

THE HIGH COURT**2006 200 R****BETWEEN:****THE REVENUE COMMISSIONERS****APPELLANT****-AND-****WEN-PLAST (RESEARCH AND DEVELOPMENT) LIMITED****RESPONDENT****Judgment of Mr. Justice Hedigan delivered the 14th day of October, 2009**

1. The appellant is an organ of State, having responsibility for the collection of taxes and duties as well as the implementation of customs controls.
2. The respondent is a limited liability company which manufactures reinforced polyester hygienic door sets.
3. The appellant seeks to review the ruling of the Taxing Master of the High Court ('the Taxing Master') pursuant to Order 99 Rule 38(3) of the Rules of the Superior Courts ('the Rules') and section 27(3) of the Courts and Court Officers Act 1995 ('the 1995 Act').

I. Factual and Procedural Background

4. In 1997, the respondent produced a hygienic door set incorporating a fire resistant ceiling strip, specifically an intumescent strip encased in a reinforced polyester door set. The inventive aspect of this product was the encasing of the intumescent strip in a specific type of door frame made from cured plastic materials. Irish and European patents were granted in respect of the use of such a fire resistant ceiling strip built into a door frame.
5. An issue arose between the parties as to whether income from the patents was income from a 'qualifying patent' within the meaning of section 141(5)(d) of the Taxes Consolidation Act 1997 ('the 1997 Act'), that is income from an invention which involves radical innovation. On the 29th of May 2002, this issue came before Appeal Commissioner Ronan Kelly. In a reserved judgment delivered on the 25th of October 2002, the Appeal Commissioner determined that the fire resistant hygienic door set did amount to a radical innovation thus resolving the matter in favour of the respondent.
6. An appeal against the decision was brought by way of case stated to the High Court pursuant to section 141 of the 1997 Act. In a written judgment delivered on the 9th of March 2007, Laffoy J. upheld the decision of the Appeal Commissioner and awarded costs to the respondent, to be taxed in default of agreement.
7. A bill of costs first came before the Taxing Master on the 5th of July 2007. The bill of costs was then taxed on the 12th of December 2007. In his decision, the Taxing Master determined inter alia that:-

- (a) the brief fee claimed by senior counsel in the sum of €15,000 should be allowed in the sum of €10,000; and
- (b) that the solicitors' general instruction fee in the sum of €65,000 should be allowed in the sum of €41,000.

8. The appellant was unhappy with the allowances and filed objections on the 24th of January 2008, which were supplemented by written submissions on the 29th of May 2008. It was asserted on behalf of the appellant that €7,500 would have been an appropriate brief fee for senior counsel, and that the solicitors' general instruction fee ought not to have exceeded €15,000. In so contending, the appellant relied on the following three decisions of the Taxing Master:-

- (a) P. Ó Muircheasa (Inspector of Taxes) v. Bailey Waster Paper Ltd. (Record Number 2002/102 R) – in this similar case stated, approximately €500,000 had been at issue and senior counsel's brief fee had been agreed at €6,850 while a general solicitors' instruction fee of €11,000 had also been agreed;
- (b) P.V. Murtagh v. Samuel Rusk (Record Number 2003/835 R) – in this similar case stated, approximately €100,000 had been at issue and senior counsel's brief fee was taxed €7,500 while a general solicitors' instruction fee was also taxed at €7,500.
- (c) The Revenue Commissioners v. Cedric Christie and Others (Record Number 2005/172 R) - in this similar case stated, the amount at issue was not clarified but senior counsel's brief fee was taxed at €7,500 while a general solicitors' instruction fee was taxed at €13,500.

9. Replying submissions were entered by the respondent on the 10th of June 2008 and a hearing on the objections was held before the Taxing Master on the 19th of June 2008. On the 17th of July 2008, the Taxing Master gave a detailed written decision in which he determined that the submissions of the appellant did not disclose any new or additional evidence which would cause him to alter his initial findings on taxation. He therefore rejected the objections and affirmed his original decision.

