts."

Although the terms of s. 27 would appear to be permissive because of the language used – the Taxing Master "shall have power to…" –the section does, in fact, impose a mandatory obligation on the Taxing Master. As Smyth J said in *Landers v Judge Patwell & Anor* [2006] IEHC 248:

> "The use of the word "shall" in the subsection is to be construed as mandatory. There is therefore an express obligation on the Taxing Master (and, consequently, on the court on a review) to examine "the nature and extent of work done"."

Kearns J. in *Superquinn v. Bray UDC* said at p 475:

> "Where such powers are expressly conferred on the Taxing Master by statute, it must follow that the Taxing Master also has a duty to examine the nature and extent of work in any particular case and make his own fair and reasonable assessment on the merits accordingly."

When the Taxing Master has examined the nature and extent of the work done, he then proceeds to exercise his discretion in making an appropriate allowance in respect of the items claimed in the bill of costs. He may allow or disallow the whole or part of the charge made for an item. Order 99, rule 37 (22) (ii) of the Rules of the Superior Courts, which is as follows, applies to this exercise:

> "In exercising his discretion in relation to any item, the Taxing Master shall have regard to all the relevant circumstances,

and in particular to –

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question."

Central to this case are (b) above and, more specifically, the requirement to take into account the time and labour expended. Relevant also are the matters listed at (a), (e) and (f).

As to how the Taxing Master should approach his task, the authorities say that the Taxing Master must establish in sufficient detail the amount of work done and, obviously, the type of work done and then go on to put a value or cost on that by applying rational principles that have sufficient transparency to enable them to be examined on review.

It is also necessary as Charleton J. said in *Mahony v KCR Heating Supplies* that the process should be characterised by natural justice so that the paying party knows why he has to pay the particular amount. And Smyth J in *Landers v Judge Patwell* emphasised the rational nature of the estimation of the costs.

The most detailed prescription of the obligations of the Taxing Master is contained in the judgment in *C.D. v Minister for Health & Children and Anor* [2008] IEHC 299. In that case, Herbert J analysed the earlier cases, some of which I have mentioned above, and acknowledged the change that was brought about by s. 27 of the 1995 Act. The judge then looked at how the mandatory considerations in the Rules are to be applied in this context of establishing the nature and extent of the work and then putting a value on it. Herbert J said that the Taxing Master when he is considering the instructions fee has to list out the different kinds of work that the solicitor did. In regard to the obligation to look at the nature and extent of the work and the time and labour expended and the amount claimed and the degree of responsibility undertaken by the solicitor, the different types of work have to be specified and the time spent on them detailed.

It is obvious that not every piece of work is going to be charged out at the highest rate. Or, rather, not every piece of work can be recovered from the paying party at the highest rate. It may be that a client will insist on the most senior and expert solicitor doing every single piece of work in the case, no matter how trivial or mundane, or even wholly clerical in nature. The client is entitled to do that, but is not entitled to recover costs at that level from the other side. So, as Herbert J points out, the 1995 Act and the Rules taken together impose the obligation on the Taxing Master to make a detailed analysis of the work that was done and of the claims for payment in respect of each item of work or, at least, for each category of the work that was done. Thus, for example, purely routine work would be charged at one rate for whatever time was appropriately and reasonably taken up by it, whereas other work would call for a higher level of remuneration because the responsibility taken in doing that work was higher and because it needed a much more qualified person to do it. The Taxing Master also has to decide whether the work was necessary and he can and must disallow any unnecessary work or expense that has been engaged in or incurred. Adopting the approach prescribed by Herbert J. will obviously require an analysis of the time records of the solicitor making the claim for costs. It may be that a solicitor will not carry such records, although I would have thought that those solicitors would be few in the present world and becoming fewer as time goes on. But, assuming that there are no time records, it should nevertheless be possible for the work to be detailed and for the time spent to be estimated or calculated and to the extent that there is difficulty in calculating the time spent, that is a problem for the claimant solicitor because there is a clear obligation under the Rules to have regard to that element.

What this comes down to, as I see it, is that the Taxing Master is asked to inquire of the solicitors claiming the costs, what work they did, who in the firm did it, how much is charged for it or what was the appropriate rate and how long the work took. Asking what a person did and how long it took are the most elementary inquiries in evaluating work. This is not, of course, to say that getting the answers to these questions is the end of the process, but it does indeed seem to be the beginning of the exercise that is required to be done by the Taxing Master under the section and the Rules.

