THE HIGH COURT

[2010 No. 10916 P]

BETWEEN

MICHAEL O'DRISCOLL
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, BREDA O'DRISCOLL)

PLAINTIFF

AND

MICHAEL HURLEY

AND

HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 4th day of May, 2018

1. This judgment is given in a review of the decision of Taxing Master Mulcahy on the taxation of the plaintiff's costs and deals solely with the challenge to the allowance she made for the solicitor's instruction fee, claimed at €145,000 and allowed at €57,400.

2. After a four-day hearing of the medical negligence action, and judgment having been reserved, on 28 February 2012 O'Neill J. awarded the plaintiff €50,000 together with his costs to be taxed in default of agreement. Liability was conceded three months before the trial, although causation remained in issue. A total of eight witnesses were heard, including six expert witnesses. An application pursuant to s. 63 of the Civil Liability Act 1961 had been brought in regard to a tender offer and was rejected.

3. Some difficulties in examining and cross examining the plaintiff were acknowledged by the trial judge, who described the situation as "very difficult and unusual".

4. The motion for review brought on 21 October 2015 came on for hearing before me on 23 June 2016, but after a two-day hearing was adjourned to await the decision of the Supreme Court in the appeal from the decision of the Court of Appeal in *Sheehan (a Minor) v. Corr* [2016] IECA 168.

5. The Supreme Court delivered its judgment on 15 June 2017, *Sheehan v. Corr* [2017] IESC 44, [2017] 2 ILRM 454 and supplemental written submissions were furnished and addressed orally.

Sequence of hearings before the Taxing Master

6. Taxing Master Mulcahy delivered her initial ruling on 16 May 2014 but did not provide a written statement of her reasons. The solicitor for the plaintiff, Mr. O'Sullivan, made objections to the ruling pursuant to O. 99, r. 38(1) of the Rules of the Superior Courts ("RSC"), and thereafter, submissions were delivered by the plaintiff and the defendants.

7. The objections hearing took place before Taxing Master Mulcahy on 23 January 2015.

8. The solicitor for the plaintiff did not maintain a contemporaneous record of the time he actually spent on the file. For the purpose of the taxation of his instruction fee his cost accountant, Mr. Stephen Fitzpatrick, made an estimate of time spent from his detailed analysis of 78 principal activities in the litigation between 2006 and 2010, and a further 101 from 22 December 2011 to 26 July 2012. It is clear that Mr. Fitzpatrick used median figures in respect of certain tasks such as letters, telephone calls, etc. He did not consult with Mr. O'Sullivan for the purpose of the exercise.

9. An issue arose in the course of that hearing regarding the methodology in the calculation of time records and it was agreed that Mr. Fitzpatrick would provide a compilation of time records. He produced eleven folders from which he made estimates of time spent and gave evidence before the Taxing Master on 19 June 2015 and was cross examined.

10. The hearing of the taxation of the plaintiff's costs took five days in total, commencing on 29 October 2013 and ending on 19 June 2015. Taxing Master Mulcahy dismissed all of the objections in her ruling on 12 October 2015 (the "final ruling").

11. After a hearing and following oral evidence from Mr. Fitzpatrick, Taxing Master Mulcahy made the following final determination:

> "Having reviewed the time estimates in the light of the evidence furnished by Mr. Fitzpatrick in conjunction with a further examination of the solicitor's files, I remain of the view that the time estimated by Mr. Fitzpatrick having been spent by the Solicitor is arbitrary and not based on the actual work done by the Solicitor. It is not possible to relate the time estimated by Mr. Fitzpatrick to have been spent by the Solicitor with the work that was necessary to be done in the proceedings and in my view it would not be safe or fair to the Defendant paying party to place reliance on the time estimates prepared by Mr. Fitzpatrick."

