THE COURT OF APPEAL

Appeal No. 2015 141

Peart J.
Irvine J.
Cregan J.

BETWEEN

ISABELLE SHEEHAN

(AN INFANT SUING BY HER MOTHER AND NEXT FRIEND, CATHERINE SHEEHAN)

PLAINTIFF/APPELLANT

AND

DAVID CORR

DEFENDANT/RESPONDENT

JUDGMENT of Mr Justice Cregan delivered on 10th day of June, 2016

INTRODUCTION

1. The issue in this appeal is the evaluation of a solicitor's instruction fee for work carried out for the plaintiff/ appellant in her medical negligence proceedings against the defendant/ respondent. In the Bill of Costs the appellant's solicitor sought an instruction fee of €485,000. The respondent's cost accountants submitted that the appropriate fee should be €250,000. Ultimately the Taxing Master allowed a sum of €276,000.00.

2. This was a case in which the infant plaintiff suffered catastrophic injuries as a result of the defendant's admitted negligence and ultimately developed cerebral palsy. The case ran for five days in the High Court on an assessment of damages and eventually resulted in a settlement for the plaintiff of €1.9m on an interim basis (and a full capital value of approximately €8m).

3. Thereafter the plaintiff's solicitor's costs went to taxation. The first taxation process took two days; the objections hearing took four days; the High Court review hearing took four days and this Court of Appeal hearing took two days. Thus, whereas a hearing of an assessment for catastrophic injuries only took five days, the hearings on the assessment of solicitors' costs have taken twelve days. It is hard to avoid the conclusion that there must be something wrong with a taxation process that would take so long to resolve such a dispute.

4. It is difficult to understand why this has happened. However, having considered the lengthy submissions by both sides, I am of the view that the problems have been caused by the failure of the appellant's solicitors to keep a proper record of their hours spent on this case, by the failure of their cost accountants to submit a proper Bill of Costs in conformity with the Rules, by the failure of the Taxing Master to accept the appellant's solicitors' offer to submit a reconstruction of the hours they worked and by the failure of the Taxing Master to apply the Rules of the Superior Courts, as interpreted by the courts, in the proper way, to the facts of this case.

THE UNDERLYING PROCEEDINGS

5. In these proceedings, the plaintiff (suing by her mother and next friend, Catherine Sheehan) claimed damages against the respondent, a consultant obstetrician, carrying out private practice from the Bon Secours Hospital, Cork. These medical negligence proceedings alleged that the defendant was guilty of negligence in the management of the antenatal care of the plaintiff's mother. During the course of the plaintiff's mother's pregnancy, her general practitioner carried out certain tests, one of which was a blood test for certain antibodies. On 17th May, 2004, the general practitioner wrote to the defendant confirming that the plaintiff's mother's blood contained antibodies against RH(e). Further tests were carried out including a test on 28th October, 2004, which showed an alarming rise in these antibodies and also noting RH(c) antibodies.

6. However, although the defendant was notified of these matters, he did not act as he should have done in monitoring the levels of antibodies in the plaintiff's mother's blood and in arranging for an appropriate monitoring of the medical condition in question or arranging appropriate foetal blood transfusions. This set in motion a sequence of failures which resulted in the plaintiff suffering catastrophic birth injuries and ultimately developing cerebral palsy. The plaintiff has, therefore, been left with profound disability.

7. The personal injury summons in this case issued on 17th November, 2009. The personal injuries defence was delivered on 5th November, 2010, by solicitors for the defendant/respondent. Whilst the defence made a number of admissions of wrongdoing, the preliminary paragraphs of the defence put causation fully in issue. Moreover, the respondent's solicitors had previously confirmed by, letter dated 5th May, 2010, that they had commissioned expert obstetric reports and that they would not be in a position to deliver a defence in the absence of such reports. It was clear, therefore, to the plaintiff/appellant when the defence was received that causation would be the battleground in this case with expert testimony on both sides.

8. The case was set down for hearing on 18th November, 2010, and was given a trial date of 19th October, 2011. However, on 5th September, 2011, some five weeks or so before the trial, the defendant/respondent conceded the issue of causation and an amended defence was delivered on 12th October, 2011. This admission in relation to causation occurred after counsel had been briefed for the trial and after a very significant amount of work had been done by the appellant's solicitor, both on the issues of liability and quantum between September 2008 and September 2011. Thus, briefs for counsel and the booklets for the Court and the respondents had been prepared by the appellant's solicitors prior to the admission of liability. They subsequently had to be amended in the light of the concession on liability. The appellant's solicitors in their submissions state that the documentary burden in this case comprised over twenty bankers' boxes of documentation.

9. Moreover, the appellant's solicitors engaged approximately 25 witnesses for the purpose of the assessment hearing, covering a number of different issues ranging from urology to care and economics. The respondent, in turn, also scheduled eleven experts on the quantum issue and fifteen expert reports.

10. In the week before the trial, the parties engaged in lengthy settlement negotiations which were ultimately unsuccessful. Subsequently, the case opened and ran for five days in total before being settled on an interim basis pending the enactment of legislation on periodic payment orders.

11. The amount of the interim settlement was €1.9m but during the course of the hearing the High Court was told that the full capital value of the claim, had it been dealt with on that basis, would have been in the order of €8m.

12. The interim agreement was ruled and resulted in a court order dated 26th October, 2011, which order also included an order for the appellant's costs to be taxed in default of agreement.

THE TAXATION PROCESS AND THE HIGH COURT REVIEW HEARING

13. The appellant's solicitors' costs went to taxation and the hearing on the taxation commenced on 11th September, 2012 and concluded on the following day. The Taxing Master delivered a written ruling on 7th November 2012 (the "Taxation Ruling").

14. On 27th November, 2012 the appellant's solicitors raised Objections in relation to the sums allowed in respect of the solicitor's instruction fee and also in respect of the brief and refresher fees for counsel. The Objections hearing took place on 13th September, 2013, 3rd October, 2013 and 24th January, 2014. There was a further brief hearing on 27th March, 2014. The Taxing Master gave his ruling on the Objections on 29th May, 2014 (the "Objections Ruling").

15. By notice of motion dated 5th June, 2014 the Appellant's solicitors sought to review the Objections Ruling on the grounds that the Taxing Master was in error in arriving at his decision. This review was heard before Kearns P. over four days on 3rd, 4th, 5th and 6th February, 2015. Kearns P. delivered his judgment on 27th February, 2015 (the "Review Judgment").

16. Kearns P. in his decision dismissed the review and granted costs to the respondent with a stay on the order for costs pending the determination of this appeal.

THE GROUNDS OF APPEAL

17. The appellants have advanced a number of grounds of appeal which can be summarised as follows:

> 1. The issue of "Time" – that Kearns P. erred in failing to regard the Taxing Master's approach to time as an error that resulted in injustice within the meaning of s. 27 (3) of the 1995 Courts and Court Officers Act, the ("1995 Act").
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> 2. The issue of "intangibles" - that Kearns P. erred in failing to regard the Taxing Master's findings on novelty, complexity, skill, specialised knowledge and responsibility (as intangibles) as an error that resulted in injustice within the meaning of s. 27 (3) of the 1995 Act.
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> 3. The "super profits" issue – that Kearns P. erred in failing to regard the Taxing Master's findings on alleged "super profits" earned by the appellant's solicitors in unconnected cases as an error that resulted in injustice within the meaning of s. 27 (3) of the 1995 Act.
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> 4. The two "senior solicitors" issue – that Kearns P. erred in failing to regard the Taxing Master's disallowance of two senior solicitors at the hearing as an error resulting in injustice.
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> 5. The "overheads issue" - that Kearns P. erred in failing to regard the finding of the Taxing Master that there was a difference in overheads between Dublin law firms and the appellant solicitor's firm in Wicklow as an error leading to injustice within the meaning of s. 27 (3) of the 1995 Act.
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> 6. The "comparators issue" - that Kearns P. erred in failing to regard the Taxing Master's approach to comparators as an error that resulted in injustice within the meaning of s. 27 (3) of the 1995 Act.
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> 7. The "economic downturn" issue – that Kearns P. erred in failing to regard the Taxing Master's approach to the economic downturn as an error resulting in injustice within the meaning of s. 27 (3) of the 1995 Act.

THE BILL OF COSTS

(i) The Rules of the Superior Courts governing the Bill of Costs

18. However before turning to deal with the specific grounds of appeal, it is necessary to consider the Bill of Costs in this case, as it is, in my view, the source of many of the difficulties which have arisen.

19. Order 99, rule 29(5) of the Rules of the Superior Courts sets out the legal requirements for Bills of Costs and provides as follows:-

> *"Bills of costs are to be prepared with seven separate columns:-*
>
> *(a) the first or left hand column for dates;*
>
> *(b) the second for the numbers of the* items*;*
>
> *(c) the third for the particulars of the services charged for;*
>
> *(d) the fourth for disbursements;*
>
> *(e) the fifth for the Taxing Masters' deductions from disbursements;*
>
> *(f)* the sixth for the professional charges*;*
>
> *(g) the seventh for the Taxing Masters' deductions from professional charges."* (Emphasis added).

20. In any rational, fair and transparent system for drawing up a Bill of Legal Costs, one would expect to see the date on which the professional service was given, the particulars of the professional service and the charges for such a service. A client wants to know

on what date an activity was performed, what was the nature of that activity, how long did it take and how much did it cost. Thus the Rules of the Superior Courts in Order 99 Rule 29 (5) provide that each of these matters are to be set out in the Bill of Costs.

21. It would appear however that solicitors and legal costs accountants have lost sight of these Rules over the last number of years. Thus, whilst Bills of Costs generally set out the date on which a professional service was given, they have, generally, failed to set out proper particulars of the professional services charged for and have failed to set out the professional fee for each individual service.

22. This may well be because of a lack of clarity about what "particulars" of the professional services should be set out in the Bill of Costs. However the answer to this question is, in my view, to be derived from Order 99 Rule 37 (22) (ii) of the Rules of the Superior Courts which sets out the criteria to be considered by the Taxing Master in assessing a Bill of Costs.

23. One of these criteria is the "skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor". It is clear, therefore that Order 99 Rule 29(5) must mean that in setting out the particulars of the services charged for, this should include the amount of time undertaken in respect of each activity, the seniority of the solicitor carrying out such an activity and the professional charge for such an activity (which may include an hourly rate for such a solicitor).

