Neutral Citation Number [2006] IEHC 209

THE HIGH COURT

[2000 No. 12133P]

BETWEEN

LUKE BOYNE

PLAINTIFF

AND

DUBLIN BUS/BUS ATHA CLIATH AND JAMES McGRATH

DEFENDANTS

Judgment of Mr. Justice Gilligan delivered on 14th day of June, 2006.

1. This matter comes before the court by way of a review of taxation pursuant to s. 27(3) of the Courts and Court Officers Act, 1995 ("The 1995 Act") and Order 99, rule 38 of the Rules of the Superior Courts. The defendants seek to review the decision of the Taxing Master as dated the 16th March, 2005. The specific items in dispute are later specified but consist of

(a) Senior Counsel's Brief Fee,

(b) Junior Counsel's Brief Fee,

(c) Refresher Fees for Counsel,

(d) The plaintiff's solicitors instruction fee,

(e) The fee as charged by Peelo and Partners, Chartered Accountants, in respect of an expert report.

2. The substantive proceedings arose from a road traffic accident which occurred on the 20th January, 1999, in circumstances where the plaintiff, having alighted from the defendant's bus, was knocked down by the bus in such a manner as to cause the plaintiff very significant personal injuries. The plaintiff had consumed alcohol immediately prior to the accident occurring and subsequent to boarding the defendants bus had no recollection of any of the following events. The second named defendant who was the driver of the bus was completely unaware of any accident.

3. Liability was contested in full by the defendants and contributory negligence was pleaded on the part of the plaintiff principally that he failed to have any adequate regard for his own safety and welfare and that he exposed himself to a risk of injury by reason of the excessive consumption of alcohol.

4. It was clear to the plaintiff's legal advisors at an early stage as pointed out to the plaintiff in a letter of the 12th August, 1999, that the case could well have obvious difficulties but nevertheless in the view of the plaintiff's solicitors it was a case which had to be taken.

5. The plaintiff's solicitors retained one Senior Counsel and Junior Counsel to act on the plaintiff's behalf.

6. It was at all times quite clear that the plaintiff, as a result of the significant injuries sustained, was pursuing a very substantial claim for loss of earnings both to the date of trial and into the future and in this regard a consulting actuary had been retained. The plaintiff's actuary was proposing to rely on a 3% rate of interest for the purpose of the calculation of the appropriate multiplier to be applied to any claim for future loss of earnings following upon the decision of in *McEneaney v. Monaghan County Council* (Unreported, High Court, O'Sullivan J. 26th July, 2001). It is of some significance in the particular circumstances of this case that it was only subsequent to the commencement of the actual hearing before the trial judge in December, 2001 that it was indicated on the defendant's behalf to counsel for the plaintiff that the defendants were not prepared to accept 3% as an appropriate rate of interest for the purpose of ascertaining the appropriate multiplier to be applied in respect of the claim for loss of earnings notwithstanding the decision of O'Sullivan J. on the 26th July, 2001, in *McEneaney*. Furthermore, the defendants retained a second senior counsel to assist senior and junior counsel, as already retained on the defendant's behalf in respect of the economic argument, and it was necessary for the plaintiff's solicitors to retain the services of Des Peelo, Chartered Accountant, and Moore McDowell, Economist, as expert witnesses to give evidence in relation to the economic argument on the plaintiff's behalf. The defendants retained the services of Colm McCarthy, Economist, as an expert witness to give evidence on their behalf.

7. The actual hearing lasted for six days and in a reserved judgment on the 11th April, 2002, the trial judge apportioned liability 75% against the defendants and 25% against the plaintiff. The learned trial judge dealt extensively in his judgment with the economic issue and came to the conclusion that the appropriate real rate of return should be 3%, thereby coming to the same conclusion as O'Sullivan J. in *McEneaney*.

8. The learned trial judge assessed damages in the sum of €541,278.60 and allowing for the apportionment of liability awarded the plaintiff the sum of €405,958.95.

9. Following legal submissions on the 25th April, 2002, the learned trial judge entered judgment in the plaintiff's favour in the sum of €405,291.54 together with the costs of the proceedings when taxed.

10. The judgment and order of the trial judge was not appealed.

Preliminary Objection

11. The defendants submit that the plaintiff is not entitled to recover any costs from the defendants on a party and party taxation in circumstances where the plaintiff is not under a legal liability himself to discharge the corresponding part of his own bill of costs being the amount herein sought to be recovered on taxation. The defendants' contention is based on the decision of the Supreme Court in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 wherein Walsh J., at p. 119, in dealing with the issue of costs took the view that nothing could be recovered in party and party taxation unless three conditions were fulfilled, namely, (a) that the court has made an order for costs in favour of the party, (b) that the matters claimed had been properly incurred and (c) that the party in question is under a legal liability to pay them. Subsequent to this decision being handed down the Oireachtas enacted the Solicitors (Amendment) Act, 1994 and s. 68 thereof makes provision in relation to charges to clients by solicitors. As a result of non compliance by the plaintiff's solicitors with the requirements of s. 68 it is contended on the defendants' behalf that the plaintiff is not under any legal liability to pay his solicitor the relevant costs and accordingly nothing can be recovered on the plaintiff's behalf on this party and party taxation.

12. Section 68 of the Solicitors (Amendment) Act, 1994 states as follows:

> 68.—(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of—
>
> *(a)* the actual charges, or
>
> *(b)* where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or
>
> *(c)* where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made, by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties).
>
> (2) A solicitor shall not act for a client in connection with any contentious business (not being in connection with proceedings seeking only to recover a debt or liquidated demand) on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client, and any charges made in contravention of this subsection shall be unenforceable in any action taken against that client to recover such charges.
>
> (3) A solicitor shall not deduct or appropriate any amount in respect of all or any part of his charges from the amount of any damages or other moneys that become payable to a client of that solicitor arising out of any contentious business carried out on behalf of that client by that solicitor.
>
> (4) *Subsection (3)* of this section shall not operate to prevent a solicitor from agreeing with a client at any time that an amount on account of charges shall be paid to him out of any damages or other moneys that may be or may become payable to that client arising out of any contentious business carried out on behalf of that client by that solicitor or his firm.
>
> (5) Any agreement under *subsection (4)* of this section shall not be enforceable against a client of a solicitor unless such agreement is in writing and includes an estimate (as near as may be) of what the solicitor reasonably believes might be recoverable from any other party or parties (or any insurers of such party or parties) in respect of that solicitor's charges in the event of that client recovering any damages or other moneys arising out of such contentious business.
>
> (6) Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client —
>
> *(a)* a summary of the legal services provided to the client in connection with such contentious business,
>
> *(b)* the total amount of damages or other moneys recovered by the client arising out of such contentious business, and
>
> *(c)* details of all or any part of the charges which have been recovered by that solicitor on behalf of that client from any other party or parties (or any insurers of such party or parties), and that bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services.
>
> (7) Nothing in this section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill of costs for taxation, whether on a party and party basis or on a solicitor and own client basis, or shall limit the rights of any person or the Society under *section 9* of this Act.
>
> (8) Where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amount (or any part thereof) of that bill of costs, the solicitor shall—
>
> *(a)* take all appropriate steps to resolve the matter by agreement with the client, and
>
> *(b)* inform the client in writing of—
>
> (i) the client's right to require the solicitor to submit the bill of costs or any part thereof to a Taxing Master of the High Court for taxation on a solicitor and own client basis, and
>
> (ii) the client's right to make a complaint to the Society under *section 9* of this Act that he has been issued with a bill of costs that he claims to be excessive.
>
> (9) In this section "charges" includes fees, outlays, disbursements and expenses.
>
> (10) The provisions of this section shall apply notwithstanding the provisions of the Attorneys and Solicitors (Ireland) Act, 1849 and the Attorneys and Solicitors Act, 1870.

13. The plaintiff's solicitors did write a letter to their client on the 12th August, 1999, which they maintain does comply with the relevant provisions of s. 68 of the Act of 1994, the letter being in the following terms:

"Dear Luke

Thank you very much for your instructions in connection with this matter, and [we] are pleased to act on your behalf. It is not possible, at this stage, to give you a note of our actual charges nor a detailed estimate and for this reason we set out briefly the basis upon which our charges will be made.

Solicitors' charges are generally calculated by reference to the time spent on the matter in question and the nature of the work concerned. The level of charge will also depend on:

1. The complexity of the matter
2. The urgency of the matter
3. The difficulty or the novelty of the question raised
4. The skill, labour specialised knowledge, and responsibility involved
5. The number and importance of the documents prepared or examined
6. The amount or value of the transaction involved
7. The importance of the matter to you.
8. The time reasonably spent by us on the matter
9. The place, or places and the circumstances in which the proceedings are pursued.

In addition to the Solicitors professional fee may be items of outlay that will have to be discharged to you. These outlays may include stamp duty on Court documents, fees payable to Doctors, Engineers, Surveyors, Paramedics, Barristers, both Senior and Junior Counsel and Accountants, if necessary. Where V.A.T. arises it is currently calculated at 21% and such V.A.T. is also your responsibilities.

You remain responsible for the payment of our charges even where you reach a settlement with the Plaintiff or third party or where they are ordered to pay costs. The amount which the Plaintiff or third party may agree and/or may be directed to pay will not generally cover our entire charges. The process of recovering such costs on your behalf may involve additional costs and outlay.

