Neutral Citation Number: [2008] IEHC 161

THE HIGH COURT

2004 No. 3783 P

BETWEEN

NOEL CREMIN, MARY CREMIN AND TROY CREMIN

PLAINTIFFS

AND
SEAN LYNCH

DEFENDANT

Judgment delivered by Mr. Justice Herbert on the 27th day of May, 2008

1. This appeal is brought under O. 99, r. 38(3) of the Rules of the Superior Courts, pursuant to the provisions of s. 27(3) of the Courts and Court Officers Act 1995, which 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 to 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."

2. The many decisions relating to the interpretation of this section have most usefully been collected, analysed and the principles found identified, by McGovern J. in *Lowe Taverns (Tallaght) Limited v. The County Council of the County of South Dublin and The Square Limited* [2006] I.E.H.C. 383. I do not consider it necessary in this case to repeat those principles so lucidly expressed by McGovern J. in that case.

3. By a notice of motion dated the 3rd May, 2005, the defendant, pursuant to the provisions of O. 58, r. 12 of the Rules of the Superior Courts, sought an Order of the Supreme Court striking out the appeal of the plaintiffs, dated the 19th August, 2004, from the judgment and order of the High Court made and delivered on the 26th July, 2004, dismissing their claim as an abuse of the process of the court. The defendant claimed that the plaintiffs/appellants had failed to lodge the Books of Appeal without delay and had failed to prosecute their appeal.

4. The nature of the plaintiff's claim in this action is of great significance. The plaintiffs alleged that the defendant, in the conduct of his profession as a Barrister, was responsible for initiating a fraudulent set of proceedings to be taken against them by Tony and Eileen Hartigan; that he assisted these persons in making false claims against the plaintiffs when he knew that there was no basis for these claims and no way of proving them; that he acted in concert with his instructing solicitor in preparing and advancing a fraudulent affidavit and, that he acted out of malice and in order to pervert the course of justice and with the intent of intimidating and harassing the plaintiffs in the expectation of a substantial monetary gain to himself. It would be difficult to think of a more serious and damaging allegation against a Barrister in the course of his profession. Even the fact of the very existence of such claim is capable of causing serious and possibly even irreparable damage to the professional standing of the defendant and is a matter of the utmost gravity. This is particularly so having regard to the statements made in writing by the third named plaintiff that he would bring the existence of the proceedings to the attention of the Attorney General and the Human Rights Commission.

5. This Court was told that the solicitors for the defendant endeavoured unsuccessfully to serve this notice of motion personally on the plaintiffs. On an application ex-parte to the Supreme Court made on the 27th May, 2005, that Court gave liberty to the defendant to effect service of the notice of motion and grounding documents on the plaintiffs by ordinary pre-paid post. The Supreme Court reserved the costs of that application. This Court was advised that in June, 2006, the Supreme Court was advised that the plaintiffs were discontinuing their appeal and on the 12th January, 2007, the Supreme Court awarded all the costs of the appeal to the defendant.

6. By a letter dated 29th June, 2005, sent by telefax transmission to the solicitor for the defendant, the third named plaintiff stated that the Books of Appeal had been lodged in the Supreme Court Office on 28th June, 2005, and asked them to confirm that they would not proceed with the motion to strike out. By Email transmission dated 30th June, 2005, the solicitors for the defendant replied that they were proceeding with the motion. At the hearing of the motion before the Supreme Court, the defendant was represented by Senior and Junior Counsel, attended by a person described on Taxation as a "Legal Executive" from the firm of Instructing Solicitors. The plaintiffs represented themselves. By Order made 1st July, 2005, the Supreme Court struck out the motion but awarded the defendant the Costs of motion when taxed and ascertained.

7. A Bill of Costs dated 15th December, 2005, in relation to the notice of motion of 3rd May, 2005, and the Order made thereon by the Supreme Court on the 1st July, 2005, was submitted to the taxation of a Taxing Master of the High Court. This Bill of Costs contained the following Items:-

> "15. Service thereof [Notice of Motion] €247.50
>
> 32. Paid his fee [Junior Counsel] €1,000
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> 35. Mileage 244 return at €1.32 per mile [travel from Limerick to Dublin for hearing of motion on 1st July, 2005] €322.08
>
> 37. Instructions to act [Solicitors Instructions Fee] €3,000."