24. This is because, firstly, the rule (O. 99 r. 37 (22) (ii) (b)) contains a specific reference to "time and labour" which means that a specific record of hours worked should be kept and set out in the Bill of Costs; secondly, the rule refers to the "skill, specialised knowledge and responsibility required of the solicitor" which means that where there are solicitors of differing levels of seniority in a firm, these should be identified and their individual time and labour set out in the Bill of Costs; thirdly the fact that the Rules specify that the Bill of Costs must set out the number of "items" being charged for and the professional charge for each, means that a Bill of Costs must contain the specific professional charge for each item; fourthly, in order to ensure that an appropriate professional charge is marked for the particular professional service, the hourly rate for each solicitor may be given to explain the professional charge.

(ii) Comparison of the Bill of Costs in this case with the requirement of the Rules

25. However when one compares what the Rules require for a proper Bill of Costs with the Bill of Costs in this case, it is clear that this Bill of Costs was not prepared in accordance with the Rules.

26. The Bill of Costs, in this case, was prepared by the appellant's solicitor's legal costs accountants on behalf of the appellant. The Bill of Costs was served in February 2012 and totalled €998,815.45.

27. Surprisingly, given the volumes of documentation supplied for this appeal, the actual Bill of Costs was not included in the papers furnished to the Court. However, a copy was handed into court and the Court has had an opportunity of reviewing it. It follows the normal format and layout for such a Bill of Costs.

28. In the normal course of events, one would have thought that legal cost accountants in preparing Bills of Costs would have done so in a manner which would move with the times and that the Bill would be presented in a manner which was simple, transparent and readily understandable. One would also expect a Bill of Costs, at the very least, to comply with the Rules of the Superior Courts. However, that is not the case here.

29. I have reviewed the Bill of Costs presented in this case which runs to 107 pages. It is similar to many Bills of Costs drawn up in many different types of case. It is, in effect, *"how things are done"* by legal costs accountants. The criticisms which follow therefore, whilst directed at the Bill of Costs in this case are not unique to this Bill of Costs.

30. The first criticism I would make is that the Bill of Costs is simply not drawn up in accordance with the Rules of the Superior Courts. Order 99 Rule 29(5) provides that Bills of Costs must contain the date upon which a professional service was given, the particulars of that professional service and the charge for that professional service. In this case, the dates for some - but not all - of the services are given; some particulars of the professional services are given but not all; and most importantly, the professional charge in respect of each item of professional services is not given at all.

31. The second, related, criticism is that although the Bill of Costs sets out the nature of each of the professional services undertaken by the solicitors, the requirement in Order 99 Rule 29(5) is that the Bill of Costs should set out *"the particulars of the services charged for"*. This means that a Bill of Costs should set out not only the *nature* of the professional legal service rendered (*e.g.* consultation, discovery etc.) but also the number of hours spent on that particular item, the level of seniority of the person carrying out the activity *(i.e.* whether they are a partner or an assistant solicitor or administrative assistant), and the total professional charge for that service (which may include the hourly charge for the relevant solicitor). Thus, in the current Bill of Costs, although the Bill sets out the nature of each of the professional services undertaken by the firm of solicitors, it does not set out anywhere in any detail the amount of hours spent on any item or by whom the work was done. There is simply no way of knowing from the Bill of Costs whether a review of a report took one hour or four hours; there is no way of knowing whether a review of discovery documents was done by a partner or an assistant solicitor and there is no way of knowing the professional charge for each professional service (or the hourly charge of each solicitor).

32. A third criticism of the Bill of Costs is that it omits any reference to the hours spent on the case in the last few months of the case, even though the Plaintiff's solicitors kept detailed time- recording notes for the last few months before the trial and this information was available to the appellant's solicitor's costs accountant but surprisingly, was never used.

33. A fourth criticism of the Bill of Costs (and the layout of Bills of Costs generally) is the inordinate length and prolix nature of such Bills. As stated above, the Bill of Costs in this case runs to some 107 pages. The first twenty pages set out the dates on which certain professional services were given and the nature of that professional service, (although the column for the charge for the service on the right hand column is left blank); however, pages 21 to 43 of the Bill of Costs essentially recite the Statement of Claim in full; pages 43 – 62 resume the narrative of professional services; pages 62 – 67 then set out the Defence in full. This means that about 27 pages - almost a third of the Bill - is devoted to setting out matters which do not require to be in any Bill of Costs, which are not required by the Rules and which serve only to make the Bill of Costs more lengthy. A short narrative at the start of the Bill of Costs about the nature of the proceedings would be sufficient.

34. Moreover the Bill is unnecessarily repetitious. Thus although the first 20 pages of the Bill set out the date of each item and the nature of the professional service starting from the date upon which the solicitors received instructions until the date of the trial, there are a further 54 pages which set out – for a second time - the professional services undertaken by the plaintiffs solicitors. However, whilst the details of the professional services are clearly set out the second time, the dates on which such services were rendered are nowhere to be found.

35. A fifth criticism of the Bill of Costs is that some of the items charged for appear to be lacking in reality. Thus, to take a number of items at random:

(i) Item 11, a Letter Prior to Action is priced at 85 cent even though it must have taken many hours to prepare;

(ii) Item 25 is stated to be "Arranging for and attending Consultation at the Law Library with the infant Plaintiff and her parents (three hours)" and is charged at €12.77;

(iii) Item 32 - Marking one exhibit - 27 cent;

(iv) Item 35 - Attending to file affidavit - €1.28;

(v) Item 37 - Copy Affidavit to certify - 50 cent;

36. It is difficult to understand how such items appear in a Bill of Costs in a case of this magnitude (although some of these items might be mandated by appendix W of the Rules of the Superior Courts). If a certain activity takes one hour, or part of an hour, to complete then one would have thought such an activity would have been recorded at an appropriate hourly rate. The fees levied for such activity cannot reflect the amount of time taken to carry out such an activity.

37. The final criticism is that the first mention of any Instructions fee is on page 98 of the Bill of Costs where it is stated to be in the sum of €485,000. This sum emerges out of the blue. It does not appear to be based on anything which has gone before - apart from the amount of activities. Of course there are 98 pages of narrative which preceded this amount but these pages tell us very little. One would have thought that a Bill of Costs would set out the date of the activity, the nature of the activity, the number of hours engaged on that activity and the charge for that activity. This would have resulted in a "running account" of the Bill of Costs which would have resulted in a figure of €485,000 euros or whatever the figure might be. But in this case the figure simply emerges out of nowhere. It is difficult, if not impossible, to work out from the Bill of Costs how this figure was arrived at by the solicitor or cost accountant.

38. It is hard to avoid the conclusion that the rolling up of all the items into a global instruction fee is to obfuscate, rather than clarify, the work which has been done and to justify an instruction fee by reference to the amount awarded to the client rather than the work done by the solicitor.

39. It is difficult to see on what basis legal costs accountants set out a Bill of Costs in this way. Whereas it should be transparent, it is opaque; whereas it should be simple, it is prolix; whereas it should be easy to read as a chronological narrative of events, services and charges, it is impenetrable. Of course it could be said that the Bills of Costs are drawn up by legal costs accountants for other legal costs accountants and the Taxing Master. That however is not the point. Firstly, a Bill of Costs is often drawn up for a client and should be clear and accessible; secondly it may be the subject of a review by the High Court and, for that reason also, should be clear and accessible; thirdly it should comply with basic principles of simplicity, transparency and common sense; fourthly, it must comply with the requirements of the Rules of the Superior Courts.

40. A Bill of Costs for solicitors should be no different in its nature or presentation than a Bill of Costs for accountants or other professional persons even though the nature of the work is different and even though there may well be peculiarities of the legal system which require to be set out and described. Common sense and the Rules of the Superior Courts dictate that a solicitors' Bill of Costs should include a date on which a service was delivered, the nature of the work done, the time taken to perform that work, the seniority of the solicitor who undertook that work and the professional charge being levied based on this work (which might include an hourly rate). However, unfortunately this was not done in the present case.

41. Moreover this is not a difficult exercise to undertake. Indeed in the course of the appeal, Augustus Cullen Solicitors handed in a document which set out a document entitled *"Time recording ledger by matter"*. The appellant's solicitors had engaged in time-recording of some, but not all, of their work. In particular they had engaged in time - recording their work on this particular case in the last few months of the case from July/ August, 2012 until the date of trial. By contrast with the Bill of Costs, this document is a model of clarity. It sets out the date upon which certain work was done; it describes, in a few lines, the nature of the professional work undertaken; it sets out the hours and minutes taken to perform that activity and it also identifies the solicitor (and their seniority) who was involved in that process. It is, of course, a document for internal use only but it clearly would provide vital evidential material for the drawing up of a Bill of Costs (and indeed for the Taxation process). The only items missing on this time recording document are the hourly rate charged by each solicitor and the actual professional charge for each activity listed. Thus, for example, it states *"Drafting a letter to the Sheehans in relation to special damages"* – Time taken 30 minutes; date, 16th June, 2010. Another example is *"Review file, experts report, hospital records and discovery documentation in preparation for trial brief and trial" – Time taken 5 hours; date 12th August, 2011.*

42. There is no reason, in my view, why bills of costs drawn up by legal costs accountants could not follow a similar format whilst also complying with the requirements of Order 99 Rule 29(5). This would result in Bills of Costs being produced which reflect the reality of the work done.

THE LEGAL PRINCIPLES APPLICABLE TO A TAXATION OF COSTS BY A TAXING MASTER

(i) Legal Principles

43. Before I turn to consider the grounds of appeal in this case, I wish to set out the relevant legal principles which apply to a taxation of costs as between party and party by the Taxing Master of the High Court.

44. Section 27(1) and s.27(2) of the Courts and Court Officers Act, 1995, insofar as they relate to an assessment of a solicitor's instruction fee by the Taxing Master of the High Court on a party on party basis, provide as follows:

"(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… a solicitor… 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 … a solicitor… 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."

45. Order 99, rule 10(2) RSC provides that on taxation on a party and party 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."*

46. Order 99, rule 37(18) provides as follows:

> *"On every taxation the Taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses."*

47. Order 99, rule 37(22)(ii) RSC sets out the criteria to be considered by the Taxing Master in exercising his discretion with regard to any item. It provides that the Taxing Master must have regard 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."

48. In *C(D) v. Minister for Health* [2008] IEHC 299 Herbert J. stated as follows in relation to the approach to be adopted by a taxing master:

> *"The learned Taxing Master should have objectively examined each of the separate items in the Bill of Costs which together make up the claim for a General Instructions Fee. He should have ascertained precisely what work was done by the Solicitors for the Costs, with particular reference to the documentation furnished in support, and by what level of fee-earner it was done. The learned Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The learned Taxing Master should have indicated what amount of time he considered should reasonably have been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The learned Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The learned Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a Party and Party taxation. In my judgment, this is the form of scrutinisation, measurement and evaluation which it is necessary for a Taxing Master to perform in the proper discharge of his or her statutory powers under the provisions of s. 27(2) of the Courts and Court Officers Act 1995. Without such an analysis, his discretion to allow in whole or in part as fair and reasonable or, to disallow, any item in the General Instructions Fee would not be validly exercised."* (Emphasis added).