The first challenge in this case is to the instructions fee, which is of course the biggest item in dispute, on this very ground because the Taxing Master did not call for and examine the time records of the plaintiffs' solicitors. Specifically, the complaint is made that the Taxing Master was obliged to examine the nature and extent of the work, the time it took to do it, the different levels of work required and the amounts that were charged for them. Counsel for the defendants, Mr. Declan McGrath, relied on the terms of s. 27, the mandatory references under the Rules and the cases particularly the judgment of Herbert J above cited which, he contended, could serve as a critique of the approach taken by the Taxing Master in this case, because the criticisms made by Mr. Justice Herbert apply, he said, just as much in this case as they did in the C.D. case. Moreover, Mr. McGrath argues that endorsement of the approach taken by the Master or failure to overturn it would amount to an implicit rejection of the judgment and the reasoning of Mr. Justice Herbert.

The references to this matter in the Taxing Master's report are as follows. At p. 5 the Taxing Master is dealing with the submissions put in by the defendants in objecting to the three items of costs and the following appears:-

"It was submitted that I erred in failing to carry out a full assessment of the nature and extent of the work of both solicitor and counsel as it is incumbent upon me under the provisions of s. 27(1) of the Court and Court Officers Act 1995, and the apply the provisions thereof.

The defendant submits that I should have conducted an inquiry in respect of para. (b) of the provisions of O. 99, r. 37(22)(ii) of the Rules of the Superior Courts 1986 with regard to the time and labour expended by the solicitors. It is submitted that it is incumbent upon me to inquire into the time expended as this quite clearly is a most relevant factor to be taken into account by me in the

exercise of my discretion…

The defendant submits that I must carry out a root and branch examination of the work of both solicitor and counsel and it is a duty of [sic] imposed on me to inquire into and ascertain the nature and extent of the work carried out. In *Superquinn v. Bray UDC* it was held by Kearns J. as follows:-

> 'It seems to me that in the aftermath of the 1995 Act a ruling of the Taxing Master must of necessity set out in some detail an analysis of the work and the reasoning which leaves [sic] to the determination made in respect of solicitors instructions fees and counsels fees, particularly having regard to the powers and responsibilities imposed on the Taxing Master by s. 27(1) and (2) and by the court on s. 27(3) given that the court may be called upon to review the taxation.'"

Later in the report at p. 8/9, the Master quoted another part of the defendants' submissions on this point where they cited a ruling of Taxing Master Moran of the 2nd March, 2005, in which he said:-

> "Section 27(1) of the Courts and Court Officers Act 1995, expressly confers on the Taxing Master power to examine the nature and extent of the work done and the services rendered for the respondent in this matter which was necessary and proper to defend his claim. It may not be necessary to perform this exercise on all taxations. Where the Taxing Master is obliged to exercise this power he has the duty to perform a root and branch examination into the nature and extent of the entire work done. Having carried out this exercise the Taxing Master must then assess what he, in his discretion, considers to be a fair and reasonable allowance for that work.
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> We are aware that certain timesheets have been prepared. These have been called for and produced to Mr. O'Neill who has sought details of the relevant hourly charge-out rate. Both Mr. O'Neill and Mr. Behan have relied on extracts from the judgment of Laffoy J. in *Minister for Finance v. Lawrence Goodman & Ors* – 8th October, 1999 – Laffoy J., and *Superquinn v. Bray UDC* (Unreported, Kearns J., 5th May, 2000).
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> Where time is recorded it is in my opinion a relevant factor for consideration in the quantification of the overall extent of the work done in a case. It is by means conclusive. There may be many elements of the overall work which was not recorded such as secretarial and administrative just to name two.
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> The measurement of the costs shall not be just a mathematical exercise of hours x rates. Such an exercise on its own will create injustice. It is very important that the nature of the subject matter in respect of which work was done is fully appreciated and understood. Laffoy J. in *Goodman* performed a mathematical exercise as can be seen from p. 57 of the her judgment and applied an uplift in respect of certain hours and then proceeded to make an unexplained lump sum deduction in determining the final amount of the instructions fee.
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> In this taxation I will [be] insisting on a full examination under s. 27(1) of the above Act together with consideration of all relevant timesheets as an aid factor in helping me to determine the overall amount of work done and performed on behalf of the successful respondent.
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> I will not be assessing the instructions fee merely by performing a mathematical exercise."