8. The costs were taxed by Taxing Master Flynn on the 20th February, 2006. A Notice of Objections was delivered by the solicitors for the costs on the 1st March, 2006, requiring the Learned Taxing Master to review his taxation. The Report of the Learned Taxing Master to this Court consequent upon the hearing of the objections is dated the 17th July, 2006. The present appeal to this Court by the solicitors for the costs relates exclusively to the above indicated Items. The Learned Taxing Master disallowed Items 15, 32 and 35 and dismissed the objection in relation to them. As regards Item 37, the Learned Taxing Master increased the Instructions Fee of €1,500 allowed on taxation to €1,600.

9. As regards Item 15 of the Bill of Costs the learned Taxing Master reports as follows:-

> "A letter dated 15th May, 2004, was put in evidence which stated that the writer, Dr. Cremin, 'would accept service of any Motion you wish to bring'. Accordingly I disallowed the claim for personal service in the Bill of Costs as constituting over caution pursuant to O. 99, r. 37 on the part of the Defendant. The issue of the Order for substituted service by

prepaid ordinary post was not articulated before me. The objection was dismissed."

10. In his affidavit sworn the 3rd April, 2006, in the course of the Taxation the third named plaintiff avers that he is a Bachelor of Civil Law and holds a "Masters in Company Law and a Doctorate in International Law".

11. In my judgement the Learned Taxing Master has not erred in principle in disallowing this Item and his decision in that regard is not unjust.

12. Order 52, r. 1 of the Rules of the Superior Courts provides that all interlocutory applications shall be made by motion unless otherwise provided by the Rules. Rule 2 of that Order provides that such motion should be on notice to the parties concerned, unless existing practice or the Rules permit an application *ex-parte*. In the instant case none of these exceptions applied. Order 121, r. 2 of the Rules of the Superior Courts provides that unless personal service is required, service *shall* (the emphasis is mine) be by leaving the document or a copy thereof (as appropriate) at, or sending the document or a true copy thereof (as appropriate) by registered post to the residence or place of business in the State of the person to be served. The mandatory nature of the direction as to the mode of service specified in O. 121, r. 2, is emphasised by the provisions of O. 124, with regard to the consequences of non-compliance with the Rules.

13. Order 10, r. 1 of the Rules of the Superior Courts provides that:-

> "If it be made to appear to the Court that the plaintiff is from any cause unable to effect prompt personal service, or such other service as is prescribed by these Rules, the Court may make an order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise."

14. In this case the solicitors for the defendant adopted a mode of service which was not required by the Rules of the Superior Courts. If the issue had been whether that form of service was sufficient, I am satisfied that the court would declare that personal service if actually affected was sufficient (see O. 9, r. 15). No service can be better than personal service since the concern of the court is to be satisfied that the existence of the motion is sufficiently brought to the attention of the party sought to be affected by it. However, in my judgment the provisions of O. 121, r. 2, are not simply provisions enabling either of the two indicated modes of service to be adopted, but leaving it open to the party to opt for personal service even though this is not required by the Rules.

15. The fact that the third named plaintiff stated in a letter dated 15th May, 2004, that he would, "accept service of any Motion you wish to bring", is in my judgment irrelevant as he does not thereby insist upon and undertake to accept personal service. The notice of motion should have been served in one of the ways provided by O. 121, r. 2. If the solicitors for the defendant had concerns that the plaintiffs or some of them might seek to contend that they had not received the document, if it was left at their residence or place of business, they could have availed of the option of service by registered post. If service by registered post was not effective they could have sought an order for substituted service pursuant to the provisions of O. 10, r. 1 of the Rules of the Superior Courts. In my judgment, however prudent and cautious may have been the decision to attempt to serve the plaintiffs personally with the notice of motion, it could not be said to be reasonably necessary to enable the defendant to conduct the litigation, and was not in accordance with the Rules of the Superior Courts. The court will therefore disallow the appeal from the decision of the Learned Taxing Master on this Item.