12. Taxing Master Mulcahy then made her ruling on the hourly rate proposed by the solicitor for the plaintiff at €400:

> "The work done by the Solicitor in the proceedings was with varying nature, including some work of an administrative and a mundane nature, and in my view no single rate would be applicable to all the work undertaken by the Solicitor. Quite apart from that, the plaintiff did not engage the Solicitor for the Costs to undertake work on her behalf on the basis that the time spent by him at the rate of €400 per hour, or indeed any rate, and it is not appropriate that the fees to be allowed to the Solicitor would be calculated on that basis".

13. In her conclusion, Taxing Master Mulcahy expressed the view that there was "an over reliance on time" in the bill of costs and in submissions made on behalf of the solicitor for the plaintiff:

> "The overriding basis on which the Solicitor's General Instruction Fee is to be assessed is the nature and extent of the work done by the Solicitor on behalf of the Plaintiff in the proceedings. In this taxation the assessment carried out is of such work as was reasonable and necessary to enforce the rights of the Plaintiff and for the attainment of justice so as to be recoverable as between party and party".

14. For those stated reasons, she refused to allow the amount of €145,000 in respect of the general instruction fee and allowed €57,400.

The legal basis for review

15. The review is brought pursuant to O. 99, r. 38(3) RSC and s. 27(3) of the Courts and Courts Officers Act 1995 ("the 1995 Act") 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 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 or the County Registrar is unjust".

16. Section 27 of the 1995 Act has the effect of constituting the Taxing Master a specialist tribunal in respect of whose decision the court should not interfere save by way of review, and when it is determined that the result is unjust. That a result be unjust is more than a requirement that the person claiming costs achieves less that he or she submitted, and injustice must be tested in the context of an assessment of the nature of the litigation, the amount of expertise engaged, and all of the other factors that might be relevant in the case in issue.

17. The test to be applied on review is well established. Ryan J. in *Cafolla v. Kilkenny & Ors* [2010] IEHC 24, [2010] 2 ILRM 207, set out the limits of the review:

> "In order to succeed, the defendants have to establish that the Taxing Master erred as to the amount of one or more of the […] allowances so that his decision was unjust".

18. The burden on a party seeking to challenge a ruling of the Taxing Master is heavy and, as put by Hedigan J. in *Revenue Commissioners v. Wen-Plast (Research and Development) Ltd* [2009] IEHC 453, at para. 24, the court "will be more reticent to interfere" than might have been the case before the changes effected by the 1995 Act.

19. Geoghegan J. in *Bloomer v. Incorporated Law Society of Ireland (No. 2)* [1999] IEHC 260 [2001] IR 383, at p. 387 described in some detail the exercise of the review jurisdiction as follows:

> "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".

20. Kearns J. in *Superquinn v. Bray UDC (No 2)* [2000] IEHC 115, [2001] 1 IR 459, at p. 476 agreed with the approach of Geoghegan J. in *Bloomer v Incorporated Law Society* and considered that the High Court must "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".

21. Laffoy J., in *Sheehan v. Corr*, at para. 98 also considered that the reviewing court should show deference to the expertise of the specialist Taxing Master.

The basis of the present review

22. The plaintiff argues that Taxing Master Mulcahy attached insufficient weight to, or ignored entirely, the detailed chronology of work and time estimates prepared by Mr. Fitzpatrick.

23. Counsel for the plaintiff argues that whilst in her initial ruling the Taxing Master accepted that the time was a factor to be taken into account or was, as she put it, "of considerable assistance to me in assessing the work", she then went on in her final ruling to wholly ignore the time estimates, and thereby fell into error.

24. It is further argued that in failing to have any account to the sworn evidence of the plaintiff's legal cost accountant, the approach of the Taxing Master was neither rational nor transparent for the purposes of the test identified by Ryan J. in *Cafolla v. Kilkenny.* The error is argued to be one of principle within the meaning of s. 27(3) of the 1995 Act, as was found by Geoghegan J. in *Bloomer v. Incorporated Law Society*.