The Taxing Master cited the plaintiff's submissions in response to these criticisms made by the defendants. He recorded at p. 17 that:-

> "It is also the plaintiffs case that there is no basis whatever for the defendant's assertion that I failed to carry out an adequate assessment of the plaintiffs solicitors work. All documents were retained by me for the purpose of assisting him [sic] in considering the instructions fee and the detailed analysis by me which prefaced my assessment of the instructions fee clearly testifies that a root and branch consideration of the issues on the solicitor's files had been conducted. It is the plaintiff's case that the defendants' disagreement with my assessment does not represent a legitimate basis for alleging that I failed to adequately consider the documentation."

Again, at pp. 17/18 the Master further referred to the submissions by the plaintiff as follows:-

> "The instructions fee falls to be assessed in accordance with the criteria as outlined in s. 27 of the Courts and Court Officers Act 1995, and O. 99, r. 37(22)(ii) RSC which requires*, inter alia*, that I should take into account a range of criteria, time being one of the elements thereof. The defendants' submissions in this regard highlight the dangers inherent in focusing on one aspect to the detriment of the others and, in fact, represent an attempt to distract and detract from the true nature and extent of the plaintiff's solicitor's work. Under the relevant Rules of Court the element of 'time' is to be considered by the Taxing Master with the skill, specialised knowledge, responsibility and labour expended by the solicitors, together with the other factors outlined. The instructions fee was accordingly presented for taxation and assessed by the Taxing Master in the usual manner and in compliance with the relevant statutory requirements."

Following the references to the submissions of the parties, there is a heading at p. 18 – Conclusion – that introduces the final part of the Taxing Master's report covering pp. 18 – 24. In this part, I am unable to find any conclusion or judgment or determination made by the Master on the point raised by the defendants' in their objections and expanded in the course of the submissions as to the obligation to look at the time actually spent by the solicitors on the work that they did. It would appear that the Master adopted the submission made by the plaintiff as to the time issue. But the Master does not say that and unfortunately he does not appear to have given the matter the serious consideration it required. Indeed, beyond recording the plaintiff's submission he entirely failed to do so. There could have been no misapprehension about this issue in view of the information that was put before the Master and that he recorded in the course of his report.

It is not obvious why the Taxing Master would not have wished to avail himself of this useful tool to assist him in his work. There is of course no suggestion that the process of taxing costs is a mere mathematical exercise in the sense that the only thing to do is to multiply the number of hours reasonably expended on work by an appropriate rate of charge per hour. But how could anybody say that such a calculation is of no relevance? Or how could any evaluator of work acting reasonably reject out of hand the two queries: what work did you do? and how long did it take? In this instance, it was believed that there were timesheets available to show the time that was spent by the plaintiff's solicitors and, presumably, by the different personages in the firm in working on this case. The defendants had pointed out the relevance of those records and the mandatory nature of the inquiry as to the time spent.

Mr. Fitzpatrick argued that time records are tempting but are not the law and he cited *Treasury Solicitor v Regester and Anor* [1978]

1 W.L.R. 446 at 450/1, where Lord Donaldson expressed reservations about using time as a measure for determining a fee in cases whose other features dwarfed it into insignificance. In *Thompson v Dept of the Environment for Northern Ireland* [1986] NIJB 73, Carswell J. said at 83 that the assessment of remuneration was "an exercise in balanced judgment, not a purely arithmetical exercise." Counsel said that there was no authority in this jurisdiction requiring the Taxing Master to call for time sheets. These helpful judgments do not, however, support an argument that they are to be ignored.

Counsel relied on p. 22 of the Taxing Master's report to show that he looked at the work actually done: "He waded through the eleven boxes," Mr. Fitzpatrick said, and he was, therefore, able to see the amount of work actually done. The reference is to the following:

> "The taxation of costs took place on the 28 July, and I was given eleven bankers boxes complete with all the briefing documentation and the solicitors working papers to consider. Having considered the papers and examined the nature and extent of the work pursuant to s.27 of the [Courts and Court Officers Act, 1995] …."