16. As regard Item 32 in the Bill of Costs, the Learned Taxing Master reported as follows:-

> "Issue arose as to the attendance on the return date of the motion of Junior Counsel. I did not consider it necessary to hear conflicting submissions on the attendance/non-attendance of Junior Counsel and I made the decision on the necessity to retain two Counsels on an application of this nature. In doing so it was not necessary to consider whether Mr. Andrew Walker BL was in attendance or not. I held that I did not believe it was necessary to retain the services of two Counsels in an application of this nature. I stated that I was of the belief that there was an element of over caution/luxury and as such these costs are not recoverable on a Party and Party basis. It was not in my view reasonable and prudent to brief two Counsels. The objection was dismissed."

17. The application was brought pursuant to the provisions of O. 58, r. 12 of the Rules of the Superior Courts, seeking an order of the Supreme Court dismissing the plaintiffs' appeal for want of prosecution for failing to lodge without delay the books of appeal as specified in O. 58, r. 12. This was not a hearing on the merits of the appeal. An application of this nature does not fall within the provisions of O. 52, r. 17 of the Rules of the Superior Courts, which sets out a list of applications in which one counsel only is allowed, unless otherwise ordered by the Court.

18. Section 27(2) of the Counts and Court Officers Act 1995, confers on a Taxing Master on a taxation between party and party, power,

> "to allow in whole or in part any costs, charges, fees or expenses included in a Bill of Costs in respect of counsel (whether Senior or Junior) … as the Taxing Master … considers in his or her discretion to be fair or reasonable in the circumstances of the case, … and shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

19. In my judgment, the Learned Taxing Master would be undoubtedly correct in considering that as a general rule it would not be fair and reasonable to allow a brief fee to two counsel in an application pursuant to the provisions of O. 58, r. 12 of the Rules of the Superior Courts. However, it is clear from the wording of s. 27(2) of the Courts and Court Officers Act 1995, that the Taxing Master must make his or her assessment of what is fair and reasonable to be allowed by way of fees to counsel by reference to the circumstances of the particular case.

20. In his Report the Learned Taxing Master records that prior to the hearing of the motion the books of appeal had been lodged, but a Certificate of Readiness to Proceed with the appeal had not. In such circumstances, having regard to the decision of the Supreme Court in *Dhand v. McCrabbe* [1960] 96 I.L.T.R. 196 at 197 per. O'Daly C.J. (Kingsmill Moore and Walsh J.J. concurring), which was a case where the Books of Appeal were only lodged on the morning of the hearing of the Motion to Dismiss for Want of Prosecution, the defendant's legal advisers must have been aware that it would be difficult to persuade the Supreme Court to exercise its jurisdiction to dismiss the plaintiff's appeal for want to prosecution. As I have already indicated, this was the sort of application which would in normal circumstances be made by a single counsel and, having regard to the provisions of para. 10.3 of the Code of Conduct of the Bar of Ireland, as it was on the 1st July, 2005, this would be Junior Counsel. I am satisfied that the Learned Taxing Master would not be wrong in principle in concluding that no difficult questions of law were involved in the application, nor was it a matter where some particular specialist expertise on the part of counsel was required, nor could it be fairly and reasonably said that there were

particularly complex problems involved.

21. In *Superquinn Limited v. Bray Urban District Council and Other*s [2001] 1 I.R. 459 at 475, Kearns J. held as follows:-

> "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."

22. Having regard to the status of the Supreme Court, to the fact that it is the highest and final court of appeal in the State, to the absolutely critical importance of even the mere existence of this case to the defendant, having regard, particularly in that context to the period of the delay in lodging the Books of Appeal, –the judgment of the High Court was given and the order of that court was perfected on 26th July, 2004, but the Books of Appeal were not lodged until the 28th June, 2005, - having regard to the basis of the decision appealed against and, having regard to the threatening manner in which the plaintiffs, through the third named plaintiff, approached and conducted the case, I am satisfied that the Learned Taxing Master erred in principle in concluding that it was not reasonable nor prudent to brief two counsel and that this involved and element of excessive caution on the part of the instructing solicitors. I am satisfied that the solicitors for the costs have discharged the heavy burden of proof by demonstrating that the Learned Taxing Master failed to have proper regard to the statutory requirement that he judge what was fair and reasonable by reference to the circumstances of the particular case. (*Vide: Smyth and Another v. Tunney and Others* [1999] 1 I.L.R.M. 211 at 215 and 217, per. McCracken J.). It appears from the Report of the Learned Taxing Master that on Taxation he had disallowed the fee paid to Junior Counsel because the plaintiffs had submitted that Senior Counsel alone had appeared at the hearing of the Motion before the Supreme Court. The solicitors for the defendant had no note on their file confirming the attendance of Junior Counsel. However, the Learned Taxing Master states in his Report that on the Objection that he dismissed the objection to this Item solely by reference to the fact that he considered that it was neither reasonable nor prudent for the solicitors for the Costs to brief two Counsel on an application of this nature. Apart from surmise and suspicion, no basis was laid, for the submission by Counsel for the Costs, that the Learned Taxing Master had again disallowed the fee paid to Junior Counsel on the original taxation basis. In the absence of clear and unequivocal proof to the contrary, the court accepts the correctness of the Report of the Learned Taxing Master as to the reasons for his decision.

