

THE HIGH COURT

[2010 No. 5214S]

BETWEEN

HUGH A CARTY, JOHN P CARTY, H GAVAN CARTY, SHANE CARTY PRACTISING UNDER THE STYLE AND TITLE OF KENT CARTY
SOLICITORS

PLAINTIFFS

–AND –

MR H

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Key Issue Arising

1. This is an application to review a decision of the Taxing Master concerning certain costs arising from and pursuant to family law proceedings that involved Mr H.

II. Basis of Review

2. Section 27(3) of the Courts and Court Officers Act 1995 provides that “*The High Court may review a decision of a Taxing Master of the High Court*”. However, it may do so “*provided only that the...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*”. The provision is perhaps somewhat unusually worded in that it is difficult to see how the court can be satisfied as to error unless it has done a review of the Taxing Master’s decision, yet it may only do the review provided it is satisfied as to error. Be that as it may, the parties to the proceedings have rightly proceeded as though s.27(3) has the effect that relief by way of judicial review may be ordered provided the Taxing Master has so erred as to yield a decision as to an allowance or disallowance that is unjust.

III. Background Facts

3. Mr H owes legal fees to the plaintiff solicitors arising from family law proceedings. The fees went to taxation and have been the subject of a comprehensive decision by the Taxing Master. Mr H has brought this appeal against the Taxing Master’s decision on the ground that it is unjust. The court turns to the various headings of complaint below.

IV. Objections Raised

(i) Items No 1-34 covering the period 08.04.09-12.06.09.

4. Mr H’s principal complaint under this heading is that he is being required to pay fees for his solicitor at a time when his solicitor had been engaged to act for him but had not yet come on record. There is no general reason why a client should not have to pay fees to his solicitor for work undertaken by the latter during such period. Mr H urged on the court that a solicitor is limited as to what he can do for a client in court before formally coming on record. But in practice, provided a solicitor gives an undertaking that he will come on record, s/he will be heard by a court. And, contrary to Mr H’s repeated suggestion in this regard, there is no difference in the practice of the courts in this regard when it comes to family law cases.

5. Mr H also complains, in effect, that he should have to pay for receiving his solicitor’s advice. This is because of his apparent belief that a solicitor should act unquestioningly on his client’s instructions once given and that any advice tendered thereafter is not to be paid for. But that is to reduce a solicitor to the role of unthinking flunkey; and this is not a role that a solicitor is ever expected to play. Of course, there comes a time when a solicitor, for so long as s/he continues to act for a client, must act in accordance with that client’s lawful instructions, but in practice a solicitor is often obliged as a competent professional to urge his or her client to pursue an alternative course of action from that settled or embarked upon by a client, when the solicitor sees that the alternative course of action will better protect the client’s legal interests. Patently, such legal advice must be paid for. If Mr H did not wish to pay for listening to his solicitor’s advice, it was always open to him to cease to engage his solicitor.

(ii) Items No 25-100 covering the period 13.06.09-09.10.09.

6. Under this heading, Mr H reiterates his complaints as regards paying for a solicitor who has been instructed but who has not yet come on record. His complaints in this regard are rejected for the same reasons as are outlined above.

7. Mr H complains as to the quality of his solicitor’s services at this time, in particular the quality of the solicitor’s instructions to counsel and the length of the notes taken by his solicitor in court and the related scale of fees arising. The fee rates do appear high (an average of about €250 an hour) but there is nothing in the Taxing Master’s decision in this regard as would render it unjust. As to the quality of the services tendered, if Mr H considers that the solicitor in his doings strayed into the realm of negligence, then it was open to Mr H to sue for that alleged wrong.

(iii) Items 119 to 241 covering the period 19.11.09-19.01.10

8. Mr H asserts that his solicitor (i) acted in breach of his instructions, (ii) bullied and harassed him, and (iii) acted in a manner that

amounted to negligence. There is no evidence before the court to support any of these very serious assertions. If Mr H had complaints as to professional misconduct, one might have expected him to make complaint to the Law Society. As mentioned above, if Mr H considered himself to have a good cause of action in negligence, one might have expected him to commence relevant proceedings. It does not appear from the evidence before the court that any such complaint was made and/or proceedings commenced. Unsupported assertions of professional misconduct and/or negligence offer no sound basis for a reduction in fees due and owing.