He also refers to pp. 1 – 4 of the report and p. 18 and says that the Taxing Master examined all the papers in the case. In thus examining the work and papers, it is submitted, the Taxing Master imbibed all the relevant information about the work and then ruled on all the objections raised. The Master does not identify the sources of the information in these pages and it is not apparent that it had to be gleaned from the documents in the eleven boxes.

I cannot agree that the Taxing Master complied with the Act and the Rules. It seems to me that the requirements of s. 27 of the 1995 Act, of O. 99 r.37 (22) (ii) of the Rules of the Superior Courts, the obligations derived from them and explained by Kearns J and detailed by Herbert J are all to the same effect. The other cases endorse those views in more or less detail. The Taxing Master's colleague in the passage that he cited in his report in this case contains a clear description of what is required.

In my view, the approach taken by the Taxing Master in this case represented a regression to the previous practice prior to the 1995 Act. Kearns J in *Superquinn v Bray UDC* disapproved of an 'a priori' approach. That is what happened in this case. I think that the Taxing Master fell into error, and serious error, in the way he approached this question, and particularly in the way he rejected the suggestion that he had to inquire as to the time that was taken to do the work and the different parts of the work. I agree with Mr McGrath that a finding to the contrary would represent a rejection of the principles that are clearly laid down in the succession of cases that have analysed the changes to taxation that came about following the enactment of the 1995 provisions.

This approach adopted by the Master is difficult to understand in light of his observations in an earlier case about the difficulty of evaluating work when he did not have available to him solicitors' timesheet records. Smyth J. in *Landers* said:

> "The Taxing Master further stated:
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> > In cases such as the instant case with the absence of time records, it is difficult to precisely value the work in monetary terms. [Page 10]
> >
> > In the absence of particulars in this regard, there was an absence of a relevant matter. There is therefore an inherent frailty in arriving at a decision which is devoid of a relevant circumstance.
> >
> > The Taxing Master goes to great trouble to quote from several sources which help or helped him to come to his decision, including Greenslade on Costs (Longmans 1993). Of the nine elements recited as going to inform the function of the Taxing Master in assessing the instructions fee, one-third of the guidelines, to wit:
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> > > "(d) to determine the time actually spent by each such earner in the conduct of the matter.
> > >
> > > (e) to decide whether such time was reasonably spent.
> > >
> > > (f) to calculate the total cost of that time (excluding attendances or other matters covered elsewhere in the Bill other than the preparation time) . . ."
>
> were not capable of detailed rational consideration for the reason the Taxing Master himself gives, ie "the absence of time records."

The Master also fell into error in failing to provide a detailed analysis of the work that was done. I do not think that he performed a root and branch examination into the nature and extent of the entire work done. Looking at the decision part of the report, at pp. 19/20 for example, it is not possible to understand how the Taxing Master arrived at this conclusion, nor is it possible to see what work he ascertained had been carried out, or that he decided that it was reasonable and necessary in the circumstances and went on to value the work. These pages are replete with vague generalisations such as "considerable correspondence was entered into", "a number of draft affidavits being prepared and considered", "considerable work was undertaken with diverse parties", "considerable work was undertaken in relation to the witness statements", "the work undertaken also discloses considerable correspondence with DTZ Sherry Fitzgerald in relation to their draft report in title matters". This unfortunately is the very antithesis of what was specified by Smyth J., Kearns J., Herbert J. in the cases above cited and by other judges in the cases on s. 27 and O. 99.

I find it impossible to understand from the Taxing Master's report how he arrived at the figure of €550,000 for the instructions fee. It is not just that one cannot understand why he awarded such a high figure; it is just as impossible to understand why he reduced the amount from the €620,000 that was claimed. There is simply nothing to enable one to see the process of reasoning that resulted in the figure of €550,000. Counsel, Mr. McGrath, said that the observations of Mr. Justice Herbert in C.D.'s case on the bill of costs there applied just as much to this decision, and I think he is correct in that submission. Similar considerations apply to the allowances in respect of Counsel's fees, to which s.27 also applies.

The defendants argue that the Taxing Master had excessive regard to the potential development value of the overall site that was intended to carry the whole project. The interest that was in dispute in the case was known as the Donnelly interest because it was an intermediate holding held by a company of that name. The contract for sale whereby Coneforth acquired that interest through the vehicle of Lyttleton was for €2.5 M. The defendants argue accordingly that this is the value of the property in issue and not the overall development value of the land. Even if the latter value is to be taken into account, it is necessary to make deductions for the outgoings so as to arrive at nett figure. The context of this discussion is the obligation under O. 99, r. 37 (22)(ii)(f) on the Taxing Master in exercising his discretion in relation to any item to take into account "where money or property is involved, its amount or value".