25. It is established in the authorities that when time records have not been kept, an estimate of time spent may be prepared and interrogated by the Taxing Master. As Ryan J. said in *Cafolla v. Kilkenny*, time estimates can be the "beginning of the exercise" of taxing the costs.

26. In three recent judgments, the Irish courts have clarified the role of time in taxation process.

27. Cregan J., giving the judgment of the Court of Appeal in *Sheehan v. Corr*, came to the conclusion that the amount of time expended was the central consideration in the assessment of costs, what he termed at para. 62 the "foundation stone of a proper assessment", and at para. 94 he stated:

> "That is why any assessment of a solicitor's instruction fee must start with the hours worked on each item, the level of seniority of the solicitor involved and the professional charge for that individual activity (which may include the hourly charge). This allows the parties - and indeed the court – a measure of objectivity in the assessment because professional

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

28. Laffoy J., giving the judgment of the Supreme Court on the appeal considered that the amount of time actually spent should not be elevated above all other relevant criteria mandated by the Rules of the Superior Courts. At para. 73, she stated:

> " […] what the Court of Appeal suggests is the correct approach for the Taxing Master to adopt in relation to the general instructions fee in the judgment at paragraph 126, which recommends a process in which the relevant circumstances outlined in rule 37(22)(ii) other than time spent should only be considered after an assessment of time spent by reference, *inter alia*, to the number of hours spent and the hourly rate, and the appropriate professional charge for each element of a professional service, is not in accordance with Order 99. Although what is characterised as the "correct methodology to be followed by a Taxing Master", as set out in paragraph 57 of the judgment, is phrased somewhat differently, nonetheless, time spent is there elevated above the other circumstances listed in rule 37(22)(ii), such as complexity and difficulty, which I would consider to be important factors in the assessment of the nature and extent of the work under scrutiny and in putting a value on it. For the foregoing reasons, I have come to the conclusion that the defendant is correct, and that the methodology which the Court of Appeal determined the Taxing Master must use in the taxation of the general instructions fee is not in accordance with law".

29. Laffoy J. concluded on the relevance of the time as a factor in the assessment of the costs at para. 81 by positioning the analysis of time actually spent as "only one element of the relevant circumstances by reference to which the nature and the extent of the work done is assessed".

30. The Supreme Court considered that a retrospective reconstruction of the time actually spent on a case was permissible, and at para. 90 Laffoy J. held that the Taxing Master had the power to allow or direct the production of retrospective reconstruction of time spent.

Discussion on time estimates

31. It is inevitable that when a solicitor does not have time records, some element of retrospective estimation will be proffered, and the Supreme Court has accepted that retrospective time estimates can be an acceptable alternative to actual contemporaneous time sheets. Taxing Master Mulcahy did indicate a willingness to adopt that course of action as there were no actual time records, but the plaintiff argues that she thereafter ignored the estimates without justifying reason.

32. Both parties approached the taxation process on the basis that the time spent was a relevant factor and would assist Taxing Master Mulcahy in coming to her conclusion. The plaintiff claimed 359 hours' work and the defendants proposed allowing 189 hours. The proposal that Mr. Fitzpatrick prepare retrospective time estimates was accepted and indeed encouraged by the Taxing Master. The plaintiff argues, however, that in thereafter refusing to have any regard to the detailed estimates prepared by Mr. Fitzpatrick, the Taxing Master fell into error.

33. The defendants argue that the Taxing Master did not ignore Mr Fitzpatrick's time estimates, but rather identified sufficient failings in his compilations to be entitled to treat them as unreliable.

Whether a Taxing Master may entirely disregard retrospective estimates

34. If the retrospective estimate is analysed and found by the Taxing Master to be incompatible with concrete evidence on the file or inaccurate in some other material way, a total disregard of the estimate might be justified. Taxing Master Mulcahy made no such finding. She dismissed the retrospective estimates by reference to what she saw as "failings in compilation", and did not interrogate the instruction fee by reference to its various elements. She concluded that she was unable to break down the work claimed to have been done and to identify what portion comprised solicitor/client work or the work of junior associates or secretarial or administrative staff, but thereafter did not go on to engage the exercise of actually assessing the allowable time and appropriate rate identified in the Supreme Court analysis by which a taxing master must himself or herself assess the work done and how it is to be costed.

