Neutral Citation Number: [2012] IEHC 247

THE HIGH COURT

[2004 No. 7717 P]

BETWEEN

MICHAEL BREHONY

Plaintiff

And

LONGFORD WESTMEATH FARMERS MART LIMITED

Defendant

JUDGMENT of Mr. Justice Hanna delivered the 30th day of March, 2012

Background
This is a review of taxation arising out of a claim for damages in respect of personal injuries suffered by the plaintiff on the 1st November, 2001 in the course of his employment with the defendant at the defendant 's mart at Ballymahon , Co. Longford. The personal injuries proceedings were listed for hearing at the High Court on Thursday the 11th February, 2010. The case was not reached on that day and it was again listed for hearing on Friday 12th February, 2010 when again it was not reached. It was further listed for hearing on Tuesday the 16th February, 2010 when, at 4.30pm following discussions, the matter settled for €35,000 together with High Court costs and reserved costs to be taxed in default of agreement. This settlement was ruled on the 17th February, 2010.

A formal bill of costs with summons to tax was served on the defendant's solicitor and taxation came on for hearing and determination before the then Taxing Master (Charles A. Moran) on the 20th September, 2010.. He allowed the sum of €9,000 (being €3,000 per day) by way of attendance fees to the plaintiffs solicitor for each day the matter was listed for hearing. The defendant was dissatisfied with the allowances made by the Taxing Master and his solicitor tiled and served objections to the allowances on the 27th September, 2010 which were returnable for mention before the Taxing Master on the 12th October, 2010. Submissions by both sides were exchanged (by the defendant on the 8th November, 2010 and the plaintiff on the 15th December, 2010).

Taxing Master Moran retired in December, 2010. The matter was listed before Taxing Master Flynn on the 251h January, 2011 and both parties were agreed on Taxing Master Flynn making a ruling and a determination on the objections as if the original taxation had been commenced before him.

On the 11th March, 2011, Taxing Master Flynn made his rulings and determinations on the objections. He affirmed the taxation of Item 188, in respect of the instructions fee. In his written ruling, he stated as follows at p. 5:-

> "With regard to days in the list and not reached, where the solicitor attends for the full day [this] attracts an allowance of €3,000.00 or thereabouts depending on the circumstance. This allowance is adjusted depending on the location of the solicitor's office to the court and the length of time the solicitor actually spends in court. The plaintiffs solicitor's offices are in Longford and the case was heard in Dublin. Such an allowance of €3,000.00 was appropriate at time of taxation. In such circumstances, I see no reason to reduce the fee and correspondingly disallow the objection and affirm the taxation."

The defendant was dissatisfied with the rulings and determinations in relation to Item 188 and sought review by way of motion dated the 1st April, 2011 , pursuant to O.99 r. 38(1) of the Rules of the Superior Courts 1986 ("the Rules"). The motion was grounded on the affidavit of F. Gerard M. Gannon, solicitor for the defendant, sworn on the 12th April, 2011. The motion is confined to the claim by the plaintiff and allowance by the Taxing Master in relation to Item 188 in the Bill of Costs, the instructions fee.

The relevant provisions
The Courts and Court Officers Act, 1995 ("the Act of 1995") confers upon the Taxing Master the general power to tax, assess and determine the value of work done or services rendered by a solicitor in a variety of circumstances.

Section 27(2) confers discretion upon the Taxing Master "to allow in whole or in part, any costs, charges, fees or expenses included in a Bill of Costs" in respect of a solicitor which "he considers in his or her discretion to be fair and reasonable in the circumstances of the case." The Taxing Master has the power in the exercise of that discretion to allow or disallow costs, charges, fees or expenses in whole or in part.

The powers of the High Court in a taxation appeal have been curtailed somewhat by s. 27(3) of the Act of 1995. That sub-section reads 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."

O. 99 r. 12(1) of the Rules sets out the way in which the costs of a solicitor are to be computed:

> "The scale of costs contained in Appendix W, Parts I, II, and V, together with the notes and general provisions contained therein shall apply to the taxation of all costs incurred in relation to contentious business."

