

THE HIGH COURT

[2012 No. 612 J.R.]

BETWEEN

ARNAUD D. GAULTIER

APPLICANT

AND

THE REGISTRAR OF COMPANIES

RESPONDENT

AND

LOIRE VALLEY LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Faherty delivered on the 28th day of April, 2017

1. This is an application pursuant to O.99 r.38 of the Rules of the Superior Courts (RSC) for a review of the Taxing Master's treatment of a specific item of the bill of costs as submitted by the respondent.

2. The present application has its background in underlying proceedings whereby the applicant sought a number of declaratory and other reliefs by way of judicial review, the purpose of which was to have the respondent's decision to dissolve the third party in these proceedings, namely Loire Valley Limited, voided. The basis put forward by the applicant for the voiding of the respondent's decision was that there was misfeasance, malfeasance, nonfeasance, obstruction to the administration of justice and a breach of duty in and around the circumstances in which the company was dissolved.

3. Judgment was delivered by Dunne J. in respect of the aforesaid substantive proceedings on 8th March, 2013, wherein the applicant was refused the relief sought and the application for judicial review was dismissed. By order of Dunne J. of the same date, it was ordered that "the Respondent do recover from the Applicant the costs of the said Motion filed on the 25th January 2013 and the herein proceedings together with the costs resolved in the Orders herein dated 21st November 2012 and 28th January 2013 respectively".

4. The applicant has appealed the dismissal of his judicial review proceedings to the High Court by notice of appeal dated 11th April, 2013.

5. Subsequent to the High Court's dismissal of his judicial review application, the respondent pursued its costs and issued a summons to tax against the applicant on 8th January, 2015, which was returnable before the Taxing Master on 18th March, 2015. The Taxing Master delivered his ruling on 28th April, 2015.

6. At the outset of his ruling, the Taxing Master considered a preliminary point which the applicant raised, namely that since the order granting costs to the respondent did not in fact direct taxation thereof the Taxing Master was without jurisdiction in the matter. This argument was rejected on the basis that it was implicit in an award of cost to a party, in High Court proceedings, that in default of agreement as to the amount thereof, the legal remedy is for taxation pursuant to the relevant statutory provisions. In this regard, the Taxing Master quoted *Gill on Costs* (1982).

7. The Taxing Master also considered a point raised by the applicant which was that in considering the extent of the respondent's solicitor's work in the substantive proceedings he should exclude any work relating to correspondence between the respondent and the Revenue Commissioners or the Revenue Solicitor in relation to the forfeiture by the State of a certain quantity of wine imported by the third party company of which the applicant was a director. The Taxing Master noted that the Revenue Commissioners' had admitted that an error had occurred and had offered compensation to the company. The Taxing Master referred to the judgment of Dunne J. who had noted this background in some detail, together with the delays in the filing the company's annual returns for the years 2006 to 2009 and the failure to file returns for the years 2010 and 2011, which ultimately led to the company being struck off by the Companies Registration Office and dissolved on 6th April 2012. The Taxing Master was of the view that it was "essential for the purpose of opposing [the] Judicial Review proceedings, that the Respondent's Solicitor should have taken full instructions concerning this background" and, accordingly, he was of the view that the relevant work had to be taken into account in the taxation.

8. The Taxing Master's ruling continued:

"I have also considered the Applicant's submission that I should not measure a sum by way of instructions fee in this case. It is contended that the Respondent's Solicitor as a State employee should not be entitled to professional fees in the circumstances. The law requires that I should assess the instruction fee in the same manner as would apply for the assessment of an instructions fee applicable to any practising Solicitor, unless evidence is adduced which would support an assertion that the 'indemnity principle' has been breached

...

Order 99 Rule 37 (22) (ii) of the Rules of the Superior Court requires that in assessing the sum to be allowed by way of instructions fee I must take into account the several matters referred to therein, including the time reasonably spent on the task. This is not in my view to be interpreted as a direction that the exact number of hours spent should be specified or that a particular rate or rates per hour should be applied. In fact no information of this sort has been proffered to me. It is the cumulative effect of the factors outlined, including the time factor which must be taken into consideration.

The Applicant asserts that there was no particular urgency involved but it does seem to me that in the circumstances of this case where serious allegations were raised against State Agencies and personnel it should be expected that the Respondent and in consequence the Respondent's Solicitor would wish to have the matter determined as speedily as possible in view of the importance of retaining public confidence in the Statutory procedures and their implementation.