35. That this function is one that must be engaged is apparent from the Supreme Court endorsement of the approach already identified by Herbert J. in *C.D. v. Minister for Health* [2008] IEHC 299 that the function of the Taxing Master is to subjectively examine each separate item in the bill of costs, assess precisely what work was done and by whom, and whether special skills were required for some role of the relevant work.

36. In *Sheehan v. Corr*, Laffoy J. considered that the focus was to be on "the work that was done in a case by solicitors, barristers and expert witnesses". At para. 74, she summarised the conclusions with regard to the importance of time as a factor in the assessment of the costs:

> "Time is a factor to which the Taxing Master must have regard. If it is in issue, he should indicate the amount of time he or she considers should reasonably have been devoted to the work, but as Herbert J. stated, he or she should do so to the extent that the nature of the work and the information available to him or her permits".

37. Taxing Master Mulcahy made a determination that she could not rely upon the time estimates prepared following her direction on the 17 February 2014. She considered that the retrospective time analysis was unreliable as it did analyse the type of work done and was therefore "artificial" and "arbitrary". She said that she found some entries impossible "to relate the times he [the cost accountant] has estimated to the work as evidenced on the file to a large extent". In his oral evidence, Mr. Fitzpatrick said that in his view the exercise of analysing the nature of the work was one not within his brief and was for determination by the Taxing Master Mulcahy.

38. Taxing Master Mulcahy concluded:

> "Having again reviewed the papers furnished to me, and treating the time estimates prepared by Mr. Fitzpatrick, I am satisfied that the sum of €57,400 arrived at in the taxation as the Solicitor's General Instruction Fee is a fair and reasonable fee".

39. I accept the argument of the defendants that Taxing Master Mulcahy did have regard to the time estimates but the question I

must determine is whether she had a basis for rejecting the estimates as "artificial", "arbitrary", and "unclear".

40. It may be correct in general to treat retrospective compilations of time estimates as carrying less weight than evidence derived from contemporaneous time records, but Taxing Master Mulcahy's stated difficulty was the fact that the cost accountant did not engage the solicitor who had carriage of the file in his preparation of the time estimates and the solicitor did not review or approve these before they were submitted to the Taxing Master.

41. The methodology employed by Mr. Fitzpatrick was to estimate different aspects of the work as having a "median time", *e.g*. he ascribed ten minutes for a telephone call, fifteen minutes for a letter etc. Taxing Master Mulcahy considered that such a time estimate was "not reliable". She also considered that certain items included by Mr. Fitzpatrick in his time estimates were more properly solicitor and own client's matters and not properly capable of being ascribed to party and party costs, and that certain tasks could have been carried out by a more junior solicitor in the firm or by administrative staff.

42. Taxing Master Mulcahy explained in her final ruling that she was unable to understand some of the elements of the estimates of time spent and confirmed the initial ruling she already made on taxation:

> "[…] it is not possible to identify what portion of the estimate of time was spent by the Solicitor on activities that were of a Solicitor/client nature in respect of which no fee would be allowable, it is not possible to identify what portion of the estimated time was spent by the solicitor on work of a mundane or administrative nature in respect of which a lower fee would be allowable."

43. She went on, and at p. 11 made a finding accordingly as follows:

> "Having reviewed the time estimates in the light of the evidence furnished by Mr. Fitzpatrick in conjunction with a further examination of the Solicitor's files, I remain of the view that the time estimated by Mr. Fitzpatrick to have been spent by the Solicitor as arbitrary and is not based on the actual work done by the Solicitor".