49. Moreover, as Ryan J. also stated in *Cafolla v Kilkenny & Ors* [2010] IEHC 24:

> *"Adopting the approach prescribed by Herbert J. [in C(D)] 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 enquiries 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."* (Emphasis added).

50. Moreover this approach - that asking what a person did and how long it took were the most elementary enquiries in evaluating work - was endorsed in *Bourbon v. Ward* [2012] IEHC 30 by Kearns P.

51. In *Minister for Finance v. Goodman (2)* [1999] 3 I.R. 333 Laffoy J. commented that the enactment of s.27 of the 1995 Act introduced a fundamental change in relation to the functions of the Taxing Master in that it was now part of his function to examine the nature and extent of the work and to determine the value of the work done or the services rendered and also to then assess what he considers, in his discretion, to be a fair and reasonable allowance for the work done or service rendered.

52. Likewise in *Superquinn v. Bray UDC (No. 2)* [2001] 1 I.R. 459 Kearns J. concluded that the provisions of s.27 of the 1995 Act imposed a duty upon the Taxing Master to examine the nature and extent of the work done in order to assess what he considered to be a fair and reasonable allowance for the work done or the service rendered. Kearns J. stated:

"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"

He also went on to state that while the fee of an opponent is relevant this "does not exonerate the Taxing Master from conducting *a root and branch examination of the defendant's bill on its own merits."* (Emphasis added).

53. Likewise, as is stated in *Cafolla v. Kilkenny & Ors.* [2010] IEHC 24, Ryan J. stated as follows:

"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."

54. Likewise in *Cafolla*, at p.5, Ryan J. states:

"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." (Emphasis added).

(ii) The Methodology of the Taxing Master in this case

55. I have set out in some detail the relevant rules on Bills of Costs and the problems with the Bill of Costs in this case because it is the cause of many of the issues which have arisen. The other major problem in this case is the methodology used by the Taxing Master and his approach to the assessment of the solicitors' instruction fees.

56. It is clear from s. 27 (1) of the 1995 Act that the Taxing Master must examine the "nature and extent" of any work done by a solicitor as set out in the Bill of Costs. It is also clear that O. 99 r. 37 (22) (ii) RSC sets out the criteria to be considered by the Taxing Master in examining the nature and extent of this work. This clearly includes the skill, specialised knowledge and responsibility of, and time and labour expended by, the solicitor. It also includes the novelty and complexity of the matter. Moreover Herbert J. in *C (D)*, set out in detail the approach to be taken by the Taxing Master and Ryan J. specifically stated in Cafolla that, adopting the approach of Herbert J. in *C (D)* would obviously require an analysis of the time records of the solicitor and that "asking what a person did and how long it took" are not only the most elementary enquiries in evaluating work, they are also the "beginning of the exercise" required by s. 27 (1) and the rules.

57. Thus the correct methodology to be followed by a Taxing Master in assessing Bills of Costs in taxation is as follows:

(1) Firstly, as the beginning of the process, he should ascertain from the Bill of Costs (or other records of the Solicitor) what work was done, who in the firm did it and what was their seniority, how long did the work take, how much is being charged for each individual professional service and what was the appropriate hourly rate for that solicitor.

(2) Secondly, he should conduct a root and branch examination of the Bill of Costs and other papers in the case, consider the time and labour expended by the solicitor, and the skill, specialised knowledge and responsibility required of the solicitor in respect of each of the above items and assess whether the amount being charged for each professional service is fair and reasonable.

(3) Thirdly, he should then assess the complexity of the cause or matter, the difficulty or novelty of the issues involved in the case and the other matters in O. 99 r. 37 (22) and consider whether this requires an adjustment to the fee upward or downwards.

58. However when one compares what the Taxing Master did in this case with the methodology required by the Act, the Rules and the case law of the courts, it is clear that the Taxing Master has not followed the correct methodology in this case. Thus on page 22 of the taxation ruling the Taxing Master states:

"It is a Taxing Master's obligation, in the first instance, to ascertain a full understanding of the nature and extent of a claimant's solicitor's work and then, and only then, having heard the submissions of the parties, attempt to put a value on the case. Having carried out this exercise, the resultant valuation should be tested against either, or both, the comparators which are relied upon by the parties and the extent of time necessarily expended by the solicitor in attaining justice on behalf of his client." (Emphasis added).

59. With respect, this passage illustrates how the Taxing Master used the wrong methodology. I set out later in the judgment, under each of the grounds of appeal, the errors in methodology. However the main errors of methodology are set out below.

60. Firstly, when he received the Bill of Costs from the plaintiff's solicitor's costs accountant, he should have realised that it simply did not contain any information about who in the firm carried out the particular service, what was their seniority, what was their appropriate hourly rate, how long did the work take and how much was being charged for that particular service. None of the necessary information was contained in the Bill of Costs and therefore the Taxing Master should have directed the plaintiff's cost accountants to prepare a fresh Bill of Costs and resubmit it.

61. Secondly, the plaintiff's solicitors offered to reconstruct the time spent on the file and to submit a memorandum of hours spent on the case to the Taxing Master. However the Taxing Master refused this offer and directed the plaintiff's solicitors not to do this. This was a significant error as it meant that the Taxing Master did not have any proper information about the time and labour spent on the case to consider the nature and extent of the work done.

62. Thirdly, instead of starting the assessment of the plaintiff solicitor's work with an assessment of time and labour and then assessing whether the complexity and/or importance of the case required the fee to be adjusted upwards or downwards, the Taxing Master assessed the instruction fee primarily by reference to the complexity and nature of the case and only thereafter assessed a putative number of hours worked as a cross check on his assessment of an appropriate instruction fee. This is, in effect, putting the cart before the horse. The foundation stone of a proper assessment of a Bill of Costs is an assessment of the time and labour and charges of each solicitor for each professional service provided. The issues of complexity, novelty, importance of the case to the client and its value are only to be considered thereafter.

THE PRINCIPLES TO BE CONSIDERED BY THE HIGH COURT ON A REVIEW OF A DECISION BY THE TAXING MASTER

63. Before I turn to the specific grounds of appeal in this case against the decision of the High Court, it is necessary to consider the legal principles to be considered by the High Court on a review of a decision by the Taxing Master.

64. Order 99, rule 38(3) of the Rules of the Superior Courts provides that a party who is dissatisfied with a decision of the Taxing Master as to any item of costs which has been objected to, or with the amount of those items, may 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"*.

65. Section 27(3) of the 1995 Act also makes provision for a review of the decision by the Taxing Master and provides as follows:-

> *"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."* (Emphasis added).

66. Order 99, rule 38(3) of the Rules of the Superior Courts and s. 27(3) of the 1995 Act have been considered by the courts in a number of cases. In *Superquinn v. Bray UDC (No. 2)* [2001] 1 I.R. 459, Kearns J. stated as follows:-

> *"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."*

67. In *Smyth v. Tunney (No. 2)* [1999] 1 ILRM 211, McCracken J. stated at p. 213:-

> *"The principle on 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."*

68. In *Bloomer v. Incorporated Law Society of Ireland* [2000] 1 I.R. 383, Geoghegan J. expanded on the principles which a court would take into account in trying to assess whether (a) there was an error by the Taxing Master; and (b) whether the decision of the Taxing Master was unjust. He stated at p. 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."*

69. In *Superquinn*, Kearns J. in referring to the views set out above by Geoghegan J. in Bloomer stated at p. 476:-

> *"This view makes obvious sense but it is frankly difficult to see how it can be reconciled with that of McCracken J. in Smyth v. Tunney (No. 3) [1999] 1 I.L.R.M. 211. In discharging its function the High Court inexorably must, if it can, form a view itself of the particular item of costs or the amount it would have awarded in any given situation. Otherwise, there is no basis upon which any conclusion as to 'injustice' can exist in the absence of some mistake of principle. I would therefore regard the reasoning of Geoghegan J. as more correct.*

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."

70. In summary, therefore, the standard of review which should be considered by a Court in reviewing a decision of the Taxing Master is:-

(i) whether the Taxing Master has erred as to the amount of the allowance or disallowance; and

(ii) if so, whether that error is of such an amount or of such a nature that the decision of the Taxing Master is unjust.

71. I also note the decision of Hedigan J. in *Revenue Commissioners v Wen-Plast (Research and Development) Limited* [2009] IEHC 453 and the statements of McGovern J. in *Lowe Taverns (Tallaght) Limited v. South Dublin County Council* [2006] IEHC 383, where McGovern J. stated:-

"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."

When does an error as to amount become unjust?

72. The issue of when an error is such that it becomes unjust is also a question which has been considered by the courts. In *Superquinn*, Kearns J. stated:-

"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."

73. However, in subsequent cases, this mathematical or formulaic method of assessment has been questioned. Thus, in *Quinn v. South Eastern Health Board* [2005] IEHC 399, Peart J. stated:-

"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."

74. Likewise, in *Wen-Plast*, Hedigan J. stated:-

"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."

75. I also am of the view that, although a 25% margin rule has the attraction of simplicity, the requirements of assessing whether the error amounts to an injustice, requires a more flexible approach based upon an examination of all the circumstances of each case. The larger the fee, the more a court needs to have consideration to all the circumstances of the case. In a case of an instruction fee of €500,000, an error of 10% amounts to €50,000 which could amount to an injustice in a particular case.

76. The Respondent submitted that the Appellant had to establish that the Taxing Master made a "serious" or "significant" error and also that the Appellant must show that the injustice was "clear and manifest". However, in my view, that is to ignore the express language of the statutory section. Section 27(3) provides that the High Court may review a decision where it is satisfied that the Taxing Master has erred. It does not provide that it may only review a decision where the Taxing Master has made a "serious" or "significant" error. Likewise, s. 27(3) provides that the High Court may review the decision if the Taxing Master has erred in such a manner that the decision is "unjust". It does not provide that the injustice must be "clear and manifest". The question of what is unjust depends on all the circumstances of the case. The section is drafted in a simple and straightforward manner and there is no reason, in my view, to add words to it.