Having considered the papers it does seem that a good deal of the legal drafting work was undertaken by Counsel and/or legal personnel in the office of the Respondent. I cannot take into account any internal costs incurred by the Respondent in this regard."

9. The Taxing Master went on to assess the instructions fee as follows:

"1. Taking of instructions and work up to filing opposition papers on 16

October 2012 €3,850.00

2. Opposing Applicant's Motion seeking injunctive relief; replying Affidavit, briefing Counsel and attendance at Court 21 November 2012. €1,500.00

3. Attendances in court on 16 October, 22, 27 November, 4, 6, 11, 18 December 2012 (including preparation for vacated hearing on the eve of 28 November 2012 at the instance of the Applicant) €3,000.00

4. Opposing Applicant's Motion for liberty to cross examine the Respondent; briefing Counsel thereon; and attending Court on three occasions €1,750.00

5. Work of preparation for hearing including briefing of Counsel; perusal of drafts, exchange of submissions, and attending Court on 5 March 2013 €4,500.00

6. Attending Court to take reserved Judgment €400.00

Total €15,000.00

The ruling then went on to deal with the fees claimed by external Counsel retained by the Respondent.

10. On 21st May, 2015, the applicant filed written objections to the Taxing Master's decision.

11. In his objections, the applicant made reference to his earlier requests that the Taxing Master demonstrate his impartiality and that "as a consequence of the possibility of a conflict of interest that the Taxation was only to be based on objective criteria, i.e. time spent in hours with relevant hourly rate." He "still contended that the Respondent's solicitor should not be entitled to professional fees in the circumstances where it is a department of the [State] and a Respondent to this matter."

12. Quoting Article 15 of the Constitution, he stated:

"No such law has been referred to in the ruling explaining why the Taxing Master's office should assess the instruction fee in the same manner as would apply to the assessment of an instruction fee applicable to any practising Solicitor."

He further submitted, quoting Article 47 of the EU Charter of Fundamental Rights ("the Charter") that:

"[i]n circumstances where the State has failed to assess the resources of the Applicant when made aware of the Applicant's intention and obligation to bring a litigation against the State to protect and regain several fundamental rights, it would be an unacceptable view to pass the burden of the State legal costs to the Applicant. Indeed, such practice would constitute an infringement to another fundamental right of the Applicant: the right of access to Justice, as limiting such access to a condition of resources."

The applicant went on to state:

"Regarding the allegation of Urgency made by the Respondent and accepted by the Taxing Master, the need for impartiality and objectivity first requires to define the criteria of Urgency in times of days and weeks and then to verify if such do applies.

In all events, it is hard to argue that a period in excess of 14 weeks between the applications for Judicial Review and the filing of the Statement of Opposition by the Respondent can be construed as meeting the criteria of urgency.

Furthermore, justifying Urgency on a State Agency's enthusiasm in retaining public confidence was based on a wrongful assertion that State Agency ever has public confidence. It is important to outline that a colossal guarantee has been given by the State to the banks without such being required by the banks without any note or record of the meeting leading to such decision. As this led to the bankruptcy of the State and is not being investigated to make [personnel] responsible accountable for such, the bare notion of public confidence in State agency will not be mentioned in writing for the next 40 years or until any consequence liability would be cleared, whichever will be the soonest."

13. On 25th June, 2015, the Respondent filed written submissions in reply to the Applicant's objections.

14. The hearing of the objections was fixed for the 12th October, 2015, following which the Taxing Master ruled on the matter on 16th December, 2015.

15. The Taxing Master dealt with the Applicant's contention on conflict of interest, in the following terms:

"1. It is essentially asserted that since a Taxing Master is appointed by the Minister for Justice a conflict arises in cases in which the Minister is a party thereto. Since the Minister is a Defendant in proceedings instituted by the Applicant herein, as Plaintiff, against the Minister and which proceedings are connected to or relevant to this taxation, it is my understanding that the Applicant submits that this establishes a conflict of interest.

2. I reject this objection as being irrelevant to my statutory function and it is beyond by jurisdiction to determine such an issue. I would merely add that my appointment was not made by the said Minister but by the Government of Ireland. The issues raised by the Applicant could be raised in relation to all State appointed adjudicators. I am one of two Taxing Master's charged of the Statutory responsibility of adjudicating in a fair and impartial manner all legal costs disputes which may become before me. No other agency is empowered to carry out this function and I bound by Statute to perform it.

For the reasons outlined in my original ruling, the Order dated 8 March 2013 awarding costs to the Respondent provided the requisite jurisdiction to me to carry out my function and tax the costs”.