44. I have examined the estimates prepared by Mr. Fitzpatrick which contain a recital of the work carried out, but do not contain a breakdown of the time expended on each activity. The activities or events are identified and a global estimate of the time expended is included. I consider, however, that it was possible for Taxing Master Mulcahy to assess what portion of the estimated time was expended on activity that was administrative in nature, more properly ascribed to own-client activity, or work carried out or reasonably carried out by the principal solicitor in the firm or a junior associate.

45. I cannot accept that the estimates prepared by Mr. Fitzpatrick were not sufficiently detailed or were arbitrary. Mr. Fitzpatrick is a cost accountant with considerable experience and skill, and I consider that it was not inappropriate that he prepared his estimates without detailed consultation with Mr. O'Sullivan, and indeed the estimates may be regarded as objective and true estimates for that reason. They, therefore, were presented as a guide to the likely time expended, not as a retrospective reconstruction of the file.

46. For this reason, I consider that Taxing Mater Mulcahy fell into error in coming to a conclusion that the time estimates were not reliable, and also for failing to herself then interrogate the data furnished to her and perform the task of assessing the correct instructor fee.

47. The plaintiff argues also that the Taxing Master failed to explain the basis from which she derived the general instruction fee. I turn now to examine her general approach to this assessment.

The other factors in the assessment: the general instruction fee

48. The plaintiff argues that Taxing Master Mulcahy incorrectly approached the question of the solicitor's general instruction fee in that she took a broad and unexplained figure which did not arise from an analysis of the individual factors relevant to then assessment.

49. Herbert J., in C.*D. v. Minister for Health*, regarded it as proper for the Taxing Master to have assessed that element of the costs by taking into account the work done as well as matters such as the novelty, rarity, complexity and difficulty of the matter, whether liability was in issue, and whether skill and specialised knowledge was involved. Laffoy J. expressly endorsed that approach in *Sheehan v. Corr*, at para. 81.

50. Laffoy J. regarded it is appropriate to carry out an assessment of the general instruction fee by reference to the "various components" of the fee but that it was neither necessary nor desirable to value individual items. Time is one element but not determinative, and the purpose of the taxation process is to have regard to the relevant circumstances "by reference to which the nature and extent of the work done is assessed".

51. It is established in the authorities quoted in this judgment and approved by McDermott J. in *Sulaimon v. The Minister for Justice and Equality* [2016] IEHC 350 at para. 18, that the Taxing Master must explain how he or she treated the discrete elements of the instruction fee and to observe fair procedures.

52. In her final ruling, Taxing Master Mulcahy stated the following:

> "I analysed what had been done by the Solicitor under separate categories and in the Ruling I delivered on the 16 May 2014, I addressed the issues in the case and the work that had been done by the Solicitor on behalf of the Plaintiff in the proceedings".

53. The plaintiff's solicitor, however, says that this general assertion is not borne out by the facts, and that Taxing Master Mulcahy did not undertake the required analysis of the elements which she regarded as relevant or give reasons for her calculations.

54. Laffoy J., giving the decision of the Supreme Court in *DMPT v. Taxing Master Moran* [2015] IESC 36, [2015] 3 IR 224, held that a failure to give reasons infringed the right to fair procedures and constitutional justice. She was dealing with the failure to give reasons at the end of the initial stage of the taxation process, the precise stage of the process in respect of which the argument is made in the present case, and considered that the failure to give reasons for the initial ruling is not cured by a subsequent review of the objection stage in the final ruling. At para. 61, Laffoy J. said the following:

> "In summary, whether the decision of the Taxing Master is to make an allowance which the party bearing liability for the costs thinks is too high or a disallowance which the party claiming the costs thinks is excessive, if the dissatisfied party is

not in a position, to use the term used by Fennelly J. in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, to "understand" why the Taxing Master came up with that result because he will not give reasons, the dissatisfied party is put in an impossible situation. Without reasons for, and thus understanding of, the decision of the Taxing Master, the dissatisfied party will have to assess whether to:

(a) move on to the second stage of the taxation process, having gone through the cumbersome and expensive first stage, in the knowledge that the expenditure he incurs in the second stage will be borne by him, or,

(b) accept that decision as the final determinative decision.