23. As regards Item 35, on the Bill of Costs, the Learned Taxing Master reports as follows:-

> "The objections stated that I had erred or mis-directed myself in disallowing mileage charges for the solicitor attending from Limerick. The Plaintiff submitted an Affidavit stating that the Solicitor for the Defendant was not in attendance in Court on the hearing date. The Defendant introduced a letter from Junior Counsel, supported by a memorandum from the solicitor to the effect that both Counsels and the Solicitor were in attendance. The Plaintiff also submitted that the representative in attendance was not a qualified solicitor and as such would not have a right of audience in the Supreme Court. Accordingly as no evidence was introduced to support the Defendant's assertion, I considered the Plaintiff's Affidavit to be the best and only evidence on the issue. I was also of the view that a non qualified person would not have a right of audience, quite apart altogether from the simple fact that in most motions of this nature a town agent is instructed thereby obviating the necessity for travelling and resultant expense. The objection was accordingly disallowed."

24. It was accepted by Counsel for the Costs at the hearing before me, that no solicitor from the firm of solicitors representing the defendant was present at the hearing of the motion before the Supreme Court. It was accepted that this firm of solicitors was represented and, counsel were attended by, a then unqualified senior assistant to the principal of the firm. I accept the submission of Counsel for the Costs that this very experienced person had been entrusted with the day to day carriage of the case, but always under the guidance and supervision of the principal of that firm who remained and, whose firm remained, totally responsible in the matter.

25. The person who attended counsel on behalf of the solicitors for the Costs at the hearing of the motion before the Supreme Court was described as a "Legal Executive". In the neighbouring Jurisdiction persons with this title are generally persons who are Fellows of the Institute of Legal Executives who have limited rights of audience in Chambers and before the County Courts, as well as the right to provide other legal services. The person concerned in the instant case, whether she should be properly described as a "clerk" or an "assistant" or a "Member of the Irish Institute of Legal Executives", was still an "unqualified person" within the definition of s. 2 of the Solicitors Act 1954. Section 55(1) of that Act, provides that such a person shall not act as a solicitor. This raises the question of whether, by attending counsel in court on the occasion this person was so acting. I do not think that she was. She was not seeking to address the court, neither was she providing legal advice or conducting the litigation on her own behalf, nor was she instructing counsel. In my judgment she was not in any real sense providing "legal services" as defined by s. 2 of the Solicitors (Amendment) Act 1994. She was present solely as an agent representing her supervising solicitor and the firm by which she was employed and in my judgment it was this firm which was providing the legal services.

26. I note that para. 5.15 of the then current Code of Conduct of the Bar of Ireland provided that:-

> "In general a barrister shall be attended in court by his instructing solicitor or his clerk or assistant but it is not necessary that he be so assisted when moving an application for an adjournment."

27. I shall leave to the Supreme Court the issue of the propriety of unqualified persons attending counsel at the hearing of interlocutory motions before that court.

28. Section 57(1) of the Solicitors Act 1954, provides that:-

> "Where a solicitor acts as a solicitor while he is not a solicitor qualified to practise, costs in respect of anything done by such solicitor so acting shall not be recoverable in any action, suit or matter by such solicitor or by any persons claiming through or under him."

29. This very draconian provision has no application in the instant case because the person who attended counsel at the hearing of

the motion before the Supreme Court was not a solicitor nor was she pretending to be a solicitor, (s. 56(1) Act of 1954)..