Insofar as the costs recovered from the other party are insufficient to discharge your liability to us for costs, then you will be liable to make up the shortfall. These costs are known as Solicitor and Client costs.

You should bear in mind that in the event of you:-

· Losing, or

· Compromising the case, or

· The Court failing to award you your costs or a portion of them, or

· The Court awarding costs against you, or

· Being unable to recover your costs due to the financial status of the other party

You may be liable to pay the other parties costs as well as your own.

As you know, we have made numerous efforts to obtain a Garda abstract report from Clondalkin Gardaí and are still awaiting same. Liability in this case very much depends on what the witnesses say and, at the end of the day, while we may have obvious difficulties, it is a case which has to be taken.

If there is any aspect of the above which you need to be clarified or if you have any questions in relation to same please to not hesitate to contact us.

Once again, we thank you for your instruction.

Yours sincerely, …"

14. It is the defendants' case that the plaintiff is under no legal liability to pay part of his own solicitors' bills referable to the party and party costs. The defendants contend that having regard to the authoritative judgment of the Supreme Court in *McGarry* the plaintiff is not entitled to recover any costs on a party and party taxation.

15. The central thrust of the submissions as made on behalf of the defendants are to the effect there has been no compliance with s. 68(1)(c) of the Act of 1994. Furthermore on taking the instructions of the plaintiff, the plaintiff's solicitor did not then, or as soon as practicable thereafter, provide the plaintiff with particulars in writing of the basis on which the charges were to be made as required by s. 68(1)(c). The letter of the 12th August, 1999, on which the plaintiff seeks to rely is simply too general to satisfy the statutory requirements. It provides no detail of the actual charges and no estimate of those charges and furthermore it cannot, in the submission of counsel for the defendant, 'plausibly be contended that it sets out the basis upon which charges will be made'. It is submitted that the letter simply contains a list of generalities which leaves the reader in a state of complete ignorance as to how the

charge will actually be calculated and gives no guidance.

16. The defendants further seek to rely on the provisions of s. 68(4) and (5) of the Ac of 1994. This arises in the context of the last two sentences on the first page of the plaintiff's solicitors letter of the 12th August, 1999, wherein it is stated;

> "The amount which the [defendant] or third party may agree and/or may be directed to pay will not generally cover our entire charges. The process of recovering such costs on your behalf may involve additional costs and outlay". It is accepted on the defendants' behalf that an agreement of the kind as specified is lawful under s. 68(4) of the Act of 1994. However s. 68(5) of the Act of 1994 makes clear that such an agreement will not be enforceable
>
> "unless such agreement is in writing and includes an estimate (as near as may be) of what the solicitor reasonably believes might be recoverable from any other party or parties (or any insurers of such party or parties) in respect of that solicitors charges in the event of that client recovering any damages or moneys arising out of such contentious business".

17. The defendants contend that there has been no compliance with s. 68(5) because there has been no agreement in writing, no estimate of what the solicitor reasonably believes might be recoverable from the defendants and further that the subsequent production of the bill of costs is not sufficient compliance for the purposes of s. 68(5). It is contended on the defendants' behalf that s. 68(5) clearly envisages that the estimate is to be given at the time the agreement is made' whereas in the present circumstances the arrangement was arrived at in August, 1999, more than two years before the bill of costs was prepared.

18. In these circumstances the defendants contend that the agreement of August, 1999 is unenforceable and it follows, having regard to the dicta of Walsh J. in *McGarry*, that the plaintiff has no legal liability to pay that element of his own bill of costs which equates to the party and party costs and it further follows that the defendants are likewise not under any liability to pay such costs.

19. The defendants accept however that Peart J. in *A & L Goodbody Solicitors v. Colthurst* (Unreported, High Court, 5th November, 2003) rejected a similar argument. Further counsel for the defendants acknowledges that this Court may be reluctant not to follow a decision of Peart J., but nevertheless the defendants wish to pursue the arguments as identified.

20. In *A & L Goodbody Solicitors v. Colthurst* the plaintiff, a firm of solicitors, had been instructed by Mr. Colthurst in relation to six separate contentious matters arising out of disputes which he had had with his parents. Eventually all matters in dispute were settled between the various parties when the matter came on for hearing before the High Court in July, 1999. Part of the settlement terms were that each side would bear their own costs. The second named defendant in the proceedings was a limited liability company used by the first named defendant in connection with some business interests in Blarney, Co. Cork and that company was a party to two of the cases which were ultimately comprised and it was joined in the proceedings so as to ensure the necessary parties were before the court, as Mr. Charles Colthurst claimed that some of the amount of money claimed by the plaintiffs was due by the company and some by him.

21. The plaintiff's solicitors prepared a composite bill of costs and subsequently, by order dated the 6th November, 2002, the Master of the High Court ordered that the plaintiffs be at liberty to enter final judgment against the first named defendant for the sum of €252,977.13. The Master directed that the proceedings as against the second named defendants and the proceedings as against the first named defendant, Charles Colthurst, insofar as they related to the balance of the claim as against him, should be transferred for hearing to a judge of the High Court.

22. The matter came before Peart J. by way of an appeal from the order of the Master on behalf of the first named defendant in respect of the sum for which the plaintiffs were given liberty to enter judgment and part of the grounds of appeal centered on the fact that no letter as provided for in s. 68 of the Solicitors (Amendment) Act, 1994 had been furnished by the plaintiffs to the defendants and in this regard the plaintiff accepted that they had been unable to locate any copy of any such s. 68 letter.

23. Peart J. deals with this particular aspect at p. 13 of his judgment and sets out the relevant provisions of s. 68 of the Act of 1994 and continues at p. 15 of his judgment as follows:

> "The defendants maintain that the absence of such a letter has the effect that the plaintiffs cannot therefore recover their costs, outlays and disbursements, since the requirement under section 68(1) is mandatory, even if such an effect is a draconian one. The plaintiffs contend however that if such a draconian consequence was intended by the legislature, the Act would have clearly stated it. They also submit that such an interpretation would render subsection (7) meaningless, since it provides that notwithstanding anything contained in section 68, nothing shall prevent any person from exercising any existing right to require a solicitor to submit a bill of costs for taxation. They say that this clearly shows that a situation was contemplated that even in the absence of a section 68 letter, a bill could be taxed, and that this is meaningless if the absence of such a letter has the effect of no costs being recoverable by the solicitor.
>
> Counsel for the defendants has submitted that the purpose of section 68(1) is to ensure that the client is in a position on receipt of a bill to form an opinion as to whether it is a correct bill by reference to the letter setting out the charges or the basis of the charges which will be made for the service provided. They also submit that it is not unknown for an Act of the Oireachtas to be silent as to the effect of a mandatory section and for there nevertheless to be serious effects in the event of non-compliance, particularly in the area of planning legislation, and the court was referred to a number of cases in which this was found to be so, namely *State (Elm Developments) v. An Bord Pleanála* [1981] ILRM 108; *Monaghan Urban District Council v. Alf-a-Bet Promotions Limited* [1980] ILRM 64; and B*lessington Heritage Trust Limited v. The County Council of the County of Wicklow and others* [1999] 4 IR 571. In response Counsel for the plaintiff has submitted that these planning matters can be distinguished since they occur as part of an administrative process, whereas that is not the situation in relation to the question of costs.
>
> In relation to subsection (7), Counsel for the defendants submits that the plaintiffs interpretation is incorrect, and that another interpretation is possible, namely that where a solicitor has complied with the provisions of section 68(1), a bill can still be referred to taxation.
>
> The defendants also submit that if the effect of failure to provide a letter as provided for in section 68(1) is not to deprive the solicitor of his right to recover his costs, the client derives no benefit from the section, since the obligation is rendered meaningless, and provides him with no protection.
>
> Taking this latter point first, it is not correct that there is no sanction on a solicitor, or no redress for the client, if the letter is not sent as required by the Act.

> Firstly, the absence of such a letter is something which the Taxing Master may, if he wishes, take into account when deciding upon the appropriateness of the fees sought. If fees being charged are in excess of what the Taxing Master considers appropriate in the absence of prior notification of the basis of charges, it would be something he can have regard to, even if he might be prepared to allow the same fees where a letter had been written.
>
> Secondly, the failure to comply with the requirements of the section is something which the Disciplinary Tribunal of the Law Society can have regard in an appropriate case, and indeed has done so in recent times, resulting in the censure and fining of a solicitor who was found to have failed to comply with the obligations imposed upon solicitors by section 68.
>
> In relation to the other submissions under this heading, I do not believe that section 68 was intended to derive the solicitor, who has failed to send a section 68 letter, of his right to recover his costs when taxed, in spite of the fact that the section is worded in mandatory terms. I agree with Counsel for the plaintiff that if such were to be the consequence of failure to send the letter, it would have said so in clear terms given the seriousness of the consequence of failure to do so. The cases to which the defendants have referred the court are cases involving mandatory procedures laid down as part of an administrative process, and cannot in those circumstances be called in aid of their submissions under this heading. Section 68 is not part of an overall scheme created by the Act. Rather it is a "stand alone" section designed to put in place a number of recruitments, intended to provide greater protection to clients of solicitors in the matter of costs, but are not intended as a substitute for the statutory role of the Taxing Master who is charged with the task of ensuring that a client is only charged appropriately for services rendered, upon a Bill of Costs being presented for taxation. The client's right to have all costs taxed in this fashion is the ultimate protection available, and the Taxing Master is fully empowered to take all relevant matters into account when performing that task, including the power to attach such significance to the absence of a section 68 letter as he deems appropriate in any particular case. There is of course also the right to a party dissatisfied with the determination of the Taxing Master to seek a review of the taxation by the High Court.
>
> The defendants' objection under this heading must also fail.
>
> I also favour the submission of the plaintiffs that subsection (7) of section 68 would be meaningless, and superfluous, if the interpretation put forward by the defendants was correct."