77. Any concern that any error, no matter how trivial or minor, on the part of the Taxing Master could form the basis of a review, or trigger an inquiry by the court is, in my view, misconceived. The error must be such as to lead to an injustice. If the error is minor or trivial then it is unlikely to have led to an injustice. If, on the other hand, the decision is unjust then the error may not have been minor or trivial.

THE APPELLANT'S FIRST GROUND OF APPEAL – THE "TIME" ISSUE

78. I turn now to consider the specific grounds of appeal in this case. The first ground of appeal by the appellant's solicitors is that the Taxing Master's approach to time was an error that resulted in an injustice within the meaning of s.27(3) of the 1995 Act and that Kearns P. erred in failing to regard the Taxing Master's approach to time as an error that resulted in an injustice.

Taxation Ruling/ Objections Ruling

79. The appellant's solicitors submits that the Taxing Master did not carry out any, or any proper, assessment of the time taken by the appellant's solicitor to do the work which resulted in the claimed solicitor's instruction fee of €485,000 or the Taxing Master's recommended instruction fee of €265,000.

80. The appellant's solicitors accept that from September 2008 (the date on which they first received instructions in this matter) until August 2011, they did not keep any records of time spent on the case. Thereafter from August 2011 until the conclusion of the case in October 2011 they kept detailed time- recording information. According to their time- recording records, the appellant's solicitors maintain that they spent 490 hours on the plaintiff's case (broken down by actual solicitor, seniority of solicitor and hours done on each item) from August 2011 to October 2011. (Of these 490 hours, there were 51 hours which appear to have been double counted. These were however noted on taxation and accepted by the plaintiff's solicitor. They are therefore not in dispute. This is exactly the sort of discrepancy which one would expect to emerge in a taxation process).

81. However the plaintiff's solicitors estimate that the number of hours which they spent on this case was approximately 1,000 hours.

(This included the 490 hours recorded above).

82. The plaintiff's own cost accountants introduced, and relied upon, an hourly rate of €375 per hour. The Taxing Master did not introduce it but used this and other hourly rates as a test against his own assessment of the instructions fee.

83. The plaintiff's solicitors subsequently introduced a revised estimate of between 1,000 to 1,200 hours spent working on this case.

84. Therefore the Taxing Master could not have had any proper or reliable figure for hours worked on the case as a basis on which to assess the time and labour expended by the solicitors. On one view of the situation he appeared to be working off the figure of approximately 490 hours; on another view of the situation he might have used the plaintiff's solicitor's estimate of 1,000 hours; on a third view of the situation he might have used the plaintiff's solicitor's estimate of 1,200 hours. Moreover in his first Taxation Ruling he referred to 875 hours and 920 hours.

85. It is clear therefore, on the facts of this case, that the Taxing Master did not assess properly the amount of time and labour spent on each professional activity and/or assess an appropriate professional fee or charge for each activity.

86. Of course, the main reason for this is that the Bill of Costs furnished by the appellant's solicitors did not, as set out above, provide any information about the time taken by the appellant's solicitors to carry out the relevant professional service on each occasion. The Bill of Costs was, therefore, not in the correct format and should have been rejected by the Taxing Master with a request for a revised Bill of Costs.

87. Moreover, to compound this error, the appellant's solicitor offered to provide time estimates for those activities where no contemporaneous time records existed but the Taxing Master directed the appellant's solicitors not to do so. This was clearly an error by the Taxing Master. He should have directed the appellant's solicitors to provide details of such hours to him to enable him to carry out a proper assessment of the plaintiff's solicitors' work. Indeed as Mr Gleeson SC, counsel for the plaintiff's solicitors submitted, the refusal of the Taxing Master to accept the reconstruction of time records was an error which condemns the Taxation Ruling, the Objections Ruling and the High Court Review Ruling.

88. In fact, the approach of the Taxing Master was to break down the plaintiff's costs into broad periods of time e.g. September – December 2008; January – December 2009; January – December 2010; January – October 2011; he then sought to ascribe certain amounts of fees based on the activities carried out in each period of time.

89. His approach, which was based on that suggested by the defendant's costs accountant, was to refer to the number of "activities" carried out during each of these particular periods without, in any way, considering the number of hours or time and labour for each activity or the professional charge for each activity. Thus, for example, the defendant's cost accountants suggested that in 2009, there were *"130 activities"* with a suggested value of €20,000; in 2010, there were *"163 activities"* with a suggested value of €30,000; in January – October 2011 there were *"1,133 activities"* with a suggested value of €150,000. Each of the *"activities"* are clearly separate and distinct. They may take a single hour or many hours. They may be done by a junior solicitor or by a partner but none of these matters are set out and assessed by the Taxing Master. The number of activities was simply counted by the Taxing Master and a notional value ascribed. This is wrong in law and wrong in principle. If there is an "activity" it should be recorded by time and labour and a value ascribed to it which can be agreed or disputed.

90. The difficulties in the assessment of the Taxing Master are also apparent in the Objections ruling. Thus for example, the appellant's solicitors assessed their work in 2009 at a sum of €60,000. The Taxing Master assessed it at €20,000. He agreed with the defendant's costs accountant's assessment. It is difficult to understand from his ruling, however, what objective factors he used to come to this assessment. Indeed the Taxing Master stated:

> *"I assessed the allowance of €20,000 based upon the extent of the work, the submissions of the parties and the period of time involved, not the number of hours, during which the work was carried out." (Emphasis added).*

91. The failure by the Taxing Master to carry out this review of the time and labour taken by the plaintiff's solicitors on each activity was an error of law, because the Taxing Master failed to assess the plaintiff's legal costs in full conformity with s.27 (1) and (2) of the 1995 Act and the Rules of the Superior Courts and, in particular, O. 99, r. 37(22)(ii)(b) which require the Taxing Master to consider the time and labour expended by the solicitor. The Taxing Master's failure to do so was also not in conformity with the approach set out by Herbert J. in *C.(D.)* or that set out by Ryan J. in *Cafolla*.

92. The time taken to perform a certain task, the nature of that task, the seniority of the solicitor involved in that task and the professional charge for each service (which may include the hourly rate) should be the first step in the Bill of Costs and in an assessment of the Bill of Costs. It is the beginning of the entire process. Indeed it is the foundation stone of the Bill of Costs. That is not to say that all the other factors set out in O. 99 r. 37 (22) are not to be considered. They should be considered but only after the preliminary exercise of time and labour have been assessed. To assess an instruction fee by reference to all the other criteria set out in O. 99 r. 37 but to ignore "time and labour" and then to cross- check such an instruction fee by reference to the time spent is, in my view, the wrong approach by which to assess an instruction fee.

93. One has only to look at what has happened in this case to see the problems with any other approach, and indeed with the approach adopted by the Taxing Master in this case. Counsel for the appellant submitted to Kearns P. in the High Court that it appeared that the Taxing Master had simply "looked into his heart" to determine that the instruction fee in this case was €276,000. However, of course the same comment could be made of the appellant's solicitor and, in looking into their heart, they considered an instruction fee of €485,000 to be reasonable.

94. Indeed this case illustrates the great difficulties all parties – the plaintiff's solicitors, the defendant's solicitors, the Taxing Master and indeed the High Court – have in properly assessing a solicitor's instruction fee in a difficult and complex piece of litigation. This difficulty is caused by the subjective evaluations put on work done by the various parties. The plaintiff's solicitors, who have worked hard on a case over many years and who have achieved a significant result for their client, believe that they should be entitled to mark a fee commensurate with that award; the defendant's solicitors, likewise, are seeking to reduce the fee as much as they can in the best interests of their client; the Taxing Master is given the difficult task of trying to "assess" an appropriate instruction fee in these contested circumstances. This results in a sterile debate based on the subjective assessment of either the Taxing Master or the plaintiff's solicitors as to what is an appropriate instruction fee. Such a subjective assessment needs to be replaced by a more objective analysis of the various factors in play which result in a particular instruction fee. That is why any assessment of a solicitor's instruction fee must start with the hours worked on each item, the level of seniority of the solicitor involved and the professional charge for that individual activity (which may include the hourly charge). This allows the parties - and indeed the court – a measure

of objectivity in the assessment because professional charges for specific items (including hourly charges) are transparent and can be assessed with some objectivity and can be compared with other hourly rates. The debate will then be about whether the hourly rate was reasonable in all the circumstances and/or whether the number of hours spent was reasonable and/or the level of seniority of the solicitor involved. There may also be an assessment as to whether fees should be adjusted upwards or downwards because of the other matters set out in Order 99 rule 37 (22). That is the proper battleground for a taxation of costs rather than whether, when taken in the round, an appropriate instruction fee should be €265,000 or €485,000.

The judgment of Kearns P.
95. It is clear that Kearns P. in his judgment had regard to O. 99 r. 37 (22) (ii), C (D) and *Cafolla* and the requirement that time is a factor which the Taxing Master must take into account in making his assessment of what is reasonable.

96. Kearns P. noted that no detailed time records were kept by the solicitors until August 2011. He also noted that "the Taxing Master did not require the solicitors to prepare retrospective schedules but nonetheless did examine and explore the amount of hours actually expended". It is however difficult, in my view, to see how the Taxing Master could have properly examined and explored the amount of hours actually expended without having the detailed calculation of hours spent on each item prepared by the appellant's solicitors. Whilst it is the case that the plaintiff's solicitors did not keep time records from September 2008 until July/ August 2011, nevertheless they did offer to reconstruct the hours worked on each item and to provide a memorandum of these hours to the Taxing Master. The Taxing Master however refused this offer. This meant that he did not have the relevant information upon which to properly assess the time and labour spent by the solicitors on each item of the professional service which they provided in this case.

97. Kearns P. also stated that:

> *"In this respect, the Court accepts the defendant's contention that the Taxing Master did in fact test and cross-check his assessment against the time records and time estimates made available to him. This seems an eminently suitable approach to have adopted in circumstances where the time records adduced were not accurate and the majority of time expended went unrecorded. Rather than engage in a full recital of the Taxing Master's reasoning, the Court has appended the relevant pages of the Taxing Master's second ruling on this issue at the end of this judgment. I agree with the approach adopted by the Taxing Master as therein detailed, which has due regard to all of the relevant criteria."*

98. However, again, in my view, it is difficult to see how the Taxing Master could have tested and cross - checked his assessment of the instruction fee against the time records and time estimates made available to him in circumstances where the time records and time estimates made available to him were manifestly deficient (and indeed accepted by the plaintiff's solicitors as being deficient). The problem could have been rectified by the Taxing Master directing the plaintiff's solicitors to furnish to him a reconstruction of their estimate of the hours worked on the case from September 2008 to August 2011.