10. In refusing to depart from his original determination, the Taxing Master noted and placed emphasis upon a number of factors which were appropriate to the level of fees in the case, including:-

- (a) the fact that a separate fee of €2,500 had been paid to senior counsel for the preparation of written legal submissions in respect of the case stated;
- (b) the general practice whereby the preparation of written legal submissions is treated similarly to a refresher fee;
- (c) the involvement of the respondent's solicitors in the preparation of written legal submissions;
- (d) the fees allowed in cases of a similar nature ('comparators');
- (e) the lack of any legal obligation to specifically follow comparators;
- (f) the extended periods of time during which no demonstrable work was undertaken in respect of the case stated;
- (g) the extremely serious implications which the outcome of the case stated held for the respondent, including financial liability to the appellant of anywhere between 1.8 and 5 million euro;
- (h) the lengthy correspondence between the parties in preparation of the case stated;
- (i) the preparation of extensive books of authorities by the respondent's solicitors;
- (j) the work undertaken by the respondent's solicitors in consideration of the written legal submissions filed on behalf of the appellant;
- (k) the attendance of the respondent's solicitors in court on all relevant dates;
- (l) the general implications of the decision for the appellant in the determination of the status of other patents.

11. By notice of motion dated the 1st of October 2008, the appellant appealed against the determination of the Taxing Master to this Court, on the basis that the allowances made by the Taxing Master were erroneous and unjust.

II. The Submissions of the Parties

12. The appellant submits that the Taxing Master acted erroneously and unjustly both in the approach which he took to the issue of taxation and the manner in which his determination was given. Specifically, it argues that the Taxing Master overstated the complexity of the action and exaggerated the burden which lay on the respondent's solicitors. The appellant also contends that the Taxing Master consciously chose not to approach the taxation in lawful manner, in particular by expressing serious reservations as to the value of comparators.

13. With regard to the brief fee of senior counsel, the appellant argues that the fee of €10,000 is far in excess of that which a paying party might expect to be assessed on a party and party basis. Furthermore, it is submitted that the additional fee of €2,500 should have been taken into account in the overall assessment of the nature and extent of senior counsel's work pursuant to section 27(1) of the 1995 Act. The appellant asserts that senior counsel would have been required to devote little time and consideration to the major complexities of the case, since they had largely been resolved at the initial hearing before the Appeal Commissioner.

14. In respect of the solicitors' general instruction fee, the appellant suggests that the Taxing Master fell into error in his failure to afford due regard to the comparators which were before him. The appellant suggests that even if the probative force of such evidence was diminished through the introduction of section 27 of the 1995 Act, its continued use has nonetheless been heavily endorsed by the courts. It is emphasised that the general instruction fee in the three main comparators which were cited to the court was considerably less than that awarded by the Taxing Master in the present case. The appellant contends that there was no justification, based on the circumstances of the case or otherwise, for the departure from those examples.

15. The respondent argues that the manner in which the taxation of costs and the review of objections were undertaken by the Taxing Master was entirely appropriate. It submits that his conclusions were reached following a detailed examination of all aspects of the work undertaken to bring the substantive litigation to a successful conclusion and was in accordance with the requirements of all the apposite legislation.

16. With regard to the brief fee of senior counsel, the respondent emphasises that a number of the provisions dealing with the issue of fees, such as Order 99 Rule 37(22)(ii)(g) of the Rules, are expressly confined to solicitors. Furthermore, the respondent rejects the suggestion that the preparation of written legal submissions served in any way to reduce the work which might otherwise have been necessary in relation to the brief fee. It is asserted that the imposition of an automatic reduction in brief fees, based on the preparation of written legal submissions, would render the taxation of costs redundant, as the Taxing Master would be required to take with one hand what he had given with the other. In all, the respondent argues that the brief fee was reduced appropriately in the circumstances, having due regard to all relevant facts and appropriate comparators.