30. In my judgment the Learned Taxing Master applied an incorrect test in disallowing the objection relating to this Item of Costs. In my judgment the question to be asked is whether the firm of solicitors for the costs is entitled to recover these mileage charges where a clerk or assistant or a legal executive in that firm, acting on the instructions of and under the supervision of a qualified solicitor in that firm. attends on counsel at the hearing of an interlocutory motion in contentious litigation.

31. In my judgment, for the reasons stated above, the person in the instant case was not purporting to act as a solicitor nor was she pretending to be a solicitor so that her appearance before the Supreme Court attending on counsel was not a contempt of that Court nor, a criminal offence and, the provisions of s. 55(1) (as amended), s. 56 and s. 57 of the Solicitors Act 1954 did not apply. She was not acting in breach of any Practice Direction of the Supreme Court nor, of any Regulation of the Law Society. The then relevant Code of Conduct of the Bar of Ireland clearly considered that it was appropriate for a person of her standing to attend on counsel as she did. In these circumstances, absent some other valid reason to disallow the objection, it appears to me that the solicitors for the costs should be entitled to recover a fair and reasonable sum in respect of her travelling expenses from Limerick to the Four Courts and back to Limerick. However, they certainly would not be entitled to recover mileage charges on the basis of a solicitor and in particular a solicitor at senior partner level, attending from Limerick. The amount claimed in Item 35 of the Bill of Costs is €322.08 representing a return journey of 244 miles at €1.32 per mile.

32. The Learned Taxing Master disallowed this Item in the Bill of Costs, on the additional ground that the work claimed could reasonably and properly have been done by a Town Agent.

33. In the majority of cases and, to this extent I agree with the Learned Taxing Master, an application to the Supreme Court pursuant to the provisions of O. 58, r. 12, of the Rules of the Superior Courts would not reasonably and properly require the attendance in Court of the solicitor having the carriage of the proceedings, and the matter could readily be dealt with by a Town Agent. However, as the statute requires, each case must be assessed by reference to its own particular facts and, not by the application of a general rule that in all such motions the attendance of a Town Agent only will be allowed on taxation of costs between party and party. The particular circumstances of an individual case may render it reasonable and proper for the instructing solicitor, or a representative of the instructing solicitor, who has had carriage of the case, to attend at the Four Courts for the hearing of the motion and, to be allowed his or her reasonable travel costs and expenses of so attending, on a taxation of costs between party and party.

34. On the very special facts of the instant case, I am satisfied that it was proper and reasonable for the particular representative of the solicitors for the defendant, who had carriage of the case throughout and who was fully familiar with the documentation and with all aspects of the entire history of the litigation and, not just of the particular motion, to have attended on counsel at the hearing of the motion before the Supreme Court. I find on the evidence that Junior Counsel, who had moved the application to dismiss the plaintiffs' proceedings before the High Court, was instructed and was present with Senior Counsel at the hearing of the motion before the Supreme Court. It might be argued that Junior Counsel should be as familiar with the documents and with the entire history of the case as the representative of the instructing solicitors and, that therefore on an interlocutory application heard on affidavit, where the plaintiffs were representing themselves, counsel could have been sufficiently attended by a Town Agent. However, in the very special circumstances of this case, to which I have adverted elsewhere in this judgment, I am satisfied that it was reasonable and proper, that the person who had the actual carriage of the case throughout, and consequently was fully familiar with all aspects of the files, correspondence and documents in the case and, with all steps taken in the action, should have been present and attending on counsel at the hearing of the motion before the Supreme Court. (See for example, In *Re. Foster*, 8 Ch. Div. 598 per. Bacon C.J. and *Garthwaite and Another v. Sherwood* [1976] 2 All E.R. 1015 at 1019 per. Kerr J.). I find that the Learned Taxing Master in reaching his conclusion to disallow this Item of Costs, failed to have sufficient regard to the very special circumstances of the case and therefore erred in principle in disallowing this Item in its entirety, rendering his decision unjust.