24. The defendants herein submit that the Taxing Master erred in his ruling in relation to the relevant provision of the Act of 1994 and failed to give any adequate consideration to the matters raised in the submissions before him, relying instead on his earlier decisions in the case of *Peiler v. Anderson* and *Whatt v. Hill and Byrnes.*

25. It is contended on the plaintiff's behalf that the Taxing Master unhesitatingly dismissed this preliminary ground of objection for the reasons set out in his previous ruling in *Peiler v. Anderson* of the 6th March, 2003, the ruling of Taxing Master Flynn in *Whatt v. Hill and Byrnes* of the 13th November, 2003 and the judgment of Peart J. in *A & L Goodbody Solicitors v. Colthurst and Another* (Unreported, The High Court, 5th November, 2003).

26. In his ruling in Peiler Taxing Master Moran stated as follows:

> "1. That when it is established on taxation that the party for the costs is the client of the solicitor on record in the litigation and for the applicant on the summons to tax there then exists a presumption that the personally is personally liable to pay the solicitors costs.
>
> 2. That presumption can be rebutted if it can established that there was an express or implied agreement binding on the solicitors that the plaintiff would not have to pay solicitor and client costs in any circumstances.
>
> 3. That it is only where the paying parties raised a genuine issue as to whether the party for the costs is liable to pay his solicitors that it would be necessary to prove by evidence that he is under a legal liability to pay."

27. At page 21 of his ruling in the *Peiler* taxation, Master Moran stated as follows:

> "If a paying party is in any doubt that the plaintiff might not have to pay solicitors costs then this issue should be raised at the final order as to costs by the court. The court has a discretion to awards costs and a need to limit the extent of the costs that a successful litigant should recover. The onus is clearly on the paying party to establish by genuine facts and not by mere speculative submission on taxation that the plaintiff has no liability to his solicitor for costs. As can be seen from several cases above referred to the law is very clear and unambiguous on this precise issue".

28. The plaintiff contends that the defendants in the present case have no standing to police the operations of s. 68 as the only relevant parties who are affected by the relevant provisions are the solicitor and his client. It is submitted that the Law Society also have a valid interest in the proper operation of s. 68 but not the opposing party against whom an order of this Court has been made to pay the costs of the opposing party when the sole purpose is to seek to avoid such liability.

29. Further it is contended on the plaintiff's behalf that there has been compliance with the relevant provisions of s. 68 having regard to the contents of the letter of the 12th August, 1999, as forwarded by the plaintiff's solicitor to him. In particular it is submitted that this letter set out in writing the basis upon which the solicitors' charges would be made in compliance with s. 68(1)(c) of the Act. It is contended on the plaintiff's behalf that the content of the plaintiff's solicitors letter which refers to the calculation of the level of charges is in the same or very similar terms to those as set out in Order 99, rule 37(22)(ii) of the Rules of the Superior Courts which relate to the relevant circumstances which the Taxing Master shall have regard to in exercising his discretion in relation to any item of costs. It is contended on the plaintiff's behalf that the letter of the 12th August, 1999, was provided to the plaintiff as soon as practicable after taking instructions and in circumstances where the initial instructions appear to have come in or about the 15th July, 1999.

30. It is further contended on the plaintiff's behalf that if the defendants do have standing to raise this issue and even, if on the facts, the letter of the 12th August, 1999 does not comply with the relevant provisions of s. 68(1) of the Act of 1994 this does not relieve the plaintiff of his contractual liability to pay the charges made by his solicitor for the provision of legal services. The section itself makes no reference to the wiping out of the liability in circumstances where adequate particulars are not furnished or not furnished at an early enough point in time. It is contended on the plaintiff's behalf that in the absence of an express statutory provision to that effect it is not appropriate for the Court to read into the statute such a far reaching provision which in effect would nullify the order of the learned trial judge as made herein that the defendants are to be responsible for the plaintiff's costs.

31. The plaintiff relies on the judgment of Peart J. in *A & L Goodbody Solicitors v. Colthurst* on the basis that it constitutes persuasive authority which should be followed by this court in the present case.

32. The Court of Appeal in *Garbutt and Another v. Edwards and Another* [2006] 1 All ER 553 dealt with a similar situation, the background to which was that a dispute between parties was settled by an order under which the defendants agreed to pay the claimants' costs and those costs were subsequently assessed. An appeal from that order was dismissed. However, there was a further order for costs and in respect of those costs an order was made for summary assessment. Section 31 of the Solicitors Act, 1974 provided for the making of rules regulating the professional practice, conduct and discipline of solicitors and r. 15 of the Solicitors' Practice Rules provided that solicitors were to give information about costs and other matters in accordance with the Solicitors' Costs information and Client Care Code. The code obliged solicitors to give the client the best information possible about likely overall costs. At the summary assessment the defendants argued that they had no costs liability because the claimants' solicitors had failed to provide their clients with an estimate of the likely costs of the application. The district judge rejected that submission, although the amounts in question were reduced. The defendants appealed. The judge dismissed the appeal and the defendants appealed to the Court of Appeal. The Court considered whether a paying party could claim that his liability to the receiving party under an order for the payment of costs was discharged, or that it should be reduced, if the solicitor for the receiving party had failed to give to his client an estimate of costs in accordance with the code, in the light of the indemnity principle and the special status of the solicitors' certificate of accuracy attached to a bill of costs. The defendants submitted, *inter alia*, that the effect of a breach of the obligation to give an estimate was to render the contract of retainer unlawful.

33. It was held by the Court of Appeal in these circumstances that:

> "On the true interpretation of the statutory framework for costs estimates a contract of retainer between solicitor and client was not rendered unenforceable by a failure by the solicitor to given an estimate of costs as required by the code. It was a question for the discretion of the judge assessing costs in any particular case whether to take into account any failure by the receiving party to provide an estimate in the circumstances and of the kind required by the code. Where the solicitor for the receiving party had failed to give to his client an estimate of costs in accordance with the code as required by the practice rules, the paying party could, if he had grounds to do so, submit that, if the receiving party's work had been estimated in accordance with the requirements of the code, a lower amount of costs would have been incurred. In those circumstances he could ask the costs judge to require the receiving party to prove that such an estimate was given. The costs judge had to be satisfied that there was some real basis for the paying party's contention that the receiving party should be required to prove that there was an estimate, or an adequate estimate, and that the dispute was not a sham or fanciful dispute. The costs judge also had to be satisfied that the absence of an estimate, or a proper estimate as to costs, could have had a calculable, and not immaterial, effect on the costs claimed. In the instant case no reason had been advanced to the judge as to why the presence of an estimate of costs would have made any difference to the amount of costs that the paying party should be required to pay. The judge's order had accordingly been correct and the appeal would therefore be dismissed."

34. In giving the judgment of the Court, Arden LJ in his conclusion makes some useful observations for the principle that is in issue before this court. He states at p. 564 of the judgment;

> "The launch pad for the appellants' arguments is the indemnity principle, which I described at the outset of this judgment. In reliance on the indemnity principle, Mr Morgan argues that if, as he submits, the effect of the receiving party's solicitors' failure to give an estimate is to render the receiving party's promise to pay his solicitor's fees unenforceable, no fees are recoverable from the paying party. This is so if the receiving party wishes to pay his solicitor and considers it appropriate to do so.
>
> To determine the effect of a failure to give an estimate of costs, it is necessary to examine carefully the legislative framework on which the obligation to produce such an estimate is imposed. In that way the nature of the obligation can be determined.
>
> I have set out the legislative framework above. Estimates are required only by the code (as defined above). The code is made pursuant to r 15 of the Solicitors' Practice Rules. These rules are made by the Council of the Law Society pursuant to s 31 of the 1974 Act (set out above). In making these rules, the Council of the Law Society is acting in the public interest, and the rules have the force of subordinate legislation (see *Swain v. Law Society* [1982] 2 All ER 827, [1983] AC 598). The inference I would draw is that the code is there to protect the legitimate interests of the client, and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred.
>
> But the rules are silent on the effect of a breach of a code on an assessment of costs as between the parties to litigation. By contrast, para 1 of Sch 1A to the 1974 Act confers powers on the Council of the Law Society to impose sanctions on solicitors. If there is a complaint about fees, the Law Society can determine the amount of costs to which a solicitor is entitled, or award compensation not exceeding £5,000.
>
> I accept Mr Morgan's submissions about the benefits to the client of having an estimate. The imposition of the discipline of producing estimates is one of the strategies which has been adopted to contain legal costs, and there is no doubt as to the public interest in avoiding the incurring of unnecessary legal costs. Excessive legal costs imperil access to justice.
>
> Having set the scene, I turn to consider the effect of a failure to give an estimate of costs as required by the code on the contract of retainer between a solicitor and his client. In my judgment, for the reasons given below, that contract is not thereby rendered unenforceable …
>
> … There are a number of textual points which might be thought to support Mr Morgan's case. In particular, r 15 beings by providing that a solicitor 'shall' provide costs information. But, while the word 'shall' is often mandatory, particularly when used in legislation, it has, depending on the context, been interpreted on occasion as directory or exhortatory only: see for example *R v Immigration Appeal Tribunal, ex Jeyeanthan, Ravichandran v Secretary of State for the Home Dept* [1999] 3 All ER 231; [2000] 1 WLR 354. In r 15, for the reasons given below, the word 'shall' is not in my judgment mandatory in the sense that non-compliance with the code will always result in a breach of r 15. Rule 15 must be interpreted with the notes that appear immediately following it. It is clear from note (i) that not every breach of the code will result in a breach of r 15. It has to be a serious breach of the code, alternatively there have to be persistent and material breaches. In my judgment this note is an indication that a breach of the code does not of itself render the contract of retainer unenforceable. Mr Morgan has not suggested that the contract of retainer is unenforceable only

where r 15 is by virtue of note (i) to be taken to be breached.