Accordingly, the failure to give reasons at the end of the initial stage at the request of the dissatisfied party in relation to items in dispute must infringe the right of the parties to the taxation process to fair procedures and constitutional justice".

55. A Taxing Master is often met with figures which are, even if not exaggerated, the highest, or in the case of the paying party, the lowest figure that a person wishes to achieve. A reduction of many percent in those circumstances would not, without more, raise an argument that the cost assessment is unjust. However, where the reduction by the Taxing Master is of the level which occurred in the present case, i.e. 60%, the imperative that the reasoning of the Taxing Master be understandable becomes more pressing.

56. An assessment of costs is not unjust within the meaning of s. 27(3) on account of it being lower or even much lower than the amount proffered by either party. In Superquinn v. Bray, Kearns J. regarded a discount of 25% or more as giving rise to a prima facie argument that there had been an injustice, but an approach by reference to the amount of the discount was later rejected by Peart J. in *Quinn v. South Eastern Health Board* [2005] IEHC 399, who preferred an approach which had regard to the "different factors" assessed "on a case to case basis". The approach of Peart J. seems to be more consistent with later authorities that a Taxing Master and, thereafter, the court should have regard to all of the relevant elements.

57. Cregan J., in *Sheehan v. Corr*, while finding the 25% margin rule to have "the attraction of simplicity", considered that a "more flexible approach based upon the examination of all the circumstances of each case" was more appropriate, and expressly said that in the case of a large fee, a smaller percentage deduction might amount to an injustice.

Application to the facts and conclusion

58. This is a medical negligence case, and causation remained an issue until the case commenced. The solicitor's general instruction fee must therefore be assessed on the basis of a trial of a medical negligence action where liability was not in issue, but because causation remained in issue, medical expert evidence was required. The case ran for four days and it seems to me the Taxing Master does not show how she dealt with the fact that the plaintiff required a level of attention that some plaintiffs might not have needed as a result of his state of mind.

59. The defendants argue that Taxing Master Mulcahy could not fully engage with the nature of the litigation or analyse or assess the nature of the work because there were no detailed attendance notes which recorded the nature and extent of the work carried out. I disagree, and in my view the Taxing Master did have sufficient information regarding the nature of the role engaged by the solicitor from a combination of the notes furnished to her, the eleven folders of documents analysed by Mr. Fitzpatrick, the written judgment of O'Neill J, and the evidence adduced at the taxation hearing.

60. The defendants argues that the estimate of time at 359 hours was grossly excessive on a party and party basis, having regard to evidence available on file and the time estimates of the defendants of 189 hours. What is not apparent from her ruling, however, is how the Taxing Master did resolve this significant difference, and if her calculation was based on or broadly reliant on a time element, the time she actually thought could properly be allowed.

61. The defendants also argue that the hourly rate of €400 is excessive and Taxing Master Mulcahy had taken the view that a rate between €250 and €350 an hour was more appropriate. She carried out an analysis of the hourly rate in her initial ruling, and regarded the hourly rate of €400 to be "a premium rate", not one that could be applied to all activities. It seems to me that she must be correct in this having regard to the fact that, undoubtedly, some of the work was either actually carried out at an administrative level within the office or could have been so carried out.

62. But it is not clear how this rate led to the final instruction fee.

63. I am satisfied that the Taxing Master has erred in fact, in principle, and in law in her rulings, and that her determination of the solicitors' instruction fee is unjust within the meaning of s. 27(3) of the 1995 Act.

64. Kearns J., also took the view in *Superquinn v. Bray* that the High Court must, if it can, form a view itself of the amount it would have awarded in a particular situation. Accordingly, rather than remitting the matter to another Taxing Master for re-taxation pursuant to O. 99, r. 38(6) RSC, I will hear counsel on whether I should measure the costs.