Part I of Appendix W identifies 81 separate items which arise in relation to litigation. In respect of ten of those items, no fee is prescribed. The particular items are expressly left to the discretion of the Taxing Master. Of the remaining 71 items either particular fees are prescribed or in some cases fees within a given range are prescribed.

Order 99 r. 37(22)(i) provides:

> "Where in Appendix W there is entered either a minimum and a maximum sum, or the word "discretionary", the amount of the costs to be allowed in respect of that item shall , subject to any order of the Court, be in the discretion of the Taxing Master within the limits of the sums so entered (if any)."

In the instant case an attendance fee of €20.49 (£16.12), which is the maximum allowance under Item 24 (for attending at sittings) in Appendix W, was allowed by the Taxing Master, in addition to which he provided a sum of €3,000 per day to the plaintiffs solicitor in respect of an attendance fee for the three days in question. The question before the Court is whether in allowing the extra sum of €9,000 the Taxing Master has erred as to the amount of the allowance or disallowance so that his decision is unjust in accordance with s. 27(3). The test as regards this is set out m caselaw and I have considered the authorities below.

The Relevant Law
In *Bloomer v. Incorporated Law Society of Ireland* [2000] 1 I.R. 383, Geoghegan J. applied the test set down in *Minister for Finance v. Goodman* (No. 2) [1999] 3 I.R. 333 and *Tobin & Twomey Services Ltd. v. Kerry Foods Ltd.* [1999] 3 I.R. 483 as follows 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."

In *Smyth v. Tunney* [1993] 1 I.R. 451, which pre-dates the enactment of the Act of 1995, the instructions fees of the three defendants' solicitors firms had been reduced in the certificate of taxation to £25,000, £12,500 and £8,000 respectively. On a motion to review this in the High Court, the Court substituted higher fees of £40,000, £22,500 and £16,000 for the solicitors. It was held that in relation to the solicitor's instructions fee, notwithstanding absurdly low maximum fees prescribed for certain items to be recovered on party and party taxation, the assessment of the amount of the solicitor's instructions fee should not be used to compensate him (whether as against his own client or the unsuccessful party to the proceedings) for the inadequacy of the fees recoverable for those individual items. It was also held that the solicitor's instructions fee had to be seen in the context of the amount of work and skill required in having carriage of and preparing the case for trial; and that regard should be had to the number of witnesses and difficulty, if any, of marshalling them or gathering evidence; but that at the trial in that particular case such preparatory work was overshadowed by the forensic skills required of counsel, given the circumstances. It was also held that while the courts were willing to place particular reliance on the knowledge and experience of the Taxing Master when allowing instructions fees of solicitors, there remained an obligation on the Court to deal with such fees even where the Taxing Master did not proceed upon any wrong principle.

At p. 468-469, Murphy J. considered the meaning of "instruction fee" as follows:

> "What is an instruction fee? Mr. Anthony Behan, a very experienced legal costs accountant who gave evidence on behalf of the plaintiffs, explained that it was to cover taking instructions for the trial or hearing and not merely instructions for the preparation of a brief. He said it was a fee to cover the overall care and attention which the case required: the difficulties in taking proofs of evidence from intended witnesses and generally organising the case; ensuring the availability of witnesses and indeed the availability of counsel. It had to cover "living with the case". It covered a variety of consultations as well as the cost of assembling and preparing the brief itself. Mr. William Brennan , the costs drawer who gave evidence on behalf of the defendants, explained that the instructions fee was frequently referred to as "the great equaliser". It was the means by which solicitors were compensated for the minimal nature of the fees allowed on the itemised basis."

In substituting the higher fees, the Court stated at p.473 that it was:-

> "...understandable that the courts have constantly indicated a willingness in this regard to place a particular reliance on the knowledge and experience of the Taxing Master. However as the President pointed out in the celebrated case of *Kelly v. Breen* [1978] I.L.R.M. 63 there remains an obligation on the court to deal with the instruction fee even where the Taxing Master did not proceed upon any wrong principle."