Another indication to that effect can be found in para 2 of the code. As one would expect, the code does not require a costs estimate to be given in every case, especially where the instructions represent 'repeat business', such as the conveyancing work on identical plots of land. Likewise an estimate is not required where it is impractical or where compliance with the code is at that time 'sensitive'. I am not clear what situations that last-mentioned provision covers, but whatever it covers depends on an evaluation of the situation by the solicitor. In my judgment, it is unlikely that the code has the effect of rendering contracts of retainer unenforceable according to whether the solicitor makes a correct evaluation of something which is bound to involve questions of opinion and judgment. Accordingly, para 2 of the code is a strong pointer against Mr Morgan's submission.

Mr Morgan has emphasised the strong policy reasons for costs estimates. Indeed, in any question of statutory interpretation the court is bound to have in mind the purpose of a statutory rule or the mischief at which it is directed, so far as such purpose or mischief can be ascertained. That is not to say, of course, that the court can simply give effect to that purpose, but where the court has to make a judgment about the proper meaning of a statute it is likely to want to consider whether it can by the process of interpretation given effect to its purpose or the mischief to which the statute is directed.

I agree with Mr Morgan that, where a rule is imposed in the public interest, it would be surprising and unlikely if there was no sanction for non-compliance. But, as the Law Society's written submissions point out, there are disciplinary sanctions for breach of r 15. Under Sch 1A to the 1974 Act, the Council of the Law Society can determine what the fees payable by the client should be and indeed may award compensation up to £5,000: see the extracts from Sch 1A set out above.

Mr Morgan submits that, if a breach of the code renders the contract unlawful, the solicitor is not entitled to any remuneration whatever. Neither the Law Society nor the respondents have contested this proposition. I note in passing one of the reasons why the Law Commission of England and Wales recently provisionally recommended a change in the law on the effect of illegality on contracts is that in general a contract which is unlawful is wholly unenforceable: see its consultation paper *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law Com no 154) (1999). If Mr Morgan's proposition is correct, then far from it being a reason for interpreting the statutory scheme in the way Mr Morgan submits, it seems to me to be a reason for the contrary interpretation. This is because in a situation like this the effect of the common law rule is that the receiving party can recover nothing from the paying party even if he has paid his solicitor in full, because he is under no liability to his own solicitor and because the indemnity principle applies. If his solicitor were insolvent, he would not be able to recover his money from him even if he were entitled so to do.

Because the question at issue turns on the true interpretation of the particular statutory framework for costs estimates, I do not consider that it is necessary to set out the various cases on illegality that have been cited to us. For the reasons given above, I reject Mr Morgan's submissions that the effect of the failure to give a costs estimate is to render the contract of retainer unlawful and unenforceable."

35. The defendants in my view raise essentially the same argument as that raised before Peart J. in *A & L Goodbody Solicitors v. Colthurst* and a similar argument in principle to that as raised before the Court of Appeal in *Garbutt v. Edwards.*

36. Peart J. in Goodbody was quite clear in coming to the conclusion that he did not accept that s. 68 was intended to deprive the solicitor who has failed to send a s. 68 letter of his right to recover his costs when taxed in spite of the fact that the section is worded in mandatory terms. He agreed with counsel for the plaintiff that if such were to be the consequence of a failure to send the letter, the statute would have said so in clear terms given the seriousness of the consequence of failure to do so. He specifically refers to the fact that s. 68 is not part of an overall scheme created by the Act but rather is a stand alone section designed to put in place a number of requirements intended to provide greater protection to clients of solicitors in the matter of costs but are not intended as a substitute for the statutory role of the Taxing Master who is charged with the task of ensuring that a client is only charged appropriately for services rendered upon a bill of costs being presented for taxation. This reasoning is along very similar lines to that of Arden LJ in *Garbutt* wherein the course of his judgment at p. 565 he comes to the conclusion that the inference he would draw is that the relevant code was there to protect the legitimate interests of the client and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred.

37. The *Goodbody and Garbutt* cases also share the similarity that, even if there was a failure by the solicitor to comply strictly with the requirements of the statute/code, it is not correct that there is no sanction on the solicitor or no redress for the client if the letter/estimate was not sent out as required.

38. As stated by Peart J. the absence of the letter is something which the Taxing Master may, if he wishes so to do, take into account when deciding upon the appropriateness of the fees sought. And further, the failure to comply with the requirement of the section is a matter which the disciplinary tribunal of the Law Society can have regard to in an appropriate case.

39. Further there is the common thread running between both *Goodbody and Garbutt* that the very purpose of the relevant provisions was to protect the client in a solicitor-client relationship and in my view can never have been intended in the absence of the required letter to have had the consequence that a client such as the plaintiff in these proceedings would be deprived of his entitlement to recover his taxed costs as against the defendants pursuant to the final order of the trial judge herein.

40. In the circumstances of this case the defendant urged upon the Court that the content of the letter of the 12th August, 1999, is meaningless and does not comply with the relevant provisions of s. 68 of the Act of 1994 and this, in effect, would place the plaintiff's solicitors in the same position as if he had not sent out any letter. Accordingly, the defendants in my view raise essentially the same arguments as that raised before Peart J. in *A & L Goodbody Solicitors v. Colthurst* and having read and considered the judgment of Peart J. as delivered on the 5th November, 2003, and the reasons as advanced by him in relation to the conclusion as arrived at, I find myself in broad agreement with his reasoning and conclusion and I am not satisfied that his decision was wrongly decided.

41. Kenny J. in *Kearns v. Manresa Estates Limited* (Unreported, High Court, 25th July, 1975) in the course of his judgment alluded to the fact that prior decisions of the High Court are acted upon and in a sense create expectations of legal validity. He stated;

"There is another argument to which I attach considerable weight. Since the decisions in *Re Montgomery Deceased and Re De Vere Deceased*, Titles to Property included in the … Estate and in other Estates have been accepted on the basis that names and arms clauses are void for uncertainty in Ireland. A decision now that the clauses involved here were valid

would render those titles bad. Although I am not bound by decisions of other judges of the High Court, the usual practice is to follow them unless I am satisfied that they were wrongly decided."

42. Parke J. in *Irish Trust Bank Limited v. Central Bank of Ireland* [1976] 1 ILRM 50 was of a slightly stronger view, coming to the conclusion that unless an earlier decision could be clearly shown to have been wrongly decided a court of coordinate jurisdiction should follow it and the decision not to follow it should normally be made by an appellate court which enjoys the power to overrule it.

43. In these circumstances I propose to follow the judgment of Peart J. in *A & L Goodbody Solicitors v. Colthurst* and adopt the principle as set out in Garbutt v. Edwards in the Court of Appeal and I reject the defendants' submissions to the effect that the failure by a solicitor to send the appropriate letter in compliance with s. 68 of the Act of 1994 deprives the plaintiff of his entitlement to recover his costs from the defendants on a party and party taxation pursuant to the final order of the trial judge herein.

44. In any event I take the view that the letter of the 12th August, 1999, and its content does provide the plaintiff with particulars in writing of the basis upon which the solicitors' charges will be been made in compliance with s.68(1)(c). The references in the letter and its basic content is very much in line with the references for calculating the level of charges as set out in Order 99, rule 37(22)(ii) of the Rules of the Superior Courts relating to the relevant circumstances which the Taxing Master shall have regard to in exercising his discretion in relation to any item of costs. The plaintiffs' instructions to his solicitors were given in or around mid July, 1999 and in my view the letter of the 12th August, 1999, does not breach the direction that details as to the basis of the charges should be provided to a client as soon as practicable after taking instructions.

45. Insofar as the defendants have made the alternative argument that the plaintiff has no liability to pay that part of his solicitors' bill of costs which equates to the party and party costs because there has been no compliance with s. 68(5) of the Act of 1994 I reject this contention. I am satisfied that the submissions as made on the defendants' behalf in this regard as misconceived and that s. 68(5) has no application to the issue that arises herein relating to party and party costs.

46. For the sake of completeness on this aspect I take the view that a paying party such as the defendants herein can only rely on the provisions of s. 68 of the Act of 1994 if it has grounds to satisfy the court that if the receiving parties' work had been estimated in accordance with the provisions of s. 68, a lower amount of costs would have been incurred. No reasons were advanced to this Court as to why strict compliance with the provisions of s. 68 would have made any difference to the amount of costs that the paying party should be required to pay against a background where the paying party is entitled to have its costs taxed by the Taxing Master in default of agreement and is entitled to a review of such taxation by this court in accordance with the relevant provisions of s. 27 of the Court and Court Officers Act, 1995.