99. The plaintiff's solicitors provided an initial estimate of the number of hours spent on this case as approximately 1,000 hours. They subsequently revised this to 1,200 hours. Kearns P. in the High Court characterised this estimate as "an unhelpful estimate" and, in my view, this is a fair criticism. It is the obligation of each solicitor when they present a bill for taxation on a party and party basis to comply with the Rules and to furnish a Bill of Costs which sets out the time and labour spent on the case and on each element of the case. As Ryan J. stated in *Cafolla* and as Kearns P. repeated in this case, if there is a difficulty in calculating the time spent that is a problem for the claimant solicitor. The obligation is on the solicitor to keep a proper record of their time and labour spent on each case. If they have failed to keep proper records of their time and labour, then there is no reason why they should get the benefit of any doubt about the estimate of hours which they spent on the case. If they submit the bill with only an estimate of hours and no proper records to back up that estimate then this estimate will be carefully scrutinised by the Taxing Master. It is at that point that the Taxing Master is entitled to make a more generalised assessment of whether the estimate of hours provided is reasonable and/or reliable and, if not, to make his own assessment of the amount of hours spent on each item, the seniority of the solicitor involved and the appropriate professional charge for that professional service.

100. Kearns P. also noted that the plaintiff's solicitors having initially submitted that a total of 1,000 hours were spent on the file later submitted that the estimate could be revised upwards to 1,200 hours. Kearns P. stated *"The Court finds this discrepancy between the two estimates to be both significant and unacceptable. A measure of exactitude is essential in this context, and a plaintiff must be in a position to justify and identify what work was done, who in the firm carried out the work, how long it took and what was the appropriate rate to be charged having regard to the nature of the work, as not all work can be charged at the highest rate."* I would also note that 1,000 hours at €375 an hour results in an instruction fee of €375,000 which is €110,000 short of the instruction fee charged by the plaintiffs in this case. If however the number of hours is revised upwards to 1,200 hours at €375 this results in an instruction fee of €450,000. It is however, in my view, an incorrect approach for solicitors to seek to adjust the number of hours which they estimate was spent on a case in order to justify an end figure for an instruction fee which they have in mind.

101. Therefore I am of the view that the Taxing Master and Kearns P did not give sufficient regard to the amount of time involved. This was an error of principle and of law which resulted in an injustice within the meaning of s. 27 (3) of the 1995 Act.

THE SECOND GROUND OF APPEAL – THE ISSUE OF INTANGIBLES – NOVELTY, COMPLEXITY, SKILL, SPECIALISED KNOWLEDGE AND RESPONSIBILITY
102. Before dealing with the issue of "intangibles" it is important to set out again the relevant provision of the Rules which deal with this issue.

103. Order 99 rule 37(22) (ii) sets out the seven matters which the Taxing Master shall consider in his discretion. These include:

(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. (Emphasis added).

104. The appellant's solicitors submit that, in addition to the time and labour expended by the solicitor, the Taxing Master, and on review, the Court, must take into account the complexity of the cause or matter, the difficulty or novelty of the questions involved and the skill, specialised knowledge and responsibility required of the solicitor.

Novelty and complexity as intangibles
105. I will deal firstly with the issue of novelty and complexity. It is undoubtedly the case that medical negligence cases are significantly more complex than other types of personal injury cases. In *Wright v. H.S.E.* [2013] IEHC 1 Irvine J. stated in relation to the complexity of modern medical negligence litigation:

"14. It is undoubtedly the case that in recent years, clinical negligence litigation has become more complex…

15. It is also the case that in clinical negligence proceedings greater numbers of expert witnesses than ever before are being retained to deal with the issues of liability and causation."

106. There is also no doubt that the case involved in these proceedings was a complex medical negligence case.

107. The grounds on which the appellant's solicitors argued that this case involved issues of novelty and complexity are summarised in the decision of Kearns P. at p. 15 as follows:

> *"It is worth once more focusing on what is stated to be the "novelty" of the case. Firstly, it involved Rhesus incompatibility disease. Secondly, the plaintiff's claim was that she should have been delivered up to six weeks sooner than she was delivered to avoid brain damage. Thirdly, it was alleged there was inadequate ante-natal care and reference was made to another case (Quinn v. Mid-Western Health Board [2005] 4 I.R. 1) which was unsuccessful because the plaintiff was unable to establish causation. Causation is sometimes a major problem for a plaintiff in a case of this sort, even if negligence is conceded."*

108. The essence of the appellant's solicitor's objections to the Taxing Master's initial Taxation Ruling, his Objections ruling, and indeed the High Court Review Judgment, was that, they say, the Taxing Master and the Court failed to take into account the novelty and complexity of this case in setting the level of the instruction fee. They submit that because of the novelty and complexity of this case there should have been an uplift in the instruction fee to the level of €485,000 (or thereabouts) as contended for by them. They submit that the Taxing Master and the High Court were in error in failing to give sufficient weight to these issues of novelty and complexity and that this error resulted in an injustice to them within the meaning of s. 27 (3) of the 1995 Act.

109. The appellants also submit that there was clear evidence of the novelty and complexity of the case given during the Objections hearing before the Taxing Master by two specialist solicitors and one specialist senior counsel. Moreover they submit that none of this evidence was ever challenged in cross examination.

110. The Taxing Master in his Objections Ruling concluded as follows:

> *"Solicitors are not expected to undertake medical research, even those regarded as specialists in clinical negligence claims. I alluded in my ruling to Mr. Boylan having considered some such research and indicated that I took it into account. Thereafter it was a matter for the experts. I do think that, in light of receipt of such overwhelmingly positive reports on both duty of care and causation, it would not be reasonable to increase the solicitor's instruction fee by reason of doubt or worries which the solicitors continue to retain in their heads. The novelty aspect was considered in light of work actually undertaken by the plaintiff solicitors. <u>While the medical condition at issue may have had an element of novelty attached to it, the legal work undertaken did not"</u>.* (Emphasis added).

111. It is clear therefore that the Taxing Master considered the issues of complexity and novelty of the appellant's solicitor's work in assessing the instruction fee. It is equally clear that the Taxing Master came to the view that although the medical condition at issue in the proceedings may have had an element of novelty attached to it, the legal work undertaken on behalf of the plaintiff did not.

112. I note that O. 99 r. 27 (22) (ii) refers to the complexity of the "cause or matter" and the difficulty or novelty "of the questions involved". It does not refer simply to the novelty or complexity of the legal issues involved. The Rule clearly includes issues of fact as well as issues of law. Having said that, all medical negligence cases are complex and difficult. The appellant's solicitor's evidence was that there were facts at issue which raised novel questions which were complex and difficult. However issues of complexity, novelty and difficulty in medical negligence cases must be assessed within a range of such complexity, novelty or difficulty. In my view, these questions of complexity, difficulty or novelty were in fact questions primarily for the plaintiff's medical experts, rather than the solicitors themselves. I do not believe therefore that the Taxing Master has made any error of principle or of law which would amount to an injustice to the appellant solicitors within the meaning of s. 27 (3) of the 1995.

113. The issue of novelty and complexity was also considered by Kearns P. in his judgment at pp. 12 to 17. Having set out and summarised the evidence on this issue, and the approach of the Taxing Master, Kearns P. stated as follows at p. 16:

> *"This Court has been visited with multiple lever arch folders, rulings on objections and submissions of inordinate length on this and the other issues to which I shall presently refer, but on this particular issue I think there has been some degree of conflation in the minds of the appellant's advisors between the unusual medical condition from which the plaintiff's mother suffered and the notion of complexity in preparing and presenting the case. The fact that a condition is rare and unusual does not necessarily render the case more complex in terms of work or preparation. It simply means that work and research must move in a direction of medical inquiry somewhat different from that more often trodden by solicitors practising in this area.*
>
> *The Taxing Master found no evidence of additional work being required because of the unusual medical condition suffered by the plaintiff's mother."*

114. In my view Kearns P. was correct in his assessment of whether there were issues of complexity and/or novelty and/or extra work caused by this issue of complexity and novelty in this case.

115. Accordingly I am of the view that, on the issue of novelty and complexity, neither the Taxing Master nor Kearns P. made any error or any error which amounts to an injustice to the plaintiff's solicitors within the meaning of s. 27 (3) of the 1995 Act.

116. However it must be emphasised that both the Taxing Master and Kearns P considered this issue of novelty and complexity against the backdrop of the fact that they were both of the view that the Taxing Master's assessment of time was correct, that his estimate of an instruction fee of €276,000 was correct and that there did not need to be any further uplift in the fee because of these intangibles of novelty and complexity. I am of the view that the Taxing Master made an error of approach in respect of time. He will therefore need to consider the Bill of Costs again. Having considered the Bill of Costs again, and the time and labour expended on the case, the Taxing Master will then need to consider, again, whether the instruction fee resulting from this exercise is fair and reasonable or whether it requires an "uplift" as a result of the issues of complexity, novelty or other intangibles.

The issues of skill, knowledge and responsibility

117. The appellant's solicitors further submit that the Taxing Master and the High Court did not have sufficient regard to the skill,

specialised knowledge and responsibility required of the solicitor in this case. These are also classified as "intangibles" by the appellant's solicitors in assessing the instruction fee. They submit that, in a case such as this, an assessment of the instruction fee does not involve a simple application of a multiplier to an hourly rate. They also submit that, although the Taxing Master stated that he had taken intangibles into account, he did not, in fact, take such intangibles into account. They submit that para. (b) of the sub rule O. 99 rule 37 (22) (ii) makes it clear that "skill, specialised knowledge and responsibility" are to be treated separately from the "time and labour expended" by the solicitor. They therefore submit that once the time and labour expended by the solicitor have been assessed there should be an uplift on the Taxing Master's assessment of an instruction fee to take account of the skill, specialised knowledge and responsibility of the solicitor. The appellant's solicitors also submit that specialist skill and experience must be rewarded because such solicitors will complete the work quicker than a solicitor without such skill and experience and that applying a multiplier to any particular rate per hour constituted a "plodder's charter" which did not reward specialist skill and experience".

118. However, in my view, the argument that a particular chargeable rate per hour represents "a plodder's charter" is unsustainable in the modern world. It is clear that, in many professions, including the legal profession, many people charge out their time on an hourly basis. Moreover, the greater the seniority and expertise of the solicitor the greater the hourly charge - out rate. It could hardly be argued that every single professional who charges an hourly rate is a "plodder" and that a fee arrangement which consists of an hourly rate is a "plodder's charter".