As regards the knowledge and experience of the Taxing Master referred to above, Flynn and Halpin state at p. 479 of *The Taxation of Costs* (Roundhall, 1999) that:-

> "The actual assessment of the monetary value of the instruction fee is generally left up to the Taxing Master. The court has displayed a moderate reluctance to interfere with his actual monetary evaluation of the fee. Mr. Justice Lardner in *CIE v. Carroll and Wexford County Council* (Unreported, High Court, Lardner J., 24 June 1988) gave the following reason for this reluctance:
>
> > ' I feel that it is a difficult task for a judge to form any judgment as to the appropriate instructions fee and to differ from the Taxing Master who is experienced in the measuring of solicitors' costs on a day to day basis.'"

On this point also, I note the comments of Kearns J. in *Superquinn v Bray UDC* (No. 2) [2001] 1 I.R. 459 where he stated at p. 475, taking into account the Act of 1995:

> "Of course, the Taxing Master may still follow and adopt these well-established principles and criteria when he deems it appropriate, but the Act of 1995 has clearly conferred on the Taxing Master, who has special expertise in this area, all the attributes of a specialist tribunal."

The Court in *Smyth v. Tunney* concluded that it had the advantage of having the sworn evidence of the experienced legal cost

accountants expressing their professional opinion as to what would be appropriate instructions fees and it had the advantage of having heard the case which provided some insight into the extent of the briefing provided for counsel and which convinced it of the dedication and commitment of the solicitors involved.

> Barron J. stated in *Best v. Wellcome Foundation Limited & Ors* [1996] 3 I.R. 378 at p. 382 that "consideration of the work required by the solicitor for the plaintiff cannot be fully appreciated without reference to the entire proceedings."

In *Best*, the Taxing Master had reduced the fee to a sum of £400,000, the bill of costs as drawn having sought an instructions fee of £440,000. On the hearing of objections to this ruling he made no further reduction in the item. Barron J. reduced the instructions fee from £400,000 to £75,000. Barron J. stated that the jurisdiction of the Court is to determine the appropriate fee and held that earlier case law which held that the Court's function was dependent upon an error in principle having been made by the Taxing Master was no longer authoritative. Barron J. also stated at p. 390 that "[i]n my view comparison is ultimately the correct approach to assess the instruction fee."

On this point, Flynn and Halpin comment at p. 483 as follows:-

> "The unfortunate disadvantage in this exercise is that it is subjective and the case may be imprecisely viewed in an effort to justify a comparison. This procedure is stigmatised with a natural bias to disregard dissimilarities and regrettably results in "fitting a square peg in a round hole" should no comparisons exist."

However, quoting Barron J. in *Commissioners of Irish Lights v. Maxwell Weldon and Darley* [1998] 1 I.L.R.M. 421 where he stated "It is not the function of the Court to reconcile what may well be irreconcilable", the authors agree that:-

> "if there is no true comparison then this must be accepted rather than trying to fit a square peg into a round hole. There is nothing static about cost. Many factors tend to affect costs. Similarities and comparisons are part of legal cost accounting but they are not the most important factors."