16. As to the applicant’s objection to the manner of the assessment, the Taxing Master had this to say:

“As explained in my original ruling the law requires me to assess an instructions fee on the basis outlined in the Judgment of Finlay P. in *Governor & Company of Bank of Ireland v. Lyons* [1981] I.R. 295 at 305. I accept Respondent’s submission at clause 6 thereof.

Again for the reasons already outlined in my previous ruling I am satisfied some urgency did attach to this matter and I accept the Respondent’s submissions at clause 7.”

17. The Taxing Master went on to note the Applicant’s clarification that paras. 3, 6 and 7 of his Objections related to the instruction fee which had been claimed at €25,000 and was reduced to €15,000. He went on to disallow VAT as against the Applicant “as it has been established the Respondent is VAT registered and accordingly the onus which is on the Respondent to establish that the tax is not otherwise recoverable ... has not been discharged.”

The Taxing Master then stated:

“There is no onus on the Respondent’s Solicitor to calculate fees by reference to an hourly rate of charge. The law requires that time be taken into account in conjunction with the other factors enumerated at Order 99 Rule 37 (22) (ii) RSC.

The Applicant’s Objections in regard to the instructions fee are based solely on matters of legal principle as to the entitlement of the Respondent to indemnity for any professional fees as between party and party. I am satisfied that the instructions fee allowed is no more than the appropriate indemnity allowable to the Respondent having regard to the parties’ respective submissions to me as no evidence to the contrary has been proffered by the Applicant”.

18. In his written and oral submissions to this court the applicant asserts that the objective of his motion for review of the Taxing Master is to review item 90 of the Bill of Costs standing at €15,000 as the Chief State Solicitor’s Office instruction fee acting on behalf of the respondent. The Applicant contests the matter of urgency alleged by the respondent on the basis that no objective definition of urgency was given, either by the respondent or the Taxing Master in terms of days, weeks or months. In addition, he contests the impartiality of the Taxing Master “by design of his appointment”. The applicant requests strict utilisation of objective criteria in estimating the respondent’s instruction fee by reference to “number of hours and hourly rates.”

19. In aid of his submissions, the applicant relies on the principle of equality before the law as enunciated in Article 40 of the Constitution; the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights (ECHR); and the right to an effective remedy pursuant to Article 13 ECHR. Additionally, he cites Article 20 of the Charter which provides for equality before the law. He refers the court to *The State (Quinn) v. Ryan* [1965] I.R. 70, *Ryan v. The Attorney General* [1965] I.R. 294 and *Ferrazzani v. Italy* (2002) 34 EHHR 45.

20. The Applicant also makes a number of complaints regarding how aspects of his judicial review proceedings were handled on certain dates when such proceedings were before the court. Moreover, he takes issues with the judgment of the learned Dunne J. which was delivered on 8th March 2013. The complaints which the applicant now makes regarding his substantive judicial review proceedings are however not matters for this court. This court’s function is confined to a review of the Taxing Master’s assessment of a discrete aspect of the costs awarded against the applicant. I note that he has appealed the dismissal of the judicial review and thus it is not for the applicant therefore to invite this court to comment on any alleged error or deficiency in the judicial review proceedings.

21. The applicant also queries why the respondent issued the summons to tax in the first place and suggests that the overall intent of the respondent in seeking taxation was to “intimidate” him from pursuing other matters before the courts. As I see it, the fact of the matter is that the respondent prevailed in the judicial review proceedings and was awarded its costs. In the absence of any stay on the award the respondent was entitled to seek to recover its costs and, in default of agreement on same, pursue the matter by the service of a notice to tax, as provided for in the RSC. In the absence of any evidence furnished by the applicant, the court finds the motive imputed to the respondent for the pursuit of its costs to be no more than an indulgence in speculation.

22. In his written submissions, under the heading “Conditions of Impartiality”, the applicant draws the court’s attention to a situation where a lay litigant has proceedings before the court where the other party is represented by counsel. The thrust of the applicant’s submissions in this regard is his concern that where a lay person is unrepresented a court might not take into equal consideration any submission or evidence of a lay litigant because “in the Republic of Ireland, judges of the Superior Courts are former solicitors and former barristers”.