47. Accordingly I dismiss the defendants' preliminary objection.

48. The remaining issues concern the plaintiff's senior counsel's brief fee which taxed at €15,000, junior counsel's brief fee which taxed at €10,000, the refresher fees of senior counsel and junior counsel which taxed at €3,000 and €2,000 per day respectively, the plaintiff's solicitors' instruction fee which taxed at €68,750.00 and the report fee of IR 3,000, as charged by Peelo and Partners Chartered Accountants.

49. I take the view that it is important to note that this Courts' function is simply to review the decision of the Taxing Master and is not an appeal *de novo*. The procedure involved is a review as confirmed by the express wording of s. 27 of the Courts and Court Officers Act, 1995:

50. Section 27(1) of the Act of 1995 states;

> "On a taxation of costs as between party and party by a Taxing Master of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall have power on taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs."

51. Section 27(2) of the Act of 1995 states:

> "On a taxation of costs as between party and party by a Taxing Mater of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master (or County Registrar as the case may be) considers in his or her discretion to be fair and reasonable in the circumstances of that case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part."

42. Section 27(3) of the Act of the 1995 states:

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

43. It can thus be seen that pursuant to s. 27(2) of the Act, the Taxing Master is taking such decision as he considers in the exercise of his discretion to be fair and reasonable in the circumstances of the case and the Taxing Master shall have power in the exercise of that discretion to disallow any costs, charges, fees or expenses in whole or in part.

44. Further, pursuant to s. 27(3) of the Act of 1995 the High Court is granted a limited jurisdiction to review the decision of the Taxing Master on the basis 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.

45. There is abundant authority which makes it clear that the High Court is entitled to review the decision of the Taxing Master if the Court is satisfied that an error has been shown which results in an injustice and to substitute for the decision of the Taxing Master an order which achieves a just result.

46. Insofar as the issues in this case all relate to amounts of money which were allowed by the Taxing Master on taxation of the plaintiff's costs, I am satisfied that if the Taxing Master arrived at figures within a range which might have been reasonably open to him to have arrived at in the exercise of his discretion and followed an examination of the nature and extent of the work as done or services as rendered by or provided by counsel (whether senior or junior) or by a solicitor or by an expert witness appearing in a case then this Court should not interfere with his decision unless the Taxing Master has committed an error of principle which leads to an injustice. For this Court to interfere I am satisfied that the Taxing Master would have to have allowed an amount which could fairly be described as unjust notwithstanding the exercise by the Taxing Master of his discretion.

47. Geoghegan J. in *Bloomer v. Incorporated Law Society of Ireland* (No. 2) [2000] 1 I.R. 383 stated in the course of his judgment 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 regard and to which he had either had no regard at all or insufficient regard. Those are examples of errors of principle in 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".

48. Geogheghan J. then stated:

> "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".

49. Kearns J. in *Superquinn Limited v. Bray UDC* (No. 2) [2001] 1 I.R. 459 at p. 476 follows the reasoning of Geoghegan J. in *Bloomer* and states:

> "In discharging its function the High Court inexorably must, if it can, form a view itself of the particular item of costs or the amount it would have awarded in any given situation. Otherwise, there is no basis upon which any conclusion as to "injustice" can exist in the absence of some mistake of principle. I would therefore regard the reasoning of Geoghegan J. as more correct.
>
> There may of course be instances where the court does not feel equipped to offer its own view, particularly in relation to solicitors' instructions fees, which have always been regarded as an area of considerable difficulty for judges. This may leave the court with no option but to remit the matter back to the Taxing Master where some mistaken principle has been applied or where there is no sufficient material to enable the court arrive at a figure which is proper in the circumstances.
>
> When does an error as to amount become "unjust"?
>
> It seems to me that, in exercising its powers of review under s. 27, the High Court should adopt a similar role and standard to that traditionally and habitually taken by the Supreme Court in reviewing awards of damages, that is to say that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge."

50. Peart J. in *Quinn v. South Eastern Health Board* (Unreported, High Court, 30th November, 2005) expressed reservations about the "25% formula" as indicated by Kearns J. in *Superquinn*. Peart J. was of the view that what might be viewed as just or unjust must be viewed on a case by case basis having regard to the work done as different factors may be at play rather than by an arbitrary formula.

51. I take the view that this Court is concerned here with a review of a decision of the Taxing Master wherein he has exercised his discretion as to certain amounts which he has allowed in respect of costs claimed on the plaintiff's behalf based on the provisions of s. 27 of the Courts and Court Officers Act, 1995 and this Court clearly has to have regard to the Taxing Master's examination of the nature and extent of the work done and the services rendered or provided by the relevant person claiming fees, but it is not a situation whereby this Court should interfere simply because it does not necessarily agree with the amount as allowed on taxation and the yardstick of 25% as adopted by Kearns J. in *Superquinn* does not appear to be an unreasonable stance to adopt but has to be considered in the context of the particular facts and circumstances of the individual case before the Court.

52. 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. It is perhaps fortunate that in the particular circumstances of this case sufficient factual information is available to enable the Court to come to a conclusion on all but one of the contested items.

53. The first two items complained of by the defendants are the allowance of €15,000 in respect of senior counsel's brief fee and €10,000 in respect of junior counsel's brief fee. It is of some significance that the plaintiff retained only a single senior counsel who acted with junior counsel and both of them dealt with the economic argument in addition to the liability and quantum aspect, whereas the defendants retained two senior counsel, one of whom was regarded as an expert on the economic argument, and one junior counsel. In this regard it is accepted that each of the defendants' senior counsel were paid a brief of €12,500 and junior counsel €8,333.

54. It is submitted on the defendants' behalf that the learned Taxing Master erred in principle in allowing a brief fee for senior counsel of €15,000 as this was excessive having regard to the nature and extent of the work carried out by a senior counsel for the plaintiff. It is submitted that the Taxing Master must carry out his own examination of the nature and extent of the work done with a view to

determining the value of that work and that this follows from a number of decisions including Laffoy J. in *Minister for Finance v. Goodman* (No. 2) [1999] 3 I.R. 333, Kearns J. in *Superquinn Limited v. Bray UDC* [2001] 1 I.R. 459 and Peart J. in Quinn v. South Eastern Health Board (Unreported, High Court, 30th November, 2005). The defendants submit that the fact that liability was fully in issue is not unusual in a personal injury action and that the determination of the liability aspect in this case was not a particularly difficult matter. It is accepted that the proceedings involved an allegation of contributory negligence. It is further submitted that senior counsel for the plaintiff was fully familiar with the economic argument, having acted previously for the plaintiff in the case of *McEneaney v. Monaghan County Council* (Unreported, High Court, 26th July, 2001). It is submitted that the economic issue which arose in this case could no longer be described as being novel or having any particular level of complexity. It is accepted on the defendants' behalf that the defendants retained two senior counsel and that each of these senior counsel were paid a brief fee of €12,500. However the fact that two counsel were retained on the defendants' behalf reflects only that the present case was of a very significant importance to the defendant having regard to the reserves which it required to have in place in the event that the relevant multiplier was to be 3% rather than 4%.

55. It is further submitted on the defendants' behalf that junior counsel should not have been entitled to a fee which was equal to two thirds of senior counsels' fee. The defendants submit that the Taxing Master should have examined the nature and extent of the work actually done by junior counsel. It is submitted that it is wholly wrong and contrary to the clear intention of s. 27(1) of the Act of 1995 to measure junior counsels' fees by reference to what has been described as "the usual two thirds basis". It is submitted on the defendants' behalf that the two thirds rule no longer applies and that junior counsels' work should be individually evaluated. In this case it is submitted that there was nothing to indicate that a very significant amount of work was done by junior counsel either in preparing for the case or in its running.

56. The defendants contend that junior counsel for the plaintiff played very little if any role in the running of the case and that in effect it would be wholly wrong to measure junior counsel's fees by reference to what has often been described as the usual two thirds basis.

57. It is submitted on the plaintiff's behalf that the fees as marked by senior and junior counsel are not excessive and that in any event this ground of objection is invalid and does not even raise a potential error of principle by the Taxing Master in the exercise of his discretion. It is submitted that the Taxing Master did carry out a detailed examination of the nature and extent of the work done in relation to the brief itself. In particular the Taxing Master had regard to the peculiar and unusual circumstances of the accident, the fact that liability was a major issue, the fact that there was a significant plea of contributory negligence against the plaintiff and the further fact that the economic issue had to be decided notwithstanding that this very particular issue had already been ruled on by O'Sullivan J. in the *McEneaney* case. It is submitted on the plaintiff's behalf that the Taxing Master complied with the requirements of s. 27 of the Act of 1995 in the manner in which he approached the assessment of the appropriate fee for senior and junior counsel. It is submitted that the Taxing Master is entitled to have regard to the fee as claimed and paid on the defendants' behalf and in the particular circumstances of this case the Taxing Master had reasonable regard to such fees. Furthermore, the Taxing Master did consider the fact that the senior counsel as retained on the plaintiff's behalf had already dealt with the economic issue in the *McEneaney* case and in particular reference is made to the fact that the plaintiff's senior counsel had written a letter as dated the 12th March, 2003, in respect of this very particular aspect and this letter was before the Taxing Master.