In *Mahony v. KCR Heating Supplies* [2007] 3 I.R. 633, Charleton J. held that the Taxing Master was entitled to determine his own procedures when taxing costs subject to the limitations of 0.99 of the Rules. The Court held that those procedures must be fair and involve the discharge by the Taxing Master of his functions under the Rules and relevant statutes as well as evenness of treatment to both sides. The Taxing Master was not obliged to adopt the procedure of a civil or criminal trial. In that case the only item which was in contention between the parties was the solicitor's instructions fee of €35,000. The case had settled for €50,000. The plaintiff, in accordance with the usual practice, submitted a bill of costs and the Taxing Master made a preliminary allowance. An objection was lodged to the taxation of costs and submissions were then made by costs drawers on behalf of the plaintiff and the defendant. The defendant argued that the solicitor's €35,000 instructions fee could not be justified and that any argument that might be made in support thereof would require a diligent perusal by the Taxing Master of all the papers generated in the case in order that he might assess the work done on the plaintiffs behalf. The case involved a claim by the plaintiff of abuse she suffered while employed by the defendant. As the Taxing Master noted, it was a "difficult and complicated case to manage and bring to fruition", given the circumstances and the fact that the plaintiff regularly became extremely distressed during consultations with her solicitor. The solicitor's fee was reduced from €35,000 to €24,000, the Court noting that some personal injury cases may attract more than an average fee and some will attract less. The Court stated at p. 642 that an offer made by the defendant of €24,000 was a generous one, "perhaps considered to represent a fee for the most work this kind of a case might need and it is one which I would not interfere with."

The Court referred to s. 27 and O.99 and stated at p. 637:-

> "To the extent to which he is not limited by the rules in O. 99, the Taxing Master is entitled to determine his own procedures. Those procedures must be fair and that involves the discharge by him of this function under the rules and the relevant statutes and evenness of treatment to both sides.

Charleton J. set out and applied the test as follows at p. 638:

> "...there are two basic principles in exercising the function of this court in a review of taxation. Firstly, I have to ask whether the amount actually involved in respect of a disputed item was too much; and secondly, I have to ask whether that allowance was unjust. Here it is claimed that the amount was too much and that the injustice, the second test, centred around the failure to peruse the papers and that this error was compounded by the use of *inter partes* correspondence as evidence in the absence of any real chance for the other side to deal with it. As well, it is also claimed that the amount involved was so excessive as to amount to an unjust allowance."

Charleton J. also commented as follows at p. 641:

"When litigation becomes too expensive it can operate as a fetter on the constitutional right of access to the courts. It is also difficult to see how an instruction fee of €35,000 on an award in a bullying case of €50,000 can be regarded as proper."

In *Boyne v. Dublin Bus & Another* [2008] I.R. 92, the Court upheld the plaintiffs instructions fee of €68,750. Gilligan J. stressed at p. 114 that the Court's function "is simply to review the decision of the Taxing Master and is not an appeal *de novo*" as is confirmed by s. 27 of the Act of 1995. Gilligan J cited the test set down by Geoghegan J. in Bloomer, which I have referred to above. Counsel for the defendant submitted that an appropriate figure would have been €55,000, that the Taxing Master failed to have adequate and proper regard to the nature and extent of the work carried out by the plaintiffs solicitors and that the instructions fee was excessive to the extent that it should be regarded as unjust. However the plaintiffs submitted that the Taxing Master did have regard to these factors as he had considered the file. The Court decided that the Taxing Master did not err in the exercise of his discretion in any way which would render his decision unjust - in reviewing the objection made by the defendant, the Taxing Master "very comprehensively" reviewed the arguments advanced on the defendant 's behalf and those of the plaintiff and, having considered the legal principles applicable in assessing a solicitor's instructions fee and applying the guidelines set out in the relevant case law, he indicated that he was satisfied that the sum allowed was proper and just and was a fair and reasonable remuneration for the work. The Court noted that the Taxing Master re examined and considered all of the facts and circumstances of the case and took the view that this was a case with major difficulties, especially on liability and he was referred to the judgment and the fact that the case had been before the Court on nine different occasions.

As an observation, I would agree with what Gilligan J. said at p. 115, that when conducting a review, the Court is aided by a comprehensive and reasoned decision:-

> "It does appear appropriate to stress that the Taxing Master should, in arriving at his decision, set out the results of his examination of the nature and extent of the work as carried out in any particular case by the relevant person or body claiming a particular fee. This is for the purpose of enabling this court to consider whether in arriving at his decision the Taxing Master has had regard or excessive regard to some factor which he either should not have had any regard to or which he should have had much less regard. This practice would also enable this court to be clear as to whether there is any 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. In essence the Taxing Master should set out a clear picture as to the nature and extent of the work carried out by the relevant person or body claiming the fee."