17. In respect of the solicitors' general instruction fee, the respondent again asserts that the manner in which comparators were employed by the Taxing Master was entirely appropriate. It submits that there were a number of special circumstances in existence in the case which prompted a departure from the examples which had been cited, including but not limited to: the potentially disastrous consequences for the respondent; the implications for other decisions of the appellant in relation to patents; and the copious correspondence which had proved necessary in preparation of the case stated. In light of this, the respondent contends that it was wholly correct and proper for the Taxing Master to depart from the figures awarded in the comparators.

III. The Legislative Regime

18. Order 99 Rule 10 of the Rules creates the general principle in relation to the taxation of costs. It provides inter alia as

follows:-

"(1) This rule applies to costs which by or under these Rules or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund (other than a fund which the party to whom the costs are to be paid holds as trustee or personal representative).

(2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

19. Order 99 Rule 37 of the Rules further sets out a number of specific regulations which apply to all taxations. Of particular relevance for present purposes is Rule 37(22)(ii) which provides as follows:-

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

20. Order 99 Rule 38(3) of the Rules creates a mechanism whereby a party may apply to the High Court for a review of taxation. This provision, which has generated a considerable body of jurisprudence, provides as follows:-

"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 determination 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. The Taxing Master may if he thinks fit on the application of the party entitled to the costs pending the determination of the review by the Court issue a certificate of taxation or a second interim certificate of taxation concerning any items no longer in dispute other than those specified in the notice of motion to review. All interim certificates of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid and save as provided by this rule, the Taxing Master shall not be at liberty, after a certificate is signed, to review his taxation or amend his certificate, except to correct a clerical or manifest error before process for recovery or payment of the costs."

21. Considerable change in this area of law, however, was effected by the introduction of the Courts and Court Officers Act 1995. In *Superquinn Ltd. v. Bray UDC* (No.2) [2001] 1 IR 459 at page 475, Kearns noted that the 1995 Act had resulted in "a significant shift in emphasis" and had placed a "heavier burden" on parties seeking to challenge the ruling of the Taxing Master. Section 27 of the 1995 Act is of particular relevance and provides inter alia the following:-

"(1) On a taxation of costs as between party and party by a Taxing Master of the High Court, [...] the Taxing Master [...] 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, fees or expenses included in a bill of costs.

(2) On a taxation of costs as between party and party by a Taxing Master of the High Court, [...] the Taxing Master [...] 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 [...] 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.

(3) The High Court may review a decision 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 [...] has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master [...] is unjust."

IV. The Decision of the Court

22. There can be no doubt but that the effect of the introduction of the 1995 Act was to considerably alter the perspective from which the Court is obliged to consider an application such as that in the present case. In *Minister for Finance v. Goodman* (No.2) [1999] 3 IR 333, Laffoy J. stated the following at pages 349-350:-

"[I]t seems to me that [sections 27(1) and 27(2) of the 1995 Act] have introduced a fundamental change in relation to the function of the Taxing Master in the taxation of solicitor's disbursements, including counsel's fees. Before the coming into operation of the [...] 1995 [Act], it was no part of the function of the Taxing Master to make a value judgment as to what the disbursements should be. However, by virtue of [section 27(1)] it is part of his function to examine the nature and extent of work to which disbursements relate and to determine the value of the work done or the service rendered. By virtue of [section 27(2)] his function is to assess what he considers in his discretion to be a fair and reasonable allowance for the work done or service rendered."

23. In *Superquinn Ltd. v. Bray UDC* (No.2) [2001] 1 IR 459, Kearns J. provided an informative discussion of the nature of the Taxing Master's role in the light of the 1995 Act. He quoted the dictum of Laffoy J. in *Goodman* and stated as follows at page 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. This must mean that some supposed "no go areas", particularly with regard to counsels' fees, no longer exist and that some principles, expressed in cases such as *Dunne v. O'Neill* [1974] I.R. 180 and *Kelly v. Breen* [1978] I.L.R.M. 63, in relation to counsels' fees are no longer determinative, but merely factors to be taken into account. Of course, the Taxing Master may still follow and adopt these well established principles and criteria when he deems it appropriate, but the Act of 1995 has clearly conferred on the Taxing Master, who has special expertise in this area, all the attributes of a specialist tribunal."