58. As regards the very specific issue of the fee as allowed to junior counsel, it is submitted on the plaintiff's behalf that the Taxing Master did carry out a detailed examination of the nature and extent of the work as done in relation to the brief itself. The Taxing Master in dealing with this aspect did have overall regard to the role as played and the work as carried out by junior counsel and there is no evidence that the Taxing Master erred in principle in allowing junior counsel a brief fee of €10,000.

59. The Taxing Master dealt very fully with the objections which came before him on the defendants' behalf on the 3rd February, 2005, and he reviewed in considerable detail items 95 and 98 which dealt with the brief fees of senior and junior counsel.

60. In coming to a conclusion on this aspect on the hearing of the objection as listed before him the Taxing Master stated as follows:

> "I have carefully considered all submissions herein, both written and oral and indeed the comparators put forward in support of what the Defendants consider should be a reasonable brief fee for senior counsel. I have re-examined my notes made in respect of the taxation itself. On that occasion I carried out a detailed examination into the nature and extent of the work done in relation to the brief itself, I had regard for the peculiar and unusual circumstances of how this accident occurred to the Plaintiff. Liability was a major issue and this can be clearly appreciated by reason of the court judgment itself wherein the Plaintiff was found to be 25% contributory negligent. Furthermore, I have had regard to the fact that "the economic issue" was live notwithstanding that the court had already ruled on this particular issue in the *McEneaney* case. Having carried out the examination and investigation I am obliged to do pursuant to s. 27(1) and, indeed, in complained with the guidance of Kearns J. in *Superquinn v. Bray U.D.C.*, I was and am satisfied that the brief fee allowed on taxation was in all the circumstances of this particular case, reasonable and fair. This objection relating to the quantum of junior counsel's brief fees being allowed at two thirds of senior counsel fee is novel and has not heretofore been canvassed. It is submitted that junior counsel played a relatively low key role in the conduct of the trial and in these circumstances should not be allowed the usual two-thirds of senior counsel fee. It is a long-established and well-settled custom and practice that junior counsel is entitled to a fee of two-thirds of his leader's fee. Notwithstanding the fact that senior counsel conducted the examination of the majority of the witnesses in court, itself, junior counsel carries a responsibility in ensuring that senior has not overlooked any particular aspect or element of the evidence or law which is material to the Plaintiff's case. It is in the recognition of the lesser role performed by junior that he/she is allowed a two-thirds proportion of the fee allowed to senior in respect of both brief and refresher fees.

61. No compelling evidence or argument has been presented on these objections that I should depart from this well-established custom and practice in existence to date. Junior counsel has to carry out an examination and read into a brief similar and identical to that presented to his leader. Junior counsel is not given any lesser of a brief. He must also take a careful note of all evidence given during the trial. Having considered all the evidence in this particular case and its complexities especially in respect of liability itself, this ground of objection now put forward is unmeritorious and is being dismissed."

62. It is quite clear that each case of this nature has to be determined on its own particular facts. The solicitor for the plaintiff retained one senior counsel and one junior counsel who clearly in the particular circumstances of this case acted as a team and junior counsel in particular led a number of witnesses on the plaintiff's behalf and was responsible for cross examining the principal witness in relation to the economic argument as called on the defendants' behalf. Furthermore junior counsel prepared the written submissions in respect of the economic argument, albeit that he was paid separately for so doing. It is quite clear that the Taxing Master reviewed the entire brief in this case and was fully conversant with the nature and extent of the work as carried out by both senior and junior counsel.

63. Against this background the Taxing Master was aware that the solicitor for the defendants, as was their entitlement, retained not only senior and junior counsel but also the services of a senior counsel expert in the field of the "economic argument". The Taxing Master was aware that senior counsel for the plaintiff had also been briefed on the plaintiffs' behalf in the *McEneaney* case but even if this fact was to in some respect counter balance the capacity of the expert second senior counsel as retained on the defendants' behalf, senior counsel for the plaintiff was allowed on taxation a brief fee of €15,000, whereas each of the two senior counsel as retained on the defendants' behalf marked and were paid by the defendants a brief fee of €12,500. In this particular regard I do not accept that there is any room for consideration by the Taxing Master of the fact that this particular case may have had a significant importance from the defendants' perspective because of the relevant reserves it was required to have in place in the event that the relevant multiplier to be applied was to be based on a 3% rate of interest rather than a rate of 4%. Following upon the *McEneaney* decision it was quite clear that the appropriate rate of interest applicable was 3% but nowhere is it either set out or implied in s. 27 of the Act of 1995 that the Taxing Master is to have regard on an individual case basis for the fact that the case may have some particular significance for a particular party. The section in my view is quite clear to the effect that the Taxing Master is to consider the nature and extent of the work done and the services rendered or provided by counsel, a solicitor or by an expert witness. Quite clearly in any event a matter having very significant importance is a question of degree and while the financial implications of the case may have a significant importance for the defendants, almost certainly the financial implications of the case were of significant importance for the plaintiff. I do not find it a credible argument that the Taxing Master should not have had regard to the fact that the defendants retained two senior counsel and that each was paid a brief fee of €12,500. Quite clearly this fact was a feature of the case which the Taxing Master was entitled to have regard to and I am satisfied that this is what he did without placing an over reliance on the situation that pertained.

64. I find there is no basis in the particular circumstances for the submission as made on the defendants' behalf that the Taxing Master erred in some way in arriving at his decision with regard to the appropriate fee allowed on taxation in respect of the single senior counsel as retained on plaintiff's behalf. In any event I am satisfied that for the Taxing Master to have allowed a brief fee of €15,000 to the plaintiff's senior counsel cannot be described in anyway as being an unjust decision against the background factual circumstances which pertained.

65. In the particular circumstances of this case the Taxing Master allowed junior counsel a fee equivalent to two thirds of the fee as allowed to senior counsel against a background where the defendants also allowed junior counsel a brief fee equivalent to two thirds of the fee of €12,500, as marked and paid to each of the two senior counsel as retained on the defendants' behalf.

66. A significant part of the submission as made by counsel on the defendants' behalf in respect of the fee as allowed to the plaintiff's junior counsel is a reference by the Taxing Master to the long established and well settled custom and practice that junior counsel is entitled to a fee of two thirds of his leader's fee. It is important to note the view as arrived at by the Taxing Master that no compelling evidence or argument had been presented to him on the objections that he should depart from the well established custom and practice in existence to date and the basis by which he came to that conclusion in the particular circumstances of this case to the effect that junior counsel had to carry out an examination of and read into a brief similar and identical to that as presented to his leader. Junior counsel was not given any lesser of a brief, he had to take a careful note of all the evidence given during the trial and, having considered all the evidence in this particular case and its complexity especially in respect of liability itself, the Taxing Master came to the conclusion that the ground of objection put forward was unmeritorious and for this reason was being dismissed by him.

67. I take the view that the fact of the fee equating to two thirds of the fee as marked by senior counsel is only a yardstick, but nevertheless a well established yardstick which is now governed by the relevant provisions of s. 27 of the Courts and Court Officers Act 1995.

68. The Bar Council in its applicable code of conduct in dealing with fees does not distinguish between the appropriate fees for senior and junior counsel. The criterion for the charging of a fee for both senior and junior counsel is set out in s. 11 of the code of conduct, dealing with fees, which states *inter alia*;

> 11.1 (a) A barrister is entitled to charge for any work undertaken or to be undertaken by him (whether or not it involves an appearance in court) on any basis or by any method he thinks fit provided that such basis or method is permitted by law and a barrister is entitled to take into account when marking or nominating such fee, all features of the instructions which bear upon the commitment which is thereby undertaken or has been undertaken by him including:
>
> - the complexity of the issue or subject matter;
>
> - the length and venue of any trial or hearing;
>
> - the amount or value of any claim or subject matter in issue;
>
> - the time within which the work is or was required to be undertaken;
>
> - any other special feature of the case.
>
> (b) A barrister may not undertake work at a salary.
>
> (c) A barrister is not obliged to accept instructions or a brief without having agreed the fee which he is prepared to accept or without having a reasonable opportunity to consider the fee offered in the light of the nature and extent of the work involved in the instructions.
>
> (d) Where a barrister decides not to accept a brief by reason of the inadequacy of the fee offered, he owes a duty to return the brief promptly to his instructing solicitor.
>
> (e) A barrister may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded.
>
> (f) Where a barrister accepts a brief on which no fee has been marked by the instructing solicitor and where no fee has been agreed in advance, he remains entitled to mark a proper and reasonable fee having regard to the nature and extent of the work undertaken and he is not bound to reduce the fee that would thus be marked by reference to the outcome of the matter.

(g) Where a barrister has accepted a brief on the basis that his fee will be discharged before appearing for his client such barrister is entitled to withdraw from the case in the event that such agreed fee is not paid by the agreed date.

(h) A barrister shall, when so requested, inform a solicitor or client of a fee he will charge if instructed by that solicitor for his client or by a client pursuant to the Bar Council Direct Professional Access Scheme.

69. It is clear accordingly that the Bar Council does not specifically provide for junior counsel as a matter of entitlement to be allowed two thirds of a fee marked by senior counsel.