(iv) Items 186 to 241 covering the period 24.12.09-19.01.10

9. Mr H complains that his relations with his solicitor had broken down at this point, and that he should not therefore have to pay for such work as his solicitor continued to do (and did do) for him at this time. If Mr H wished his solicitor to stop working for him, he should have instructed his solicitor accordingly. But he cannot, in the absence of so doing, expect that he should not have to pay for such work as his solicitor continued to do for him. As a general rule, work freely sought of, and thereafter undertaken, by a professional advisor must be paid for.

(v) Making oral submissions to the Taxing Master

10. Mr H complains that the Taxing Master accorded him a period of time during which he was heard orally and then required that any further submissions be made in writing. There is no suggestion that any submissions that Mr H sought to make were not considered, simply that he was required to make some of his submissions in writing after he was given a general opportunity to make oral representations. The court sees nothing more in this than an unobjectionable bid at efficiency on the part of the Taxing Master.

(vi) Unreliability of the Bill of Costs

11. Mr H complains that the Taxing Master looked to the Bill of Costs prepared by the costs accountant rather than undertaking an analysis of the solicitors' accounting system. The court must admit to being mystified by the suggestion that the Taxing Master would look to the latter system when a costs accountant had prepared the Bill of Costs. Mr H also makes what amounts to an allegation of negligence against the costs accountant. The remedy for any (if any) such negligence is by way of proceedings for negligence. There is nothing in the foregoing that would justify a reduction in professional fees owing.

(vii) Negligence

12. The court has indicated a number of times above that what Mr H is alleging in respect of his solicitor and also of the costs accountant is, or is tantamount to, an allegation of negligence. The Taxing Master also drew attention to the fact that certain of Mr H's allegations were in truth allegations of negligence. Mr H contends that for the Taxing Master to so conclude was in breach of his right to a fair trial under Article 6 of the European Convention on Human Rights. As the Taxing Master was not conducting a trial, this contention must fail.

(viii) Expenses

13. Mr H maintains that because his costs were reduced by more than one-sixth, he ought not to have been refused his claim for expenses. These expenses included, for example: the costs of procuring DAR transcripts that were ordered to be released to him by the court on the basis that he must pay for same and which were never opened to the Taxing Master (and for which no costs were allowed); duty payable in connection with certain judicial review proceedings brought (which the Taxing Master disallowed); travel expenses (€400 was sought for 14 trips from South County Dublin to the Four Courts; a rather generous €300 was allowed); paper-binding costs (€437.50 was sought but, as most of the binding related to proceedings previous to the taxation, the Taxing Master allowed only €100); and the un-vouched cost of a note-taker who attended for a time during the taxation process (which un-vouched expense was not allowed). Mr H has referred the court to O.99, r.29(13) in this regard. But that rule simply provides that where there is a one-sixth reduction in costs on taxation "*the costs of taxation and the Court fees on the bill of costs and on the certificate of taxation shall be disallowed...unless the Taxing Master shall in his discretion allow the items on special grounds to be stated in his order.*" The rule affords no basis on which to conclude that Mr H ought necessarily to have been allowed the entirety of his expense claims and there is nothing in the reasoning of the Taxing Master to suggest that he has been unjust in this regard; if anything, he has been notably just in his conclusions.

(ix) Breach of contract?

14. Mr H was sent two so-called 'section 68' letters which he claims did not reflect the terms of a fee-capping arrangement that he claims to have agreed with his solicitor at the outset of their business relationship. In effect, he alleges that his solicitor has acted in breach of contract in seeking such fees as have been sought in excess of the alleged cap. The remedy for any (if any) breach of contract so arising is by way of proceedings for breach of contract.

V. Conclusion

15. Returning to the wording of s.27(3) of the Courts and Court Officers Act 1995, it will be clear from the foregoing conclusions that the court is not satisfied that, when it comes to the findings of the Taxing Master as regards the taxation of Mr H's costs, there is any basis on which the court could conclude 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*". In truth, the court does not see that the Taxing Master has erred at all. That the costs arising have been reduced by one-sixth on taxation appears to speak volumes as to the level of costs which it is nowadays sought to level for legal services. But, thanks in no small part to the diligence of the Taxing Master, the fat has been pared from the costs arising and a rump of fees remains to be paid. In this last regard, the court cannot but note that the services provided to Mr H by his solicitors are now of some vintage. Yet despite Mr H's appearing to be a man of some means, it does not appear that much if any payment has been made for those services, not even the payment of a sum on account for such fees as Mr H does not dispute to be owing. It is to be hoped that, following the delivery of this judgment, payment for services now long provided will imminently be

forthcoming.