The defendant's submissions

The defendant submits that the Taxing Master was not entitled to make an allowance of €3,000 per day in circumstances where attendance fees are already prescribed by Appendix W at item 24, at a maximum allowance of €20.49, and that in assessing and measuring costs and allowances to a plaintiff, he should not have allowed an additional sum over and above that provided as a scheduled item in connection with the listing of the case for hearing and when not reached and that this was therefore duplication. It is argued that the Taxing Master erred in law and acted in excess of jurisdiction and that it would be unjust for the defendant to have to pay the sum of €9,000.

At para. 8 of the affidavit of Mr. Gannon, solicitor for the defendant, sworn on 12th April 2011, he states that:-

> "[a]gain and of greater concern is the fact that in seeking to justify the level of instructions fee claimed details of the listing of the case are set out at the end of page 47 continuing into page 48 and on the hearing of the matter before learned Taxing Master Charles A. Moran in the first instance great emphasis was laid on the fact that the case was in the list although not reached on 11th of February, 12th of February, 16th of February when the settlement was achieved and the settlement was ruled on the 17th of February. The learned Taxing Master Charles A. Moran in assessing and allowing the instructions fee at €21,000 indicated that he was taking into account the fact that the case was in the list for the dates stated and allowing an additional sum in respect of such listing in the range of between €2,000 and €3,000."

In relation to the inclusion of this additional amount for the days during which the case was listed , the defendant refers to the fact that items 23 and 24 in Appendix W in the Rules specify the extent to which a plaintiff is entitled to an indemnity from the defendant in respect of costs for days during which the case is listed or at hearing and also refers to the fact that there are notes attaching to items 16 and 17 in Appendix W stating "these items are intended to cover the doing of any work not otherwise provided for etc."

Mr. Gannon in his affidavit further states that:-

> "the learned Taxing Master in his rulings specifically ruled that the instructions fee included an allowance of the €3,000 or thereabouts for each day that the case was in the list and not reached. I respectfully submit that the Taxing Master erred in law and was unfair in granting such allowance having regard to Order 99 of the Rules of the Superior Courts and section 27 of the Court and Court Officers Act of 1995 and that having allowed scheduled items for such Court attendance at items number 174, 176, 178 and 183 the plaintiff cannot recover an additional element of costs for the same Court attendances and the instructions fee i s required to be assessed excluding the scheduled item for Court attendances as provided for at item 23 or 24 in Appendix W."

At para. 8 he states that "the recitals in the bill to justify the level of charge made by way of instructions fee included elements of work in relation to farm losses as recited in page 31 [of the bill of costs]". However the defendant argues that no such farm losses were maintained on the hearing of the claim.

Further, he states that in support of and in seeking justification in relation to the plaintiff's solicitor's instructions fee, reference to work involved in engaging the services of an agricultural consultant was made, however an agricultural consultant was not scheduled as a witness nor was he in attendance or on standby in connection with the hearing as evidenced by the claim for witnesses expenses and the Taxing Master disallowed the expenses in relation to the engagement of such consultant.

The defendant submits that it would be unfair to have a defendant meet additional costs in circumstances where there may be in excess of twenty cases listed for hearing on a given day and with little if any prospect of the case being reached on that day or even over the following days and with little if any incentive on a plaintiff whose costs will increase by upwards of €3,000 per day, to enter into meaningful negotiations to resolve the matter. Correspondingly, the defendant submits that a defendant confronted with such increasing costs is disadvantaged as regards negotiation.

The defendant submits that the jurisdiction to recover attendance fees is limited and regulated by the provisions of 0. 99 and it is therefore a matter for the Rules Committee to determine whether or not the attendance fees prescribed by Appendix W should be increased. It is submitted, therefore that the Taxing Master had no jurisdiction of his own volition to increase the prescribed fee.