It seems to me that there is validity to this criticism made by the defendants of the approach taken by the Taxing Master. However, it is impossible to know what impact the Taxing Master's approach had on his assessment of the instructions and brief fees. I think it is obvious that the value of the matter in dispute is going to have an influence on the amount of the fees. The amount of responsibility in a big case where the stakes are very high is much greater, as are the stresses and strains and pressures compared with a small case. It has always been recognised that the fees in a big case will be greater than the fees in a small case, although, obviously it is not simply a matter of multiplying the fees by the difference in the subject matter in dispute. The rules recognise that the amount of money or the value of the property in dispute is a relevant matter to be taken into account.

And it also seems to me that it is reasonable for the Taxing Master to look not just to the immediate property or money but to look beyond that to the overall importance of the dispute in the relations between the parties. The Taxing Master was entitled in this case to make some assessment of the place of this dispute in the overall scheme of development for Tolka Park. Paragraph (f) permitted him to do so and he was also entitled to look to that value under para. (e) as to the importance of the cause or matter to the client. In this case the cause or matter was of enormous importance to the plaintiff.

The criticism that I think is legitimate in this area is that the Master failed to take account of the rival valuations and also of the development costs that would have to be deducted when the nett development value of the site was considered. It seems to me that when it came to this question, the Master should have decided whether the value of the property had an effect on the costs allowances he was making and, if so, what was the nature in general terms of the impact. It would have been reasonable for him to say whether he was increasing or decreasing the instructions and brief fees because the property was of exceptionally high value or because it was of lesser value or whatever reason. He should have addressed the valuation because he is obliged to take it into account under the rules. But the fact that he did not do that does not necessarily mean that it his allowances were wrong. The difficulty is that it is impossible to know how this or any of the other matters in dispute on this hearing have impacted on the thinking of the Taxing Master in making his allowances.

It is important that there should be an independent system of assessment of the costs that fall to be paid by an unsuccessful party. The Taxing Master must act judicially and so he has to proceed in a rational, transparent way in accordance with fair procedures. And as has been said by Charleton J and other judges, a paying party should know why he is being obliged to pay the particular sum that the Taxing Master awards. In this case, the disputed costs are a very large sum of money and it is entirely legitimate for the defendants to want to know why they have to pay that much and how the figure was arrived at. The more general and non-specific the assessment, the more difficult it is for any reviewing body such as this court to decide whether the task has been done properly. The essence of transparency is to enable everybody to understand what has been done and why. It operates as an incentive to the decision maker to proceed in a proper manner and it enables the reviewer to assess the process independently. Giving reasons is also an essential part of any judicial-type process or adjudicative system.

The next point is that the Taxing Master did not take sufficient account of the fact that liability in the case was conceded in November 2007, some six weeks before the case was due to be heard in the Commercial Court. On this question, I do not think that the decision of the Taxing Master can be impugned. The point relates more to counsel's brief fees than it does to the solicitors' instructions fee. As it happens, I would agree with the Taxing Master's view in so far as it relates to the instructions fee but I would disagree on the impact of this development on counsel's fees. Having said that, I think that there is room for debate on the question and I do not think that it can legitimately be said that the Master was in error in this matter or that injustice resulted from his view. I believe that his conclusion was a legitimate one and, more importantly, it was reached after a consideration of the issue in a rational and acceptable manner and that is sufficient.

The last criticism of the Taxing Master was that he did not consider the fees charged by the defendants' solicitors to their clients to be relevant for comparison with the plaintiff's costs. Comparison of costs in other similar cases is recognised as a method of cross-checking the costs allowed in the instant case. Obviously, the difficulty is to find cases that are truly comparable and not just where the fees are at the level desired by the party to the taxation. The search is for relevant comparators.