35. The amount claimed at Item 35 of the Bill of Costs is €322.08 calculated as indicated above. In my judgment this sum is unreasonable and unfair in the circumstances as representing a mileage rate which would be appropriate to a qualified solicitor and even a solicitor partner in a firm of solicitors. In July 2005, the Public Service travel rate per kilometre was 52.16 cents per kilometre for motor cars of less than 1200cc and, 60.84 cents for motor cars between 1200 and 1500cc. In my judgment a sum of €238.90 should be allowed in respect of this Item in the Bill of Costs, being 392.67km at 60.84 cents per kilometre.

36. Item 37 on the Bill of Costs related to the Solicitors Instructions Fee. The plaintiffs objected to the level of the fee marked and submitted that an Instructions Fee of €1,100 to €1,200 was adequate remuneration for the work undertaken. On Objection the Learned Taxing Master increased the Instructions Fee allowed by him on Taxation from €1,500 to €1,600. It is submitted by the solicitors for the costs that this is an error of principle and that the amount allowed by the Learned Taxing Master in respect of this Item is unjust.

37. In the Bill of Costs Item 37 was set out as follows:-

> "37. Instructions to Act
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> and
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> Instructions for Brief to Senior Counsel on motion to dismiss
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> and
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> Instructions for Brief to Junior Counsel on motion to dismiss. The procedure commenced with the obtaining of an order for substituted service by way of pre-paid post for service of a motion to dismiss on the Plaintiffs was obtained. A notice of motion seeking to dismiss the Plaintiff's Appeal supported by a Grounding Affidavit was then issued and served on the Plaintiffs. Both Senior and Junior Counsel were briefed and the motion was prepared fully for hearing when the motion to dismiss was struck out with costs to the Defendant Taking the above into consideration and having regard to the nature of the motion it is considered a fair and reasonable fee to charge by way of instructions is the sum of €3,000."

38. In his Report to this Court, dated 17th July, 2006, the Learned Taxing Master simply states that having considered the work done he allowed an Instructions Fee of €1,500 and on Objection, he increased this to €1,600. It was submitted by Counsel for the Costs that the only proper inference to be drawn from this Report by the Learned Taxing Master, is that the instructions fee allowed was what he considered would be an appropriate fee to be charged by a Town Agent for attending on counsel at the hearing of an interlocutory motion before the Supreme Court. This, said counsel, was an error in principle and wholly unjust.

39. Unfortunately, the Learned Taxing Master appears not to have had regard to what was held by Kearns J. in *Superquinn Limited v. Bray Urban District Council (No. 2)* [2001] 1 I.R. 459 at 480, where he stated:-

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

40. The Learned Taxing Master unfortunately, does not give any indication as to what work he took into account, what work he disregarded and what process of evaluation he adopted in arriving at the instructions fee of €1,600.

41. I am unable to accept the submission of Counsel for the costs, that the Learned Taxing Master simply decided by reference to what he considered would have been an appropriate fee for a Town Agent to have charged in the circumstances. It is clear from his consideration of Item 35 of the Bill of Costs, that the Learned Taxing Master was fully aware that the services of a Town Agent had not been retained. Also, most of the work identified as forming the basis of the claimed Instructions Fee would not be work undertaken by a Town Agent. I do not think that there is any factual basis from which to draw an inference that the Learned Taxing Master reached his conclusion in this manner. I am not satisfied that the solicitors for the costs have discharged the heavy onus which lies on them of demonstrating that on the balance of probabilities the Learned Taxing Master applied such a mistaken principle in reaching his conclusion.

42. Some, if not indeed most, of the work for which costs are claimed at Item 37 of the Bill of Costs was, by reference to the evidence, done by the "Legal Executive". She was an employee of the solicitors for costs and acted entirely at the behest and under the direction and supervision of the senior solicitor partner in that firm, who, and whose firm remained solely responsible for the work. Though the facts are different, I consider that the reasons given by Holmes L.J. in dismissing the appeal against costs in *Martin v. Sherry* [1905] 11 K.B. 62 at 68/69, (Lord Ashbourne C. concurring, but for different reasons), apply with equal effect in the circumstances of the present case. In that case the unsuccessful defendant in an action, relying on the provisions of s. 48 of the Solicitors (Ireland) Act 1898, (now repealed in full), objected to such items on the Bill of Costs as arose during a period when the Stamp Duty on the Practicing Certificate of Mr. Peel junior, remained unpaid, due to an oversight on the part of the Town Agent. Mr. Peel senior, deposed on affidavit that all the work in the case had been done by himself. That section provided that no costs, fees, reward or disbursement on account of work done by a person who acts as a solicitor without having previously obtained a stamped certificate then in force, could be recoverable by such person or any other person whatsoever.