The defendant states that the Taxing Master was making an allowance of €3,000 per day for attendance fees in the instructions fee in order to compensate for the minimal fees for attendance expressly available under Appendix W to the Rules but that this is not permitted. Counsel for the defendant submits that it would be unjust to require the defendant to pay a sum of €3,000 per day to the plaintiff’s solicitor if it were the case that the Taxing Master did not have jurisdiction and was wrong in law in making such an allowance to the plaintiffs solicitor.

In relation to O.99, the defendant cites *Mahony* where Charleton J. recognised at p. 637 that "[t]o the extent to which he is not limited by the Rules in O.99, the Taxing Master is entitled to determine his own procedures".

The defendant submits that the corollary to this statement is that where the Taxing Master's powers are limited by the Rules in O.99, the Taxing Master is required to comply with the provisions of O.99.

The defendant concedes that the fee allowed in respect of item 24 of Appendix W, €20.49 may appear to be uneconomically small, but states that the fact remains that this i s the fee which has been prescribed by the Rules Committee and until it decides to change the scale of fees, the Taxing Master, in accordance with 0.99 r.12(1), must apply the provisions of Appendix W. The defendant submits that the Taxing Master would be fundamentally in error if he were to decide to compensate a solicitor in the instructions fee for the fact that the other individual items in Appendix W are measured on a very minimal basis.

As regards the actual amount of €3,000 *per diem*, the defendant submits that this is disproportionate in circumstances where the

total instructions fee allowed was €21,000.

On this basis, the plaintiffs solicitor would recover almost 50% of the instructions fee in respect of three days attending the High Court notwithstanding that any consideration of the criteria be applied in assessing the instructions fee, as laid down in O99, r.37 (22) and the notes to items 16 and 17 in Appendix W make clear that the instructions fee is largely to be assessed by reference to the work done prior to the commencement of the trial.

The defendant further submits that the Taxing Master is bound by O.99, and considerations of justice are not criteria which the Taxing Master has any jurisdiction to apply. However, in applying the test set down in the authorities cited, the Court on an application such as this must consider justice.

In the defendant's replies to the plaintiffs submissions, it is submitted, *inter alia*, that the order sought by the defendant on this motion, if granted, could have enormous implications as the plaintiff could be exposed to prohibitive solicitor and client costs. The defendant notes that the plaintiff presupposes that the plaintiffs solicitor would on a solicitor and client basis be entitled to recover standby fees of €3,000 per day in all cases however no evidence was given that the plaintiff has agreed in the present case to pay a solicitor at the rate of €3,000 per day for attending the High Court. There is also no evidence to suggest that solicitors and clients generally agree a fee of €3,000 as a daily rate for attendance in the High Court. The defendant points out that if the plaintiffs solicitor is allowed €9,000 by way of attendance fees for three days in the High Court, this would amount to almost 50% of the total instructions fee and argues that this identifies the inflated weight given to the attendance fees allowed in the present case. There is no evidence to suggest that when the plaintiffs solicitor is working in her own office, she earns at least €3,000 per day.

As regards the relationship between the Rules and s. 27 of the Act of 1995, the defendant points out that there is nothing in the terms of s. 27 suggesting that it is intended to override scales of costs, and there is nothing which suggests that it empowers the Taxing Master thereunder to award a higher fee than is prescribed by any applicable scale of costs. The defendant submits that if the intention was to override the scales of costs and to permit the Taxing Master to award fees in excess of the maximum figures in the scales, this would have been expressly done so.

The defendant notes that the Taxing Master did not carry out an examination as to the nature and extent of any work done by the solicitor in the present case during the course of the three days the matter was listed but did commence and that s. 27 clearly contemplates that the Taxing Master will examine the nature and extent of any work done by a solicitor with a view to assessing and determining the value of such work. No such examination took place here and what the Taxing Master did was apply a rate which had previously been applied in other cases.