24. As a corollary of the status of the Taxing Master as a specialist tribunal by virtue of the 1995 Act, the High Court will be more reticent to interfere with determinations made on the issue of costs. This point was also noted by Kearns J. in *Superquinn*, who continued at page 475-476:-

"Under the old system, the court had a wide ranging remit and, in the context of a review under O.99, r.28, could "make such order as may seem just".

Now under s. 27(3) of the Act of 1995 it can intervene "provided only that the High Court is satisfied that the Taxing Master ... has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master ... is unjust".

This wording seems to represent a significant shift of emphasis and to impose a heavier burden on any party seeking to challenge a ruling of the Taxing Master. This interpretation is acknowledged at p. 350 of the *Minister for Finance v. Goodman* (No. 2) [1999] 3 I.R. 333 and can scarcely be a matter of doubt. It would suggest (when taken in conjunction with s. 27(1) and (2)), that the court should exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice."

25. The test as to the requisite standard of proof, which will be mandated before the High Court will alter an award, has been formulated in a number of different ways in recent years. In *Smyth v. Tunney* [1999] 1 IRLM 211, *McCracken J.* posited the following construction of the Court's task at page 213:-

"The principle upon which I must act, therefore, is not simply to decide whether the Taxing Master erred, but also, if I am to alter his decision, I must find that his taxation was unjust. I cannot approach this issue on the basis of trying to assess what costs I would have awarded had I been the Taxing Master."

26. In *Bloomer v. Incorporated Law Society of Ireland* [2000] 1 IR 383, *Geoghegan J.* offered a slightly different statement of principle, which would focus on the factors considered and the ultimate amount of the award. He stated at page 387:-

"In considering whether the taxing master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the taxing master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in the consideration of the facts but of course the court must also consider whether the taxing master has fallen into error in either law or jurisdiction.

If this court finds that the taxing master has erred in the sense described, this court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the taxing master in fact arrives at the correct figures or at figures within a range which it might have reasonably have been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision."

27. Although there is undoubtedly some degree of nuance to be identified, it is questionable whether these two distinct formulations of the test would produce a different result save in perhaps an extreme minority of cases. Indeed, in *Lowe Taverns (Tallaght) Ltd. v. South Dublin County Council* [2006] IEHC 383, *McGovern J.* considered both decisions and made the following observations:-

"I do not see any significant difference in the reasoning [...] Section 27(3) of the Courts and Courts Officers Act, 1995 recognises that the Taxing Master is a person with special expertise in the area of costs and is, in effect, a specialist tribunal. The courts should be slow to interfere with the decisions of such a specialist tribunal and should operate on the basis of curial deference and judicial restraint."

I respectfully agree.

28. For the purposes of the present case, I am satisfied that the most helpful statement of the principle to be applied is to be found in the decision of *Boyne v. Dublin Bus* [2008] 1 IR 93. In that case, *Gilligan J.* stated at page 115:-

"[P]ursuant to [section 27 of the 1995 Act,] the High Court is granted a limited jurisdiction to review the decision of the Taxing Master on the basis that the High Court is satisfied that the Taxing Master has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master is unjust."

29. As to what will amount to an injustice, it was suggested by Kearns J. in *Superquinn* that it might be possible to delineate a mathematical touchstone against which to measure any impugned award. The learned judge made the following remarks at page 477:-

"When does an error as to amount become 'unjust'?"

It seems to me that, in exercising its powers of review under s. 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge."

30. The merit of incorporating such a specific figure into the test for injustice has been queried in a number of subsequent decisions. In *Quinn v. South Eastern Health Board* [2005] IEHC 399, Peart J. expressed the following reservations:-

"I have some hesitations about such a pragmatic formula in the context of a costs item [...] It seems to me therefore that the question of what is just or unjust in this regard must be viewed on a case to case basis, since different factors may be at play....."