43. In the course of his judgment in that case, (at p. 67), Lord Ashbourne C., asked the rhetorical question, "is there anything to say that the fully qualified father cannot recover for work which he did entirely himself, or was responsible for all through?" Holmes L.J. at pp. 68 and 69 held as follows:-

> "The ground on which I am prepared to dismiss this appeal is the view I take of the position of Mr. John Peel in his father's office. I have carefully considered Mr. Joshua Peel's candid affidavit, and I have formed the opinion that his son is in no sense of the word a partner in the business. Mr. John Peel on being admitted a solicitor, was asked by his father to assist in the business. He continued to live in his father's house as a member of the family, and was, I doubt not, liberally provided for; but he was given no share in the business, which continued to be the sole property of Mr. Joshua Peel. He was not entitled to any share in the profits, and his services resembled those of a good assistant, save that filial duty and probably an expectation of future advantage took the place of immediate remuneration. It is true that the business was carried on in the name of Peel and Son; but this gave the young man no interest in the earnings of the office. As a matter of fact, all the work in this action was done by, or under the direction of, the father, and the costs in respect thereof were payable to him alone.
>
> Considerable difficulty was created in my mind by the first paragraph of Mr. Joshua Peel's affidavit, which states that the two gentlemen were the plaintiff's solicitors on the record; but on reflection I think that it would be unjust to fasten on these words a meaning which would be inconsistent with the true facts.
>
> For these reasons, I hold that the appeal ought to be disallowed."

44. In my judgment it would be most unjust if costs could not be recovered in a taxation between party and party for work reasonably done by an unqualified assistant in a firm of solicitors at the sole behest and under the direction and supervision of a solicitor in that firm having a current and unqualified Practising Certificate, provided of course that the unqualified assistant was not pretending to be a solicitor or, acting as a solicitor.

45. I am satisfied that the Learned Taxing Master was correct in allowing an Instructions Fee in this matter. However, no fee could be allowed under Item 37 of this Bill of Costs for the motion for substituted service. The costs of that motion were reserved by the Supreme Court and were not dealt with in this motion. I consider that it would be most unjust to assess the Instructions Fee on the basis that all or even most of the work indicated in the Bill of Costs was done by a senior solicitor partner in the firm, even though he supervised the work and remained ultimately responsible for it, though these are matters which might be taken into account by a Taxing Master in arriving at a fair and reasonable fee. Though the onus of proof lay on the solicitors for the costs to show that the decision of the Learned Taxing Master was wrong in principle and unjust, no comparator cases were put before this Court which, while not conclusive in determining the issue, might serve to indicate that the value judgment of the Learned Taxing Master as to the nature and extent of the work done and, the appropriate fee to be allowed, was unjust in the circumstances, (see T*obin and Toomey Services Limited v. Kerry Foods Limited and Another* [1999] 1 I.L.R.M. 428 at 437 per. Kelly J.: *Quinn v. South Eastern Health Board* [2005] I.E.H.C. 399 per. Peart J. (p. 12 of 15)).

46. In my judgment, the solicitors for the costs have not established that the Learned Taxing Master erred in principle in reaching the conclusion which he did with regard to this Item on the Bill of Costs. Even if he had, I am satisfied that the sum of €1,600 allowed by the Learned Taxing Master as an Instructions Fee in this case was indubitably within the range of figures which it was reasonably open to him to select having regard to the above identified factors, (*Bloomer and Others v. The Incorporated Law Society of Ireland and Others (No. 2)* [2000] 1 I.R. 383 at 387 per. Geoghegan J.), in applying the provisions of O. 99, r. 37(22)(ii) of the Rules of the Superior Courts, as explained by Barron J. in *Best v. Wellcome Foundation Limited (No. 3)* [1996] 3 I.R. 378, to his task under ss. 27(1) and (2) of the Courts and Court Officers Act 1995. The sum allowed is not therefore unjust and this Court will confirm the decision of the Learned Taxing Master and will dismiss the appeal in respect of Item 37 of the Bill of Costs.