70. Kearns J. in *Superquinn Limited v. Bray UDC* (No. 2) [2001] 1 I.R. 459 at 475 considered this particular aspect and stated:

> "Where such powers are expressly conferred on the Taxing Master by statute, it must follow that the Taxing Master also has a duty to examine the nature and extent of work in any particular case and make his own fair and reasonable assessment on the merits accordingly. This must mean that some supposed "no go areas", particularly with regard to counsels' fees, no longer exist and that some principles, expressed in cases such as *Dunne v. O'Neill* [1974] I.R. 180 and *Kelly v. Breen* [1978] I.L.R.M. 63, in relation to counsels' fees are no longer determinative, but merely factors to be taken into account. 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"

71. Further, Peart J. in *Quinn v. South Eastern Health Board* (Unreported, High Court, 30th November, 2005) also considered this aspect and stated as follows:

> "In my view [the Act of 1995] has made sweeping changes to the manner in which costs are taxed.
>
> Firstly, it is clear that the fees of junior counsel, which were always allowed on the basis of two thirds of those of senior counsel, can now be examined on the basis of the nature and extent of work actually done by junior counsel. That of course can work both ways also depending on whether junior counsel has done more or less work in the case than the senior counsel. The Taxing Master has the power to look at that question now in a way which he did not prior to that enactment.
>
> Secondly, it would seem to me that the level of the appropriate Brief fee for counsel (be it senior or junior, the latter's being no longer calculated only by reference to the level of the former's) is now not to be based simply on what a solicitor acting reasonably and reasonably prudently based on his experience in the course of his practice would have agreed, but rather on the basis of what in the opinion of the Taxing Master was fairly and reasonably necessary to be incurred 'for the attainment of justice or for enforcing or defending the rights of any party'.
>
> … it seems to follow that the Taxing Master will now normally need to exercise his discretion in the matter of fees by looking at the work actually done and making his own assessment as to whether the fees in question were fairly and reasonably 'necessary for the attainment of justice or for enforcing or defending the rights of any party'."

72. It does appear accordingly that an allowance to junior counsel of a brief fee measured on the basis of two thirds of the fee as allowed to leading senior counsel is a useful and long established custom and practice which is now governed by the specific provisions as laid down in s. 27 of the Courts and Court Officers Act 1995. It is quite apparent that on taxation, as applies to the appropriate fee to be allowed to senior counsel by way of a brief fee, the Taxing Master has to have regard in the exercise of his discretion to the nature and extent of the work as actually carried out by junior counsel and has to come to a conclusion as to what would be a fair and reasonable fee in the circumstances of the particular case.

73. I am quite satisfied in the particular circumstances of this case that the Taxing Master reviewed the nature and extent of the brief of junior counsel and had regard to the fact that junior counsel was involved in the examination of a number of witnesses and the cross examination of the principal and sole witness on the economic argument as called on behalf of the defendants. Furthermore, it was apparent to the Taxing Master that junior counsel in this case prepared the actual written submissions relating to the economic argument and carried the responsibility in ensuring that senior counsel had not overlooked any particular aspect or element of the evidence or law which was material to the plaintiff's case. He must also, in the particular circumstances as was known to the Taxing Master, have taken a careful note of all the evidence given during the trial.

74. I am also satisfied that the Taxing Master was entitled to take into account the fact that in the particular circumstances of this case junior counsel representing the defendants was allowed a brief fee equal to two thirds of her leader's fee.

75. I take the view that the Taxing Master in this instance took account of and had regard to the nature and extent of the work as done by junior counsel and came to the conclusion of allowing junior counsel a fee equivalent to two thirds of that as allowed to his leader, in effect being the same decision as was arrived at by the defendants in respect of the fee as marked by the junior counsel as retained on their behalf.

76. I am not satisfied on the basis of the submissions as advanced on the defendants' behalf that the Taxing Master in some way had excessive regard to some factor which he should not have regard to or to which he should have had much less regard. I do not consider that 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. In the particular circumstances of this case I do not accept the submissions that the Taxing Master in some way erred in the exercise of his discretion. What is involved here is the amount as allowed on taxation and the justice or injustice of the Taxing Master's decision is determined by that amount and, notwithstanding that I come to the conclusion that I do not find that the Taxing Master erred in his discretion, it is appropriate that I state for the sake of completeness that in the particular circumstances of this case I do not consider that the amount as allowed by the Taxing Master to junior counsel in respect of a brief fee could in anyway be considered to be unjust.

77. In these circumstances I reject the arguments as advanced on the defendants' behalf that the fees as allowed by the Taxing Master to senior and junior counsel in respect of brief fees should be reviewed and I decline to do so.

78. The defendants also seek a review of the amounts allowed by the Taxing Master as refresher fees for senior counsel in the sum of €3,000 and junior counsel in the sum of €2,000. Counsel for the defendants submit that the appropriate refresher fee for senior counsel should be €2,500 on the basis that only one senior counsel was retained on the plaintiff's behalf.

79. It is contended on the defendants' behalf that a refresher fee of €3,000 is a very significant fee in the context of a personal injury case and would equate to many brief fees allowed in general personal injury cases. It is submitted that the Taxing Master failed to provide any analysis of the work in terms of the refresher fees as claimed or the reasoning which led to the Taxing Master's determination that €3,000 was an appropriate fee for daily refreshers. In this context reliance is placed on the observation of Kearns J. in *Superquinn Limited v. Bray UDC* (No. 2) at p. 480 where he said:

> "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 solicitors' instructions 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".

80. It is submitted that the Taxing Master over emphasised the importance of the economic issue and that the Taxing Master failed to have regard to the views as expressed by Kearns J. in *Superquinn* to the effect that a refresher fee of IR 3,150 could only be justified and allowed in quite extraordinary circumstances where two senior counsel are retained. It is submitted that this particular case did not involve anything like the level of difficulty that would have been in involved in the *Superquinn* case.

81. It is further submitted on the defendants' behalf that to allow junior counsel a refresher fee of two thirds the rate of senior counsel is unjustifiable. It is submitted that there is no evidence to suggest that the value of the work carried out by junior counsel was equivalent to two thirds the value of senior counsel's work during the course of the trial. The defendants submits that junior counsel played a relatively low key role in the conduct of the trial and that the appropriate refresher fee that is allowed to him should reflect the modest extent of his contribution.

82. It is submitted on the plaintiff's behalf that the Taxing Master carefully considered the submissions put forward in respect of the quantum of the refresher fees and that, having reflected on the submissions and the facts and circumstances of this case, the Taxing Master was satisfied to reduce the previous refresher fees which had been allowed to senior and junior counsel on the basis that they were excessive. Having taken all matters into consideration, including the sum as allowed in respect of the brief fee, the Taxing Master came to the view that a reasonable refresher fee for senior counsel for a case of this magnitude in 2002 would be €3,000.

83. It is submitted on the plaintiff's behalf that it cannot be established that the Taxing Master erred in principle in the exercise of his discretion in coming to what he believed was a fair and reasonable refresher fee for counsel in the circumstances of the present case. In particular it is noted that the Taxing Master considered the judgment of Kearns J. in *Superquinn* as previously referred to herein and further, he was entitled to take into consideration the fact that the defendants had two senior counsel and that both senior counsel had marked and were paid refresher fees of €3,000 each per day. Insofar as the Taxing Master allowed junior counsel a refresher fee of €2,000 per day, it is submitted on the plaintiff's behalf that the Taxing Master relied on the same rationale in coming to a conclusion in respect of senior counsel's refresher fee and that he did not err in principle in the exercise of his discretion as to what was a fair and reasonable refresher fee for junior counsel in the circumstances of this case. It is submitted that the fee as allowed to junior counsel in the circumstances of this case is not at a level which would make the decision of the Taxing Master unjust.

84. The Taxing Master considered the judgment of Kearns J. in *Superquinn v. Bray UDC* (No. 2) previously referred to herein wherein at p. 481 he states:

> "… in relation to refresher fees, I accept fully the submission made by counsel for the plaintiff. It seems to me that refresher fees of 3,000 guineas could only be justified and allowed in quite extraordinary and exceptional circumstances where two senior counsel are retained. This case, while difficult and arduous, falls well short of that threshold.
>
> I have only been asked by plaintiff's counsel to reduce the refresher fees to £2,000 and I will so direct … I have not been asked to reduce refresher fees below this figure, or to consider whether refresher fees should be subject to some reduction if a case goes beyond a certain time".

85. It is in my view of some significance that the defendants' main ground of objection before the Taxing Master and the hearing of the objections was that the original fee as allowed for senior counsel by way of a refresher was excessive on a party and party basis but, in respect of the refresher fee allowed to junior counsel, it was submitted to him that to allow a refresher of two thirds the rate allowed to senior counsel was unjustifiable. It is clear that the Taxing Master was aware that he had been requested to examine the nature and extent of the work carried out by counsel and especially the role played by junior counsel and it was submitted to the Taxing Master on the hearing of the objections that the fee allowed by way of a refresher to junior counsel should reflect the modest extent of his contribution.