Plaintiff's submissions
In response to the grounding affidavit of Mr. Gannon, a replying affidavit of Julie Shanley, solicitor for the plaintiff was sworn on the 22nd June, 2011. Ms. Shanley in her affidavit referred to the defendant's submissions dated the 8th November, 2010 in support of its objections to Taxation and the plaintiffs replying submissions dated the 15th December, 2010, wherein it was submitted that the instructions fee as defined in the caselaw encompasses the overall care and attention which the case required including instructions for the trial or hearing. Further, Ms. Shanley submitted that the instructions fee did not merely relate to instructions for preparation of the brief, rather it represents what has been referred to in case law as "the great equaliser" and the means by which solicitors were compensated for the minimal nature of the fees allowed on the scheduled basis in the Rules. She argues that just because the bill of costs includes a fee per day for the 11th, 12th and 16th February, 2010, this does not and should not preclude consideration of the three days spent waiting on the commencement of the hearing. Ms. Shanley submits that no solicitor could be properly remunerated by the sums listed as schedule items and that the Taxing Master correctly found that the sum of €3,000 per day as an allowance was an appropriate sum at the time of taxation taking into account the location of the plaintiffs firm in Longford and that the hearing was listed for Court in Dublin. It is submitted that it is not unjust to require the defendant to pay €3,000 per day where no provision has been made other than the Appendix W sum of €20.49 for this work. To fail to compensate a solicitor for these days would unfairly concede an advantage to a defendant who wishes, for tactical reasons, to play a "waiting game" where it perceived advantage in delaying settlement of a case until it is called on for hearing. (It is a submission which, depending on circumstances, might easily rebound!)

In relation to work undertaken for farm losses, the plaintiff states that the contention by the defendant that no farm losses were maintained at the hearing is erroneous because there was no hearing. In relation to the agricultural consultant issue, the plaintiff states that because the matter was settled and that the defendant's solicitors did not seek to exclude the costs of such a person in the terms of settlement, it is not appropriate to do so now.

Counsel for the plaintiff submits that the principle underpinning party and party costs is to indemnify the successful party in respect of the expenses to which he had been put for the purposes of obtaining justice and for enforcing and defending his rights. Party and party costs belong to the client and are a heading of claim just like any other heading of special damage. They are in effect sought to reimburse the client in respect of those obligations which the client has arising from his contractual relationship as between him and his solicitor. In circumstances where a plaintiff is awarded (or the case settles for) a relatively low quantum but where the plaintiffs case was at hearing for a number of days or in the list for hearing but not reached on a number of days (or a combination of both), situations will arise whereby the plaintiff will have his award from the Court (or settlements) severely diminished or entirely negated by the solicitor and client bills that he will have to pay.

The plaintiff submits that the issue of principle to be decided in these proceedings will have far reaching and detrimental implications for both the plaintiff and also any other party intending to institute proceedings other than large corporations including insurance companies who have the resources to discharge their legal fees regardless of the level of fees recoverable on a party and party basis.

The plaintiff contends that no injustice arises in allowing the amount of €9,000 and that a fee allowed under Appendix W of €20.49 for each day on which the matter was listed for hearing before the High Court but did not proceed to hearing would be unjust.

As regards the provisions, the plaintiff argues that it is long established that secondary legislation, such as the Rules, is subordinate to primary legislation and in particular primary legislation takes precedence over instruments made by persons or bodies to which limited legislative power has been delegated, such as the Rules Committee. Section 27 is a primary piece of legislation and in the event of a conflict between the provisions of it and the terms of Appendix W, it is incumbent upon the Court to have regard to the intention of the Oireachtas in enacting the primary legislation.

The wide discretion afforded to the Taxing Master under s. 27(2) takes precedence over the provisions of O.99. Even if the Court accepts that the Taxing Master has erred it is still incumbent on the defendant to establish that the error has resulted in an injustice and the plaintiff submits that this is a heavy onus of proof.