As to the actual comparison of the costs charged by the defendants' solicitors and those claimed by the plaintiff's solicitors, I think the Master was entitled to conclude that the work done by the plaintiff's solicitors was substantially greater than that by the defendants'. There is in the report a good deal of discussion about the different positions of the parties but the essential point is, I think, a valid one. The difficulty that presented itself to the plaintiff in trying to prove his case was substantially different in its work requirements than was the work done by the defendants' advisors. A basic point that the Taxing Master made is that it was easier for the defendants to establish the facts. Whether they were favourable or unfavourable is another matter, but the plaintiff had the real difficulty that he had to prove his case by establishing facts in circumstances where much of the relevant information was within the power or procurement of his opponents. It was, accordingly, legitimate for the Taxing Master to have regarded this difference in the positions of the rival parties as significant. What is less satisfactory is his outright rejection of any relationship between the costs of one side and the other. In my view, before he could do that, and I am not saying that it was impossible to reject the comparison, the Master had to assemble the relevant differences. On the face of it, there is a good deal to be said for the point made by Mr. McGrath on behalf of the defendants, that an obvious starting point for an analysis of fees and comparisons is what the other side in a particular case charged their clients. I think that the transparent and rational way to approach the question was to assess the different levels of work as the Taxing Master saw it that had to be done by the two solicitors firms. He might have decided that it was impossible to make a valid comparison between the two, for a variety of reasons. On the other hand, assuming that there was some *prima facie* basis of comparison, then it would have been reasonable to assess whether the plaintiff's solicitors had to do more work than the defendants' solicitors and to see whether the difference could be calculated. That would have given some basis of comparison, but instead of that, the Taxing Master rejected, more or less out of hand, any comparison with the defendants' fees.

When taxation requires comparison of cases, which is recognised as a checking mechanism, I think that the scheme comprising s.27 and O.99 r.37 (22) (ii) requires that the cases be compared by reference to relevant criteria, of which the principal one is the amount of work involved. The obligation is on the Taxing Master to conduct the comparison in a way that is rationally related to the object of the exercise, which is to test the reasonable comparability of the case to the one that is being assessed. If that approach is not adopted in comparing cases, it seems to me that the process affords little in the way of useful guidance and is another example of 'a priori' evaluation.

It seems to me overall, therefore, that the Taxing Master was indeed in error in this case. I think that it is probably the case that this taxation was something of a regression and that the Master misdirected himself and overlooked the cases that have given guidance on the approach he should take and, indeed, is obliged to do, in light of s. 27 of the 1995 Act and the provisions of O. 99. I think that the Master failed to ascertain the nature and extent of the work done by the claiming solicitors; he failed to evaluate that work as required by s. 27; he failed to ascertain the time spent on the work, as he was required to do by para. (c) of O. 99, r. 37 (22) (ii). The Master failed to take the steps specified by Herbert J. in the C.D. case; in my view, if the court were to uphold this taxation, it would amount to an implicit rejection of the approach prescribed by Herbert J. in that case. I am not prepared to do that. It seems to

me, indeed, that Herbert J has helpfully set out what needs to be done in applying s. 27 and the Rules of the Superior Courts and has done so in a way that is of substantial assistance to anybody preparing a Bill of Costs or reviewing one. The approach taken by the Master in this case is inconsistent, not only with the judgment of Herbert J, but with the other cases, with the approach taken by his colleague Taxing Master and, indeed, it is even inconsistent with his own previous practice.

The irresistible conclusion, accordingly, is that the Taxing Master was in error, and I think the error was in respect of the allowance that was made for each of the items in dispute in this case. I think that the result has been injustice to the paying parties to a sufficient degree as to warrant interference by the court. I do not make a finding of my own estimation of the costs and then apply that to the figure allowed by the Taxing Master, which Mr Fitzpatrick says is a sine qua non for interference with a taxation, because of what Kearns J said in *Superquinn*. I follow and apply instead what the learned judge went on to say in that case:

> "There may of course be instances where the court does not feel equipped to offer its own view, particularly in relation to solicitors' instruction fees, which have always been regarded as an area of considerable difficulty for judges. This may leave the court with no option but to remit the matter back to the Taxing Master where some mistaken principle has been applied or where there is no sufficient material to enable the court arrive at a figure which is proper in the circumstances. [2001] 1 I.R. 459 at 476."

This is a case where the court is simply not in a position to make an estimate of what the correct costs should be and in that situation the appropriate order is to direct that a fresh taxation take place and that is what I propose to do in this case. A different Taxing Master should conduct the new taxation of the plaintiff's costs.