23. The court refers the applicant to the provisions of Article 34.5.1 of the Constitution under which all judges are appointed, and in particular to the declaration which every judge is required to make. Moreover, insofar as the applicant questions the impartiality of the Taxing Master, as noted by the Taxing Master himself, he is obliged in the exercise of his functions to act in accordance with Statute and the RSC and to act judicially at all times. It is clear from the two rulings that the applicant’s submissions and representations were duly noted and considered by the Taxing Master. Accordingly, I find no evidence of any breach of fair procedures or due process on the part of the Taxing Master.

24. I turn now to the substantive complaint in this application namely, the Taxing Master’s treatment of item 90 of the respondent’s Bill of Costs. In his grounding affidavit the applicant avers that “neither the alleged notion of urgency of the mentioned proceedings nor the instructions fee are based on objective criteria, as required by the obligation of [the Office of the Taxing Master] to demonstrate its impartiality in rendering any decision”.

25. The applicant points to the fact that in the judicial review proceedings on 6th July, 2012, the respondent told the court that it required three months to deal with the application. The applicant thus submits that it cannot be said that the matter was urgent. He submits that the Taxing Master was obliged to define “urgency”. While he states that there was a “great” reduction in the instruction fee from €25,000 to €15,000, the issue is not about percentages. It is submitted that the issue is whether the respondent’s solicitor was working full time between July, 2012 and October, 2012, on his judicial review proceedings. Moreover, he refers the court to item 16 of the Bill of Costs wherein it is recorded that the respondent received a detailed report from the Revenue Commissioners regarding their involvement with him and the notice party and that it was perusing same. The applicant submits that he had no information concerning this as it was not disclosed to him at the time.

26. On behalf of the respondent, it is submitted that following the parties' submissions at the taxation hearing on 18th March, 2015, the Taxing Master reserved his position in respect of a number of items, including the instruction fee. In later reducing the instruction fee from €25,000 to €15,000 the Taxing Master effected a reduction of 40%. This was done in the context of the Taxing Master having reviewed the Bill of Costs. Counsel points to the fact that following the applicant's objections and the respondent's submissions in response, the Taxing Master again reserved his ruling before delivering his ruling on 16th December, 2015. It is submitted that in both rulings, the Taxing Master set out clear reasons why the respondent's instruction fee was assessed in the same manner as would apply to the assessment of an instruction fee applicable to any solicitor's firm practising on their own account. Accordingly, counsel submits that the applicant has failed to demonstrate and prove that the "indemnity principle" has been breached. It is further submitted that the Taxing Master did not err in respect of the taxation of the general instruction fee and that in actual fact the assessment is in compliance with O.99. r.37 (22)(ii) RSC insofar as that time outlay is to be taken into account in conjunction with the other factors set forth in the rule. It is further submitted that any further reduction would represent an unjust action for the party who carried the day in the underlying proceedings. Accordingly, it is contended that the Taxing Master did requisite detailed "root and branch" examination of item 90.

Considerations

27. The jurisdiction of the Taxing Master in a case such as the present is set out in O.37 r.18 RSC, 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".

28. O. 99 r.37 (22)(ii) RSC sets out the criteria to be considered by the Taxing Master in exercising his discretion with regard to any item from the Bill of Costs. 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.'

29. It is well established that the "*onus is on the claiming party to demonstrate to the satisfaction of the Taxing Master that costs incurred are proper and reasonable in all the circumstances ...*" (as per Kearns P. in *Bourbon (A Minor) v. Ward and Motor Insurance Bureau of Ireland (MIBI)* [2012] IEHC 30 following Laffoy J. in *Dunne v. Fox* [1999] 1 I.R. 283 and *Minister for Finance v. Goodman* [1999] 3 I.R. 333. In *Bourbon*, Kearns P. cited with approval the decision of Herbert J. in *C.D. v. the Minister for Health and Children & Anor.* [2008] IEHC 299 where guidelines were provided in relation to the obligation of the Taxing Master when an issue of taxation was presented to him, whereby he must examine with particularity each and every item which is set out in the Bill of Costs which, when taken together, make up the claim for a solicitor's general instruction fee. Herbert J. put it as follows, at para.60:

"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 scrutiny, 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."

30. O. 99 r.38(3) RSC provides that a party who is unhappy with the decision of the Taxing Master when it comes to items which have been objected to within the process of taxation may apply to the court for an order to review the taxation of the matter in dispute.

31. Section 27(3) of the Courts and Courts Officers Act 1995 ("the 1995 Act") sets out the statutory jurisdiction of the court to review a decision of the Taxing Master, as follows:

"The High Court may review a decision of a Taxing Master of the High Court and the Circuit Court may review a decision of a County Registrar exercising the powers of a Taxing Master of the High Court made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the Taxing Master, or the Circuit Court is satisfied that the County Registrar, has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master or the County Registrar is unjust."