31. Like Peart J., I do not find a mathematical or formulaic method of assessment to be attractive. I would prefer a more flexible approach predicated upon a subjective examination of the circumstances of individual cases. I also think the court should be wary of conflating "error" and "injustice". The act is quite specific in restricting the courts jurisdiction to intervene. Section 27(3) limits such intervention "provided only that the High Court is satisfied that the Taxing Master [...] is unjust." It is clear there must be error and then, as a result thereof, injustice. I accept the dictum of Kearns J. in *Superquinn* that the court must always retain the power to intervene where failure to do so would result in an injustice. Such an injustice must however be clear, undoubted and manifest.

32. In relation to intervention by the court in the decisions of specialist tribunals I have been referred to and I accept the dictum of Denham J. in *Scrollside Limited v Broadcasting Commission of Ireland* [2007] 1 IR 166, at pages 174-175, to the following effect:-

"This is an application by way of judicial review requesting the court to intervene in the decision making process of [a specialist tribunal]. To succeed on such an application, the applicant has to achieve a high bar and meet a significant burden of proof, to show that the decision of the specialist decision maker, in this case the respondent, should be declared void by the courts. The courts approach with caution the review of a specialist body. Such a body has particular expertise to apply to decision making in its arena. That specialist knowledge is not held by the courts. The process of review by way of judicial review is not a full appeal, but rather a review of the process and fair procedures."

33. The task which faces the Court, therefore, is first to consider whether the Taxing Master fell into error in calculating the appropriate allowances and then, if he did so, to assess whether an injustice was occasioned. It seems clear to me that the case stated which arose from the dispute between the parties was undoubtedly a highly important one, both from the perspective of the parties themselves and for the tax system as a whole. The outcome of the hearing was a lengthy, detailed and carefully considered judgment of the High Court which will no doubt be of considerable utility to both the appellant and interested third parties in the future.

34. Turning first to senior counsel's fees in respect of drafting submissions and his brief fee; no evidence of any error by the Taxing Master was put before this court. The brief fee allowed was acknowledged by the Applicant's counsel at the hearing to be little out of line with the comparators. The applicant really took issue with the Taxing Master's decision not to reduce the brief fee allowed by the amount allowed for drafting the submissions. It is clear from his decision that the Taxing Master did take into account the fact he was allowing for both. I can find no error in the approach taken. In my view this was a decision made within his jurisdiction as a specialist tribunal and not one which falls to be reviewed by this court unless some clear and manifest injustice is apparent. No such injustice is evident in the present case. Indeed, although it is not the test in this regard, I would be in agreement with the decision of the Taxing Master. The drafting of submissions and the brief itself are distinct parts of the litigation process. Moreover, the counsel who drafts the submissions is frequently not the same one who carries the brief on the day of the hearing.

35. The preparation of written submissions in cases of legal complexity has been one of the most valuable developments in the field of litigation in recent years. Such submissions are of incalculable value to all the parties to litigation and to the court itself and almost invariably result in a shortening of the time involved in court hearing to the great benefit of all. I would have thought it highly appropriate that fees allowed in respect thereof should always be separated from the brief fee to be allowed. In light of the above, in relation to counsel's fees allowed, I would not intervene.

36. Turning to the solicitors' general instruction fee; from an examination of the papers, it is evident that the respondent's solicitors possess a high degree of skill and expertise in the relevant area of law and that they undertook much of the work which might otherwise have necessitated the instruction of junior counsel. A very high standard of work was therefore required. The settlement of the terms of the case stated also necessitated a lengthy and detailed exchange of correspondence. It is clear the issues in the case before Laffoy J. were complex. The case was of immense importance to the client. Its very existence as a going concern was in question. It is further apparent from the decision he delivered that the Taxing Master gave the most careful and detailed consideration to all aspects of the case in question. The

Taxing Master found the comparators cited by the appellant were not in fact true or relevant comparators being cases which either did not involve any great complexity or ones in which the role of the solicitors went little beyond preparation of booklets and attendance on counsel. I can find no error in the manner in which the Taxing Master dealt with this aspect of the case before him. The second part of the test, i.e. injustice, does not therefore arise. No manifest injustice appears in the overall result.

37. In light of the foregoing, I will refuse the relief sought and affirm the ruling of the Taxing Master, dated the 17th of July 2008.