Given the inherent jurisdiction of the High Court, it ensures that justice is done. The plaintiff made a *bona fide* claim for damages, succeeded in that regard but the plaintiff argues that if the defendant succeeds on this motion, the damages that the plaintiff received from the settlement would be reduced significantly owing to the additional liability he will have to his solicitor should the defendant's line of argument be upheld.

The plaintiff submits that the onus is not on him to establish a liability on a solicitor client basis. A presumption arises in favour of a plaintiff in any taxation. This presumption is that a plaintiff is liable to his solicitor for reasonably incurred costs and that it is a matter for the defendant to prove otherwise. A solicitor who is attending Court on three successive days is entitled to require his client to discharge the reasonable costs incurred. Such costs would not be met by the figure provided in Appendix W.

The plaintiff submits that s. 27 gives to the Taxing Master the power to examine the nature and extent of any work done in assessing and determining the fees due and where it is manifestly clear that Appendix W contemplates remuneration that is wholly inadequate, the Taxing Master may compensate a solicitor for reasonably incurred costs on top of what is provided for in Appendix W.

The Court's findings
Flynn and Halpin state as follows at p. 522 of their text:-

> "Furthermore, a case may appear in the list, and if a judge is not available to hear the case, the solicitor must linger around the hallowed halls and corridors, disguising a stress that exists because of the solicitor's absence from the office and the knowledge that he is not attending to work that would otherwise be attended to but which must be postponed because at any stage a judge may become available. The number of days a case is at hearing is another important factor to have regard to in assessing the remuneration of the instruction fee and this factor gives rise to other grounds which include decisions such as are further consultations necessary; is the evidence adduced that day in need of attention; are there certain matters that must be done before the hearing resumes, etc. These and other factors affect the overall amount of the instruction fee and clearly, the assessment of the instruction fee is indeed a very multifarious and complex operation."

I agree with the submission made by the plaintiff that a wide discretion has been given to the Taxing Master by the Act of 1995 as referred to by Kearns J. in *Superquinn*. I accept that the instructions fee may be used as "the great equaliser." The amount of work that was spent on the case while waiting for it to be heard on a day or days when it is listed is relevant to this motion.

Each bill, however, must fall to be taxed on a case-by-case basis. The work, the professional application, the logistical and tactical engineering that the client has engaged in instructing a solicitor, warrants appropriate and fair remuneration on party and party taxation of an instructions fee. A whole range of different circumstances bedeck the panorama. On the one hand, there is the barrister led action where no witnesses are involved, where attendance upon counsel is just that. The attorney's work is, in effect, complete by the time the door of the Court beckons. No consultations are needed, no witnesses to be marshalled. On the other hand, consider, for example, a lengthy and complex professional negligence claim, the lengthy and numerous consultations with witnesses often brought from outside this jurisdiction. Such could be the sort of case mandating a beginning- to -end, "hands on" commitment from the instructed solicitor. I see no reason why this should not reflect appropriately in the party and party costs in general and the instructions fee in particular.

This is not to exclude less complex cases m personal injuries which, too, can present their own logistical challenges. Absence from an office at a distance removed from the forum of litigation may be a matter to be sprinkled in the mix to be weighed and assayed by the Taxing Master.

Thus I see no error in principle in applying the "great equaliser". I find no injustice would flow from its application. But this is not something to be engaged in willy-nilly. It is not a "rule of thumb" and must be evidence based as far as practicable and subject to sufficient analysis and explanation.

In the instant case, this did not happen in my view to a sufficient degree. I identify the errors of principle in the instant case as:

> (i) insufficient inquiry, analysis and explanation of the amount allowed on a *per diem* basis;
>
> (ii) The allowance of an amount which, taken together, seems wholly disproportionate to the overall instruction fee allowed.

Thus I identify both an error in principle and an injustice in the allowing the daily rate of €3,000.

I have no evidence upon which to readjust this figure or even if, in the circumstances, a readjustment is necessary. I must therefore remit the matter to the Taxing Master.