32. In a recent judgment of the Court of Appeal, *Sheehan v. Corr* [2016] IECA 168, Cregan J. considered the principles to be

considered by the High Court when reviewing a decision of the Taxing Master, and he addressed the obligations on the Taxing Master when taxing costs. As to the court's function, Cregan J. opined:

"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.'"

33. Cregan J. summarised the standard of review which should be considered by a Court in reviewing a decision of the Taxing Master, as follows at para.70:-

"(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."

34. As to whether an error amounted to an injustice, Cregan J. rejected a "mathematical or formulaic" method of assessment in favour of "a more flexible approach based upon an assessment of all the circumstances of a case. The larger the fee the more a court need 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." (at para.75)

35. Having established how the court must review a decision of the Taxing Master, I now turn to what Cregan J., in *Sheehan*, had to say regarding the exercise by the Taxing Master of his jurisdiction. After quoting, *inter alia*, Herbert J. in *C.D. v. Minister for Health*, Ryan J. in *Cafolla v. Kilkenny & Ors* [2010] IEHC 24 and Kearns J. in *Superquinn v. Bray UDC* [2001] 11.R. 459, he stated, at para. 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."

36. Having regard to the applicable legal principles, and the parties' written and oral contentions in these proceedings I consider that the issues for determination in this case are:

(1) Was the Taxing Master correct in assessing the respondent's instruction fee in the same manner as would apply to the assessment of an instruction fee applicable to a solicitor's firm practicing on their own account?;

(2) Did the Taxing Master err in factoring into his consideration that there was a measure of urgency, from the respondent's perspective, in responding to the applicant's judicial review proceedings?;

(3) Did the Taxing Master assess the respondent's instruction fee in accordance with the provisions of O. 99 r.37(22) (ii), and in accordance with relevant jurisprudence, including that of Cregan J. in *Sheehan*?;

(4) If the Taxing Master did err, is the error of such an amount or of such a nature as to be unjust?

37. In relation to the first issue, I am satisfied that the Taxing Master was entitled to assess the respondent's instruction fee in the same manner as would apply to the assessment of an instruction fee of an independent solicitor. This is the principle laid down by Finlay P. in *Bank of Ireland v. Lyons* [1981] I.R. 295 when he states at p. 305:

"By definition, the person who is awarded costs is, in the view of the court, the successful litigant who has been obliged to come to court to obtain justice, and as a matter of justice the party who has been defeated is bound to pay not only whatever debt may be due but also, on an indemnity basis, the costs incurred."

38. As is also clear from *Bank of Ireland v. Lyons*, the person liable for costs may object in the normal way on the grounds that the costs claimed are more than an indemnity and this objection will be adjudicated on in the taxation. In the present case, as far as the court can see, in his objections the applicant does no more other than object to the respondent's entitlement as a State employee to seek costs at all without in any way adducing evidence that the indemnity principle has been breached.

39. It appears that the overarching aspect of the applicant's complaint is that the Taxing Master's assessment of the instruction fee is not based on "objective criteria". One of the criticisms which the applicant levels at the assessment of the instruction fee is that the Taxing Master wrongly accepted the respondent's contention that urgency attached to the judicial review proceedings, without the Taxing Master first defining what was meant by the respondent's claim that the matter was urgent. Secondly, if deemed urgent, the applicant contends that any urgency should have been defined by the Taxing Master in terms of days and weeks. The applicant submits that it is only when this determination was made that the Taxing Master should have sought to verify the urgency. I find that it is clear from his ruling of 16th December, 2015, that the Taxing Master did in fact set out the basis for his acceptance that there was a measure of urgency in the matter. As noted by the Taxing Master, the nature of challenges raised in the applicant's judicial review proceedings merited the matter being determined as speedily as possible. It seems to me that the Taxing Master's conclusion in this regard fell into sub paragraph (a) of O. 99 r.37(22)(ii) RSC, namely that he must have regard to, *inter alia*, "the cause or matter" in which the instructions fee arises and the "novelty of the questions involved".

40. In my view, given that the applicant contends in his written and oral submissions that the "strict utilisation of objective criteria in estimating...item 90, ie use of number of hours and hourly rates" was required for the assessment of the respondent's instruction fee, the question in this case really comes down to whether the Taxing Master, in assessing the instruction fee, paid proper regard to O.99 r.37 (22)(ii)(b) RSC.