119. One of the cases relied upon by the appellant's solicitors is Maltby v. DJ Freeman & Co. [1978] 1 WLR 431 where Walton J. stated as follows:

> *"When dealing with the various matters mentioned, the easiest to deal with is of course…the time expended by the solicitor or his employees, because there should be little room for argument, assuming – as indeed ought always to be the case – that proper records have been kept. In a good many cases – although by no means all – it is also the logical starting point, in that it gives in itself a good indication of the weight of the matter as a whole. I would however make one gloss; however meticulously time records are kept, this would always, save in the plainest of all possible cases, represent an undercharge. No professional man, or senior employee of a professional man, stops thinking about the days problems the minute he lifts his coat and umbrella from the stand and sets out on the journey home. Ideas – often very valuable ideas – occur in the train or car home, or in the bath or even whilst watching television. Yet nothing is ever put down on a time sheet – or can be put down on a time sheet – adequately to reflect this out of hours devotion of time. Thus, it will be a rare bill which can be simply compounded of time and value; there must always be a third element."*

120. Whilst this quote sets out graphically the concerns of a professional person, such concerns are obviously not just confined to professionals such as lawyers or accountants. Indeed most, if not all, workers may well reflect on the day's events in the train or car home or whilst watching television. There is hardly anything unusual in that. It could hardly be argued that all such persons are entitled to put in for a claim for overtime. That is simply the nature of modern work.

121. However, the views of Walton J. illustrate again the important point that it is the time spent by a solicitor which is the logical starting point in an assessment of fees in that it provides a good indication of the weight and importance of the case as a whole. There may well be cases when, after an assessment of the hours spent by a solicitor, and the hourly rate charged by that solicitor, a total instruction fee is arrived at which nevertheless may not represent a fair instruction fee for the solicitor. One would have thought however that if the hourly rate was set at a correct and appropriate rate, and, if all the number of hours had been recorded then this would be an unusual if not an exceptional circumstance. However it could arise and in those circumstances the Rules of the Superior Courts permit for some form of upward - or indeed downward - adjustment of the fees. This may arise because of the importance of the cause or matter to the client, the value of the case, or indeed because of the complexity or novelty of the issue as set out in Rules of the Superior Courts.

122. It is clear on the facts of the present case that the appellant's solicitors had the relevant skills, specialised knowledge and responsibility to conduct such a complex medical negligence action and indeed conduct it carefully and successfully. However one would expect that the hourly rate charged by a solicitor would reflect his skill, specialised knowledge and responsibility.

123. Indeed as Laffoy J. stated in Minister for Finance v. Goodman (No. 2) (Unreported, High Court, Laffoy J., 8th October, 1999):

> *"If the hourly rate applied in the computation of the appropriate fee represents the reasonable and fair "going" rate for work of the type undertaken or comparable work, the factors which the "uplifts" allowed by the Taxing Master were designed to reward - skill, knowledge, complexity, difficulty, responsibility and effort – are already remunerated by the application of the hourly rate."*

124. The appellant's solicitors submit that this passage has no application to the appellant's case but I disagree. In most areas of professional life in the modern world, costs are based on an hourly rate. There is no reason why this should not apply to litigation solicitors as well as to commercial solicitors. If it turns out in certain cases that the number of hours worked, and the instruction fee as a result thereof, does not represent a fair and reasonable fee for the work done then the claiming solicitor can make an argument that his specialist skill and knowledge justifies an uplift in the fee. However if the hourly rate is set at an appropriate rate and is "the going rate" for similar professional persons then it is difficult to see on what basis such an argument could be maintained.

125. Kearns P. considered this issue at p. 32 of his judgment where he stated as follows:

> *"Equally on the topic of 'intangibles' the Court sees no reason for an uplift in the solicitor's fee for this reason. Effectively the plaintiff's solicitors are seeking an extra €100,000 by reference to intangibles. <u>However, where hourly rates are fixed for professional fees, it must be assumed that considerations of this nature are reflected in the rate arrived at. They are in the case of professionals in other disciplines.</u> Even if I am mistaken in this view, I am nonetheless satisfied that the Taxing Master had regard to this consideration, factored it in to his considerations, and the Court sees no reason to interfere with his findings on this ground."* (Emphasis added).

126. However for the reasons set out earlier in this judgment I am of the view that the methodology used by the Taxing Master was wrong in law. He ought to have first considered the time and labour expended by the solicitors and in so doing to have assessed the number of hours spent, the seniority of the solicitor involved, the hourly rate for each solicitor and the appropriate professional charge for each element of a professional service. If he had done so he would then have been able to build an instruction fee from the ground up. It is only after this exercise has been undertaken that the Taxing Master should consider other issues such as complexity, novelty, skill, specialised knowledge and responsibility. Moreover if the hourly rate is correctly set then these matters should be incorporated in, and reflected in, an hourly rate. The Taxing Master in this case did not follow that approach. He took intangibles into account at the very start of his analysis instead of at the end. That is of course an error in methodology.

THE THIRD GROUND OF APPEAL – THE "SUPER PROFITS" ISSUE

127. The Taxing Master in his initial taxation ruling on the plaintiff's costs stated at page 39 of his report:

> *"The reference made on behalf of the defendant to the possibility that "super profits" may have been earned in the past should not be discounted in my view"*

128. This reference by the Taxing Master to the fact that "super profits" may have been earned in the past by the plaintiff's solicitors in previous cases was the subject of a strenuous objection by the plaintiff's solicitor in the Objections hearing.

129. This is dealt with by the Taxing Master at page 53 of his Objections Ruling as follows where he states:

> *"The plaintiff solicitor is particularly concerned that the reference to super profits found its way into my initial ruling. I recorded that the submission had been made to me during the course of the hearing."*

130. In the course of the High Court hearing the defendant expressly withdrew any argument that the Taxing Master should have regard to any alleged "super profits" made by the appellant's solicitors in previous cases.

131. This is recognised by Kearns P. in his judgment at p. 28 where he states as follows:

> *"At one stage in the Taxing Master's Ruling, there was a suggestion that the plaintiff's solicitors were, in effect, seeking to recover "super profits" in the figures advanced for taxation in this and other cases. To the extent that this suggestion is based solely on the fact that the plaintiff's firm specialises in medical negligence work and for that reason has had a significant number of cases in the last ten years, some of which have proceeded to taxation and in respect of which substantial sums have been awarded in costs, the Court rejects it. The fact that a particular firm has expertise and is frequently instructed on that basis should not lead to any such characterisation of the solicitor's work, and the Court was glad to note during the course of the hearing that counsel on behalf of the defendant expressly withdrew any such inference or contention."*

132. One would have thought therefore that that was the end of that matter. It remains, however, a ground of appeal by the appellant solicitors in this case and therefore it is a matter which must be considered by this Court.

133. The essential point made by the appellant's solicitor is that given that the Taxing Master referred to the possibility that super profits may have been earned in the past by the plaintiff's solicitors, the Taxing Master was clearly taking them into account. The appellant submits, that the fees which the firm might have earned in other work was not a matter which the Taxing Master could, or should, take into account; indeed any information on fees received in such other cases were not before the Taxing Master and therefore he did not have any relevant evidence or information upon which to assess, let alone take into account, any alleged "super profits".

134. In my view, the appellant's solicitors are correct on this point. If the Taxing Master took "super profits" into account in his first Taxation ruling, he should not have done so. If he did, this was an error which would result in an injustice to the appellant's solicitor.

135. In the Objections Ruling, as pointed out above, the Taxing Master stated that he "merely recorded that the submission had been made to him during the course of the hearing". The appellant's solicitors argue that this is not a correct characterisation of the Taxation Ruling in which the Taxing Master had specifically said that the issue of "super profits" "should not be discounted in his view". This submission is of course correct.

136. I am satisfied however, taking the tenor of his Objections Ruling as a whole, that the Taxing Master listened to the objections made by the appellant's solicitors on this point and, as a result, did not take super profits into account. In any event, for the avoidance of doubt, and given that this matter has to be remitted again for taxation, I should say that the issue of "super – profits" is clearly irrelevant and is not a factor which a Taxing Master should take into account in an assessment of a solicitor's instruction fee in a case such as this.

THE PLAINTIFF'S FOURTH GROUND OF APPEAL – WHETHER ALLOWANCE SHOULD BE MADE FOR TWO SENIOR SOLICITORS AT THE TRIAL OF THE ACTION

137. The Taxing Master, in his original taxation ruling, noted that one of the issues raised on behalf of the defendant was, whether on a party on party basis, the defendant should be obliged to pay the costs of two senior solicitors being present in court for a period of six days during the trial of the plaintiff's action. The defendant submitted that this cost was not recoverable on a party and party basis and that one senior solicitor was capable of dealing with the trial on her own or with an appropriate assistant (*i.e.* a more junior solicitor) in attendance.

138. The plaintiff's solicitors argued that this was an enormously complicated and difficult case with a significant number of witnesses and with 20 banker's boxes of documents and that it was absolutely necessary to have two senior solicitors in attendance during the trial of the action. Moreover the plaintiff's solicitors submitted that as lengthy and complex settlement negotiations were going on in parallel with the trial, it was necessary to have one senior solicitor in court to deal with the running of the case and a second senior solicitor available to deal with the negotiations outside court.

139. The plaintiff's solicitors also submitted that the defendants themselves had two senior solicitors and a junior solicitor in court at all times and that therefore the principle of equality of arms meant that the plaintiff also had to have two solicitors in attendance during this time.

140. The Taxing Master in his taxation ruling noted that, whilst it was "readily understandable" that the plaintiff solicitors considered it appropriate to have two senior solicitors in attendance during the trial, the question was whether such additional costs were recoverable on a party and party basis or whether this would constitute a "luxury" which the defendant could not be expected to indemnify. The Taxing Master also noted that at that stage the case was concerned with an assessment of damages only.

141. The Taxing Master in his taxation ruling concluded:

> *"It seems to me that the absolute necessity of having two senior specialist solicitors at court during the course of the hearing all for the purpose of taking part in negotiations is questionable. It may indeed be necessary to have an assistant or perhaps even an assistant solicitor in court at all times to help in management of the case including coordinating witnesses and dealing with the extensive documentation involved. However I do not see the necessity for*

the attendance of two specialists both of whom are eminently qualified to advise the plaintiff and take part in negotiations in their own right. At the hearing stage of the proceedings the case was unequivocally run for assessment of damages only albeit that a complicated assessment was involved"…..

In my view the cost of attendance of the additional senior solicitor is not recoverable on the party and party basis. The question of equality of arms does not arise in my view. It is abundantly clear that the plaintiff in this case was fully and expertly represented at all stages by solicitor and counsel. I have heard no compelling argument as to why the attendance of the additional solicitor was required or necessary for the attainment of justice on behalf of the plaintiff."