41. As is clear from the Taxing Master's 16th December, 2015 ruling, an issue raised by the applicant in his Objections to the earlier ruling was that the instructions fee should be assessed having regard to a "relevant hourly rate".

42. As observed by the Taxing Master in his ruling of 28th April, 2015, no information of an hourly rate was in fact supplied to him by the respondent. He went on to state that O.99 r.37(22)(ii) did not so require. In his ruling of 16th December, 2015, the Taxing Master repeated his view that there was no onus on the respondent's solicitor to calculate his fees by reference to an hourly rate, albeit accepting that the "time factor" was one of the cumulative factors which must be taken into account in accordance with O. 99 r.37(22)(ii).

43. In *Sheehan*, Cregan J. stated, at para. 94:

"[A]ny 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."

44. In the present case, in the absence of information as to an hourly rate, the Taxing Master assessed the instructions fee by reference to the "cumulative effect" of the factors set out in O.99 r. 37(22)(ii), including "the time factor". For this, he had the Bill of Costs and the relevant file from the respondent for his perusal. The €15,000 instruction fee was arrived at by attributing a professional charge to five tranches of work (and time periods) following the commencement of the judicial review proceedings in July,

2012 to the date of the substantive hearing on 5th March, 2013.

45. Clearly, on its face, the Taxing Master's assessment does not specify the level of seniority of the solicitor or solicitors who carried out the required work or the number of hours worked on each item. Thus, on a strict interpretation of *C.D. v. Minister for Health and Sheehan*, the Taxing Master was without "*a measure of objectivity*" by way of hourly input by the respondent's solicitor into the matter. These are the factors which the courts have identified as necessary for the commencement of the assessment by the Taxing Master of an instruction fee.

46. For the purpose of the present application for review, the court is prepared to find that the Taxing Master's failure to seek such information or alternatively make his own estimate of the number of hours worked on each item was an error of principle and of law on his part.

47. That being so, the question which now arises is whether the instruction fee ultimately assessed is "unjust" for the purposes of s. 27(3) of the 1995 Act. First, it has to be remembered that the Taxing Master did in fact reduce the instruction fee from an initial €25,000 to €15,000. I would add that the mere fact of reducing the fee claimed by the respondent would not, to my mind, save the assessment from being unjust unless there was some means by which the court could form a view as to whether the sum assessed was reasonable. However, in his ruling of 28th April, 2015, the Taxing Master gave a breakdown of how he arrived at the sum of €15,000. The majority of the amounts which make up the total €15,000 relate to specific court appearances and preparatory work by the respondent's solicitor between November 2012 and March, 2013, as outlined at paras. 2-6 inclusive in that ruling. This was in circumstances where the Taxing Master had the Bill of Costs and the solicitor's file for his perusal. These factors at least give the court a barometer for the purpose of deciding whether or not the ultimate assessment of €15,000 was "*within a range which it might have reasonably been open to him to arrive at*", to quote Geoghegan J. in *Bloomer v. Incorporated Law Society of Ireland*. As can also be seen, the Taxing Master assessed a sum of €3,850 (as part of the €15,000 total) for "the taking of instructions and work up to filing opposition papers on 16 October 2012". The applicant asserts that the Bill of Costs discloses that there was no substantive work undertaken by the respondent between July, 2012 and October, 2012. However, as is apparent from the 28th April, 2015 ruling, the Taxing Master took account of the nature of the work engaged in by the respondent up to the filing of the opposition papers in October, 2012. This included the respondent's solicitors taking full instructions with regard to the background to the proceedings which underlined the judicial review proceedings, liaising with the Office of the Attorney General and the obtaining of a detailed report from the Revenue Commissioners. The Taxing Master found these activities to be "essential" for the purposes of the respondent's opposition to the judicial review application. In the circumstances it does not seem to the court that the sum of €3,850 was an unreasonable assessment for this work.

48. Based on all the circumstances of this case, and the court being satisfied that there is, in the words of Kearns J. in *Superquinn v. Bray UDC*, "*sufficient material*" upon which to form an opinion, and the court being satisfied that there were sufficient objective factors, albeit it not identified in hours, upon which the Taxing Master could base his assessment, the court does not find that the amount of €15,000 for the instruction fee to be a sum that was not reasonably open to the Taxing Master to have arrived at.

Summary

48. Accordingly, as this court does not find that the €15,000 sum assessed in respect of the instruction fee "unjust", the assessment of the instruction fee does not warrant a remittal back to the Taxing Master, or to be otherwise adjusted by the court.