142. The Taxing Master, in his Objections Ruling, also dealt with the issue at some length from pp. 23 to 31 of his judgment. He set out in some detail the evidence of a number of witnesses whom he heard in support of this aspect of the plaintiff's objections. These witnesses were the plaintiff's mother, Mr. Boylan solicitor, Ms. O'Connor solicitor and Mr. Denis McCullough S.C. All these witnesses confirmed that, in their view, the presence of two senior solicitors was necessary for the proper running of the case and for the proper conduct of negotiations between the parties.

143. The Taxing Master confirmed his original view that, in assessing costs on a party and party basis, it was not necessary or appropriate to include the costs of two senior solicitors in the taxation of costs on a party and party basis. He did indicate however that he would include a senior solicitor and a more junior solicitor.

144. Therefore the issue in dispute between these parties is the difference in costs between one junior solicitor and a senior solicitor in court for the duration of the hearing over six days.

145. Kearns P. in the High Court, having considered the arguments, came to the conclusion that the Taxing Master was correct to reach the particular conclusion which he did reach on this issue.

146. In assessing this issue it is necessary to have regard to O. 99 r. 37 (18) on party and party costs which provide as follows:

"On every taxation the Taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake…"

147. The question therefore which arises is whether the cost of two senior solicitors is "necessary or proper for the attainment of justice" or "for enforcing the rights of the plaintiff" or whether this amounts to "over – caution".

148. I am of the view, on the facts of the present case, that there was a requirement for two senior solicitors to be present. The injuries to the infant plaintiff were catastrophic and the assessment of damages hearing was one which would have a profound influence on the medical care which she would receive for the rest of her life. Whilst it is true that the case proceeded as an assessment only, nevertheless it was a difficult, complex and hard - fought assessment. Moreover, it is clear that a senior solicitor was required to conduct the case in court and another senior solicitor was required to carry out simultaneous negotiations outside court. I am not convinced that the attendance of two senior solicitors was a "luxury"; I think it was necessary and proper for the attainment of justice and also for the enforcement of the plaintiff's rights in this case where she had been so catastrophically damaged by the admitted negligence of the defendant. It is, in my view, also of some relevance that the defendant had retained two senior solicitors in court throughout this time. I am of the view that the court is entitled to have regard to this fact.

149. Therefore I am of the view that the cost of two senior solicitors should be recovered on a party and party basis in taxation. I would conclude that the error made by the Taxing Master in this regard is such as to amount to an injustice within the meaning of s. 27 (3) of the Act.

THE FIFTH GROUND OF APPEAL – THE ISSUE OF OVERHEADS

150. The appellant's solicitors also appeal on the grounds that the Taxing Master took into account, in his assessment of the instruction fee, the issue of office "overheads" when there was no evidence before him of comparative overheads between Dublin and Wicklow offices and he should not have taken these into account.

151. This issue arose, because in the Taxing Master's first taxation ruling - in considering the issue of an hourly rate of €375 an hour - he stated

"In my view, it would be reasonable by way of testing the instructions fee claimed against allowable estimated and recordable time expended by the plaintiff's solicitor to take into account an overall 875 hours (rather than 920) and in respect of which 600 hours might be allowed at the full rate of €375 per hour with a further 275 hours allowable at €200 per hour. This would indicate fees in the order of €277,000. Bringing the rates down to €375 and €176 per hour would indicate fees for a senior solicitor and an assistant solicitor at circa €202,600. I note that the plaintiff's solicitors practice is in County Wicklow and it is inconceivable that their overhead costs are comparable to the firms (whether solicitors or accountants) with the highest overheads in the city of Dublin and in respect of which Clarke J. in Marino Ltd considered €375 to be the maximum allowable at partner level with corresponding decrease in rates as indicated therein. It may be the case that the top rate of €375 should not be applied. I do not consider it necessary to decide this aspect as the rates and resultant figures are useful only by way of testing my assessment of the approximate fee. This must be the case where estimated time is put forward for consideration and no agreement is in existence that the fees should be calculated solely by reference to time expended. It seems that the plaintiff solicitors herein also have offices in close proximity to the Four Courts. No case was made to me that this should be taken into account and correctly so in my view."

152. The appellant's solicitors raised this issue in the Objections hearing and submitted that the Taxing Master was in error in forming this view without any evidence that the appellant solicitor's overhead costs were not comparable to firms in the city of Dublin.

153. It appears that the Taxing Master did not deal with this objection in his Objections Ruling.

154. The appellant's solicitors submitted to the High Court that, in failing to deal with this objection, the Taxing Master compounded his original error.

155. The appellant's solicitors also submit that the Taxing Master essentially used the finding in relation to overheads as a basis upon

which to hold that approximately 30% of the allowable time should have been measured at €200 per hour. They submit that there is no other basis as to why that portion of the estimated time should have been reduced to a fee of €200 per hour.

156. The plaintiff's solicitors gave evidence in the Objections hearing that certain surveys had been carried out on Dublin firms of equivalent size and that the plaintiff's solicitor's overheads were larger in certain areas and within the top 10% in others. It is submitted that none of this was challenged in cross examination and is uncontroverted evidence.

157. In the High Court Kearns P. stated (at pp. 31 to 32 of his Review Judgment) as follows:

> *"While it was not an error of any great magnitude, the Court is satisfied that the Taxing Master's comments in his first ruling (i.e., that it was inconceivable that the plaintiff's solicitor's overheads were comparable with firms with the highest overheads in Dublin), were exaggerated. The Court is satisfied that there was no evidence to support any such conclusion which, incidentally, was one strenuously contested by the plaintiff's solicitors."*

158. Again, one would have thought that that was the end of the matter. However, the appellant's solicitors submit that Kearns P. did not deal with the appellant's complaint that the issue was not addressed at all by the Taxing Master in his Objections Ruling and they submit that this is an error in the Review Judgment.

159. In my view, however the appellant's submissions on this point are not well founded. It is true that the Taxing Master (in the relevant paragraph on p. 34 of his Taxation ruling) referred to the maximum rate per hour of €375 and to a lesser rate of €200 per hour. It is also true that in the same paragraph he makes reference to the overheads of the plaintiff's firm and whether they are comparable to those of Dublin firms. However, there is nothing in his judgment which would suggest that he is reducing the hourly rate because the plaintiff solicitor's overheads are supposedly less.

160. There are two separate issues: the first is, what is an appropriate hourly rate for a senior solicitor or a more junior solicitor; the second issue is whether the cost of a solicitor's overheads might be a factor which would increase or decrease a particular hourly rate. This however was not an issue in this particular dispute. It is clear in a firm with senior and junior solicitors that not every solicitor's time will be charged out at the same rate. The appellant's solicitors themselves accept that this is the case. It is difficult to see therefore on what basis the plaintiff solicitors have continued to make such an issue on this point.

161. Indeed as Kearns P. stated in his decision (when commenting on this point at page 34 of the taxation master's taxation ruling):

> *"However the particular comment was made in the context of a discussion in relation to a high commercial rate of €375 per hour applied by the High Court in certain other cases. There is nothing in the ruling to suggest that the rate per hour ultimately applied by the Taxing Master resulted from any finding that the solicitor's overheads might have been lower. It is clear from the Taxing Master's ruling that the reason why he used a lower hourly rate when testing his assessment is because not every piece of work carried out by a solicitor will attract the maximum hourly rate on a party and party basis, for example routine correspondence. This approach is fully consistent with the comments of Ryan J. in the Cafolla case."*

162. In my view, these comments of Kearns P. are correct. If a senior and junior solicitor are working on a case there is no doubt that different hourly rates will be charged in respect of each solicitor. In any event, I am satisfied that this issue of "overheads" was not an error of the Taxing Master of such a nature as to result in an injustice to the appellant's solicitors on the facts of this case.

THE SIXTH GROUND OF APPEAL – THE ISSUE OF COMPARATORS

163. The appellant's solicitors' next ground of appeal is that whilst the Taxing Master took certain comparator cases into account, he failed to have adequate regard to other comparable cases where instruction fees greater than those in the present case were agreed and/or measured.

164. The issue of comparators is a complex one. Firstly, it should be noted that O. 99 r. 37 (22) (ii) Rules of the Superior Courts, which sets out the various matters to be considered by a Taxing Master does not include any reference to comparators; secondly, s. 27 (1) and (2) of the 1995 Act also do not contain any reference to comparators.

165. However it is clear that the courts have in the past permitted the use of comparators. Thus in *Best v. Wellcome Foundation Ltd.* [1993] 3 IR 421 Barron J. concluded that it was appropriate in assessing the level of an instruction fee to compare it with other cases of a similar nature and complexity. Likewise in Superquinn Kearns J. accepted the use of comparators as a guideline against which an instruction fee could be assessed. However, in *Mahoney v. KCR Heating Supplies* [2007] 3 I.R. 633 Charleton J. indicated that the proper approach of the Taxing Master was, firstly, to assess the work which was actually done as he is obliged to do under s. 27 of the 1995 Act and, only then to seek assistance from comparative cases where it could be considered that a similar amount of work was required. In *Bourbon v. Ward* [2012] IEHC 30 Kearns J. reiterated that the correct approach was to examine the nature and extent of the work and then to have regard to comparators if they are truly comparable.

166. Thus it is clear from the case- law that before the Taxing Master considers comparators, he must engage in a root and branch assessment of the work carried out on a particular case and he must have regard to all the matters set out in O. 99 r. 37 (22) (ii). Comparators can only be used, if at all, as a cross check on an assessment of a solicitor's fees carried out by the Taxing Master.

167. In considering comparators a Taxing Master must be careful to compare apples with apples. In my view, one cannot compare an instruction fee in one case, where fees were agreed, with another case where fees went to taxation as the costs may have been an element of the overall settlement; moreover, one could not compare an instruction fee in a case where liability and quantum were at issue with one which was an assessment only; thirdly, the Taxing Master must have available to him full information about the fees assessed in the comparator case and how they were assessed – otherwise he is making a comparison in the dark; fourthly, the cases would have to be comparable in terms of the matters set out in O. 99 r. 37(22) (ii) Rules of the Superior Courts (i.e. in terms of the complexity of the issues, the skill and specialised knowledge of the solicitor etc); fifthly, the cases would have to be comparable in terms of the "time and labour" expended by the solicitor.

168. Moreover it is clear from the Taxing Master's Objections Ruling that both the appellant's solicitors and the respondent accepted that, in high value cases, the instruction fee cannot be measured principally by reference to the amount of the damages. Thus, one cannot point to a similar medical negligence case where a similar amount was obtained (either on a settlement or a court award) and argue that because an instruction fee of €400,000 (for example) was assessed, that therefore a similar fee should be assessed in this case. There are so many variables in each case that such a comparison should be made only with great care. To do otherwise is to risk comparing apples with oranges and arriving at an incorrect conclusion.

169. It appears that the approach taken by the plaintiff's solicitors to comparator cases was to indicate similar medical negligence cases with similar injuries and similar awards, to indicate the range of instruction fees in those cases and to argue that the instruction fee in this case should be within that range. However such an approach is, in effect, simply a "rule of thumb" analysis whereby instruction fees are linked to the size of the award. Such an approach is wrong in principle and wrong in law. It cannot withstand the express terms of s. 27 (1) of the 1995 Act which specifically states that the Taxing Master must examine the nature and extent of the work done by the solicitor. This means therefore that a full analysis of the work done in the present case and in the comparator cases must be undertaken if the cases are to be properly compared.

170. It is necessary in this case, given the appellant's submissions, to consider how the Taxing Master, and the High Court, considered the issue of comparators. In the Taxing Master's first Taxation ruling he stated that 21 comparators had been cited on behalf of the plaintiff's solicitors as justification for their instructions fee in this case and that he was requested to have particular regard to comparators 3, 4, and 5 in the list provided. However the Taxing Master stated:

> *"The particulars of the individual cases which have been provided are not greatly informative as to the nature and extent of the work undertaken by the respective solicitors concerned. None of the cases to which particular reference has been made were taxed but rather were settled inter parties."*

171. It is difficult to see on what basis the Taxing Master should take into account an instruction fee in another case where the instruction fee was agreed between the parties rather than on an assessment in taxation. The Taxing Master, therefore, in my view, was entirely correct not to consider such cases as comparators.

172. I set out below a number of the comparators considered by the Taxing Master in his first taxation ruling. These are as follows:

(1.) Luke Miggin v. H.S.E. The Taxing Master stated that this case related to a birth injury resulting in the plaintiff suffering cerebral palsy. The Taxing Master however noted that limited information had been provided in relation to this matter. The value of the case was between €5 million and €7 million but was subject to a periodic payment order. It appears from the Taxing Master's ruling that he was not even certain whether this case involved a dispute on liability and quantum or an assessment only. The instruction fee was claimed at €495,000 and was agreed between the parties at €380,000. However it appears that very little information was given to enable the Taxing Master to compare the instruction fees. Moreover the instruction fee was in fact agreed between the parties and was therefore not the subject of an assessment. This case is therefore not an appropriate comparator.

(2.) O'Mahoney v. South Health Board. The Taxing Master stated in relation to this comparator that "the particulars submitted are so sparse as to be almost meaningless". He also stated that the action was settled and "it appears that liability was fully in issue". In my view the Taxing Master was correct to reject this as an appropriate comparator.

(3.) Lennon v. H.S.E. In this case damages were agreed at €2.395 million and it was also a periodic payment case. Liability was fully in issue and the instruction fee was claimed at €550,000 and agreed at €455,000. Again however the Taxing Master states "the particulars of work are sparse". This, and the fact that the instruction fees were agreed, rather than being assessed at taxation also mean that the Taxing Master was, in my view, correct not to regard these as appropriate comparators.

173. Moreover in circumstances where the plaintiff's solicitors provided 21 comparators but specifically directed the Taxing Master's attention to three specific comparators, the Taxing Master was within his rights to say that it was not practical or necessary to refer in detail to each and every comparator and to confine his comments to the three cases upon which particular emphasis had been placed by the appellant's solicitors. Having considered these three comparators the Taxing Master rejected them for good reasons.

174. The plaintiff's solicitors in the Objections hearing, made submissions to the Taxing Master about his use of comparators. In essence, the appellant's solicitors submitted that the Taxing Master was in error in dismissing the plaintiff's 21 comparator cases. As a result the Taxing Master in his Objections Ruling considered a number of other possible comparators.

175. It is not necessary for the purposes of this judgment to set out in detail all of the comparators considered by the Taxing Master in his Objections Rulings. However, having reviewed them, I am of the view that in each and every case the Taxing Master had an objective justification for holding that each case was not an appropriate comparator. In many cases this justification was because he simply did not have enough information available to him to assess the basis upon which an instruction fee was assessed; in other cases the instruction fee was agreed between the parties and therefore was not an appropriate comparator. If the Taxing Master did not have sufficient information, or if the instruction fee in a particular case was assessed without a proper root and branch analysis of the work done to justify that instruction fee, then such a case is not an appropriate comparator.

176. The Taxing Master also considered the Quilty case as a comparator. It appears from the appellant's submissions that the Quilty comparator was not one which was drawn to the Taxing Master's attention either by the plaintiff or by the defendant's solicitors. Moreover the Taxing Master did not afford the plaintiff's solicitors an opportunity to make submissions on this as a possible comparator. The appellant's solicitors submit that, insofar as the Taxing Master considered Quilty as a comparator without giving them an opportunity to make submissions on it, this was a breach of natural justice and fairness of procedures. In my view this submission is well- founded. If the Taxing Master intends to rely on any particular comparators, either to justify an argument or to reject an argument, then rules of procedural fairness require that all parties are given an opportunity to make submissions on such a comparator.

177. Kearns P. in considering the issue of comparators stated in his judgment at p. 33 as follows:

> *"It goes without saying that comparators historically have played an important role when assessing costs, be they solicitors' instructions fees or counsels' fees. In times of economic stability it makes perfect sense to have regard to sums allowed on taxation in similar cases and to sums agreed by way of fees between the parties to litigation.*
>
> *The plaintiff complains in this case that, while the Taxing Master ostensibly took comparator cases into account, he failed to have adequate regard to a number of fairly recent cases where sums significantly in excess of that allowed in the instant case were measured or agreed."*

178. The learned High Court President then reviewed *Murphy v. H.S.E., Lennon v. H.S.E. & Ors* and continued at p. 35 of his judgment:

> *"In light of the express obligation on the Taxing Master to base his assessment upon the nature and extent of the work done by the solicitor and/or counsel, the Taxing Master is not obliged to slavishly follow allowances made in comparator*

cases which he regards as erroneous or calculated by reference to outdated or incorrect principles. The use of comparators can not be a substitute for a root and branch examination of the actual work carried out by the solicitor." (Emphasis added).

179. In my view these observations of Kearns P. are correct. The Taxing Master must consider comparators with great care. If he does not, then he runs the risk of drawing an incorrect conclusion from the comparison. Moreover he must, as a first step, carry out a root and branch assessment of the work done by the solicitor, and only then when he has concluded this exercise should he consider any relevant and appropriate comparators as a cross check on the instruction fee that he has assessed.

180. As Kearns P. stated at p. 36 of his judgment:

> *"Comparators are in effect "a hall of mirrors" whereby fees allowed in past cases influence, if not determine, those to be allowed in a particular case under review. This model of self-replication is totally unsuited for circumstances where a major financial and economic catastrophe has affected the national finances. Comfortable assumptions that the calculation of fees for legal services should simply continue as heretofore, without the slightest regard to the privations experienced by citizens, including those rendering professional services, does not in the Court's view serve the interests of justice."*

181. Indeed I am of the view that in the light of s. 27 (1) and (2) of the 1995 Act, in the light of Charleton J's *dicta* in Mahony v. KCR Heating Supplies, and Kearns P's comments in this case, comparators should rarely be used in future taxations, except in exceptional circumstances. This is because they will involve the Taxing Master not only in an analysis of the time and labour expended in the case under review but also of the time and labour in comparator cases. This will inevitably result in the taxation process becoming even more lengthy and costly.

182. The defendant also argued that there were a number of cases subsequent to the ruling of the Taxing Master in this case where the plaintiff's solicitors had accepted similar figures for instruction fees in other cases on taxation and had not brought any review by the High Court. The plaintiff's solicitors argued in response that they were "driven" into accepting these lower fees by the "chilling effect" of the taxation in the present case. This argument was rejected by the High Court and, in my view, Kearns P. was correct in rejecting this argument. Each instruction fee must be considered on its own merits and after a root and branch review of the work done by the solicitor in each case.

183. Having considered the Taxing Master's analysis of the alleged comparators in this case and having considered the judgement of Kearns P., I am of the view that no error has been committed by the Taxing Master in his analysis of the issue of comparators. There is certainly no error of a nature which has resulted in an injustice to the plaintiff and I would therefore reject the appellant's solicitors' arguments on this issue.

THE SEVENTH GROUND OF APPEAL – THE ECONOMIC DOWNTURN ISSUE

185. The appellant's solicitors submit that the Taxing Master - and Kearns P. in the High Court - both relied heavily upon the economic downturn as a basis for rejecting comparators and for upholding the instructions fee in this case. They submit that there was no real evidence before the Taxing Master or the High Court on these issues and that appropriate evidence on this issue is required before it can be taken into account. They also submit that a policy of simply reducing the level of costs previously allowed was not a substitute for a root and branch examination of the type required to be undertaken by the Taxing Master under s. 27 (1) of the 1995 Act.

186. I agree with this last submission. The Taxing Master must undertake a full assessment of the nature and extent of the work undertaken by the solicitor as set out above. This will, or should, result in professional charges which are in line with the rates charged for these services during the economic downturn. The issue of the economic downturn in other words should be reflected, where appropriate, in the specific charges for each professional service undertaken at the relevant time rather than at the level of a global instruction fee. There is no specific provision in the Rules for an adjustment up or down depending on economic circumstances. Instead this should be reflected in the assessment of the professional charge made by a solicitor under a particular service at a particular time.

187. Therefore, insofar as the Taxing Master assessed an overall instruction fee and then reduced it because of the economic downturn, he made an error of principle. Such an approach fails to apply the correct methodology for the reasons set out above. The Taxing Master is of course entitled to take economic circumstances into account. But he should take it into account at all levels of his assessment of the fee i.e. in assessing an hourly rate, the charge for a specific professional service and his final assessment of the instruction fee as a whole.

CONCLUSIONS

188. I would therefore conclude that this Court, regrettably, has no option but to remit the matter back to the Taxing Master for a renewed assessment of the appropriate instruction fee. This should commence with a proper Bill of Costs being drawn up by the appellant's solicitor's cost accountants which sets out as fully as possible the time and labour expended by the solicitor in this case. Thereafter the Taxing Master should assess it in accordance with the methodology set out above.

189. In the circumstances, I would allow the appeal and remit the matter to the Taxing Master.