86. The Taxing Master in coming to a conclusion in respect of the total of five refresher fees as claimed indicated that he had carefully considered the submissions put forward in respect of the quantum of refresher fees. He took the view that it was evident from the order and finding by the High Court that liability was a major issue in this case. Having reflected on the submission the facts and circumstances of this case he indicated that he was satisfied that the refresher fees as originally allowed to senior and junior counsel on taxation were indeed excessive. He stated that he had taken all matters into consideration including the sum allowed in respect of the brief fee itself and he found and determined that a reasonable refresher fee for senior counsel for a case of this magnitude in 2002 would be €3,000 and in respect of junior counsel he allowed the customary two thirds allowance for the reasons which he had set out in the preceding passage of his decision. It does appear in the circumstances having regard to the actual wording as used by the Taxing Master, that he did examine the nature and extent of the work in the particular case and did make his own fair and reasonable assessment on the merits accordingly. It is clear that the result of his further consideration of the facts and circumstances of this case led him to come to a conclusion that the original refresher fees as allowed should be reduced. It is of some significance in my view to note that while the Taxing Master did state that he was allowing junior counsel "the customary two thirds allowance" he did so for the reasons as set out.

87. I am mindful of the views as expressed by Kearns J. in *Superquinn* to the effect that in 2001 a refresher fee of £3,150 could only be justified and allowed in quite extraordinary and exceptional circumstances where two senior counsel are retained. It would have to be accepted that the present case could not be described as being quite extraordinary or exceptional but nevertheless was considered to be of sufficient consequence as to have brought about a situation where the defendants agreed that their own senior counsel should each be paid €3,000 of a refresher fee and junior counsel €2,000. It also has to be borne in mind from the prospective of this Court, that counsel on the defendants' behalf is suggesting that the appropriate refresher fee for senior counsel for the plaintiff is a figure of €2,500 which would not meet with the 25% yardstick as indicated by Kearns J. in *Superquinn* as being a basis for interference by this Court.

88. It may be the situation that the Taxing Master can be criticised in this instance for not having fully set out the nature and extent of the actual work that was carried out by junior counsel on a daily basis but it does appear to me that it is apparent from the known facts of the case that quite clearly in this instance junior counsel played a significant role in assisting his single leader, and as I have previously indicated, I am satisfied on the known facts that they acted as a team.

89. I am not satisfied in the circumstances of this particular case that the defendants have discharged the task of satisfying me that on the balance of probabilities the Taxing Master in the exercise of his discretion has committed an error of principle and in any event I am satisfied that the allowance in this particular case of a refresher fee of €3,000 to senior counsel and €2,000 to junior counsel is not unjust and accordingly I decline to review the amounts as allowed to senior and junior counsel on taxation in respect of their refresher fees.

90. The defendants seek a review of the plaintiff's solicitors' instruction fee as allowed in the sum of €68,750 and counsel for the defendants submits that an appropriate figure would have been €55,000.

91. It is submitted on the defendants' behalf that the Taxing Master failed to have adequate and proper regard to the nature and extent of the work carried out by the plaintiff's solicitors and that the instruction fee is excessive to the extent that it should be regarded as unjust. While it may be that a significant level of work was undertaken by the plaintiff's solicitors, it is contended that it is difficult to see how the work undertaken could be said to justify a fee of €68,750. It is submitted that there is no indication in the bill of costs as to the actual amount of time spent by the plaintiff's solicitors in the conduct of this case and that further, the Taxing Master does not appear to have regard to the question of the time spent. It is submitted that the Taxing Master was clearly in error in failing to have regard to the individual headings as set out in a letter of the 12th August, 1999. It is submitted that there was no root and branch examination of the bill of costs on its own merits carried out as per the dicta of Kearns J. in the *Superquinn* case. It is submitted that the quantum liability and economic issues were not particularly onerous. The defendants suggest a fair and reasonable fee for the instructions would be no more than €55,000.

92. It is contended on the plaintiff's behalf that it is clear that the Taxing Master took away the plaintiff's solicitors file in order to examine and consider same so as to assist him in the exercise of his discretion. The Taxing Master had particular regard to the judgment of the learned trial judge, which outlined the difficulties which faced the plaintiff in bringing the action to a successful conclusion. It is submitted that it is clear that the Taxing Master, in assessing the appropriate level of the plaintiff's solicitors instruction fee, did have regard to the guidelines set out in the relevant case law on the subject. It is contended on the plaintiff's behalf that there is no evidence that the Taxing Master erred in principle in any way in the exercise of his discretion and that he arrived at a figure within a range which it might reasonably have been open to him to arrive at and this decision could not be considered to have been unjust.

93. The Taxing Master, in reviewing the objection as made on the defendants' behalf to the solicitors' instruction fee as allowed, very comprehensively reviews the arguments advanced on the defendants' behalf and those of the plaintiff and, having considered the legal principles applicable in assessing a solicitors' instruction fee and applying the guidelines as set out in the relevant case law on the subject, he indicated that he was satisfied that the sum allowed on taxation was proper and just and was a fair and reasonable remuneration for the plaintiff's solicitors work and in his view was not in any way unjust as against the paying party. He re-examined and considered all the facts and circumstances of this particular case and he took the view that this was a case with major difficulties especially on liability. He indicated that he had been referred to the judgment of the learned trial judge, as handed down following the conclusion of the evidence before him, which highlighted the difficulties which the plaintiff faced in bringing this case to a successful conclusion. He also referred to the fact that the case had been before the Court on nine different occasions and came to the conclusion to dismiss the defendants' objection in respect of the amount as allowed to the plaintiff's solicitor by way of an instruction fee.

94. I take the view that in coming to a conclusion on the appropriate amount to be allowed to the plaintiff's solicitors by way of taxation of costs, the Taxing Master did not err in the exercise of his discretion in any way which would render his decision in respect of the solicitors' instruction fee unjust.

95. The final item in dispute is the cost of a report in the sum of IR 3,000 in the account of Peelo and Partners, Chartered Accountants. Originally a sum of €7,920.27 to include the fee of €3,000 in respect of the report was claimed and on taxation the Taxing Master made a deduction of €968.00. It is only the fee of IR 3,000 claimed in respect of the report that is disputed by the defendants. The defendants in their objections submitted that the amount allowed was excessive and that the Taxing Master erred in failing to have regard to the fact that a similar report had been taxed at €952.30 in other taxations, that the report itself was not exclusive to this case but was common to a number of cases in which the "economic issue" was raised and the report prepared in the *McEneaney* case and the report in this case were largely similar.

96. Counsel for the defendants submitted that the amount as claimed on behalf of Peelo and Partners was significantly more than the amount as claimed by Moore McDowell, Economist, who submitted an invoice in the sum of €1,300 in respect of his report. The defendants also rely on the fact that Byrne and Sons Consulting Actuaries were allowed a figure of IR £2,412 in respect of their reports and court attendances. It is submitted that the report from Peelo and Partners is a generic report and that the invoice as submitted claims copyright over the report, which claim is not disputed. The defendants make reference to the fact that during the course of the hearing of the objection before him the Taxing Master was referred to the decision of Barron J. in *Ormond (An Infant) v. Ireland* [1988] ILRM 490 in which Barron J. held that it was appropriate to have regard to the repetitive nature of work in taxing fees. The defendants submit that the Taxing Master erred in failing to have regard to the fact that the report in respect of which a fee of IR 3,000 was claimed by Peelo and Partners was not exclusive to the present case, was common to a number of cases that raised the same issue and had taxed previously at €952.30 on prior taxation. In essence, the defendants submit that the amount as allowed in respect of the report is excessive.

97. It is contended on the plaintiff's behalf that the bill of costs as submitted on behalf of Peelo and Partners claimed an amount of €7,920.27 which included a fee of IR 3,000 in respect of the actual report itself and from the total amount as claimed the Taxing Master deducted a sum of €968. It is submitted that it is clear from the Taxing Master's ruling on this aspect that he did carry out a detailed examination in respect of the account as submitted on behalf of Peelo and Partners. The Taxing Master had evidence that Peelo and Partners were instructed to act on behalf of the plaintiff after the case had already commenced and that it was necessary for them to assist the plaintiff by dropping everything to deal with the matter.

98. The difficulty that faces the Court in attempting to determine this issue is that the situation is unclear. The Taxing Master did carry out an examination in respect of the account from Peelo and Associates and he noted that Mr. Peelo attended court and gave evidence on behalf of the plaintiff in respect of the "economic issue". He refers to the fact of the necessity for Mr. Peelo's evidence and of the fact that there would be conflicting evidence adduced on the defendants' behalf. He makes a reference to the sum of

€950.00 being offered by the defendants and that this would barely remunerate Mr. Peelo for his actual daily court attendance, never mind preparing his report. The Taxing Master did make a deduction of €968.00 from the total account as claimed in the sum of €7,920.27, but unfortunately the Taxing Master does not clarify as to the basis upon which he came to a conclusion that €968.00 was the appropriate amount to be deducted and it is not specified as to whether this amount was deducted from the overall sum claimed in the sum of €7,920.27 or from the report fee as claimed in the sum of IR 3,000.

99. The Taxing Master states that the deduction made was a sum he considered appropriate to cover any overlap on duplication in respect of work carried out by Mr. Peelo in the *McEneaney* case but he gives no other details of the basis of his calculation and in particular whether it relates to the actual report or not as the case may be.

100. The Taxing Master does not in my view adequately deal with the fact that on previous occasions the same or a similar report had been taxed at a sum of €952.30.

101. I am not clear in these circumstances as to the basis upon which the Taxing Master exercised his discretion to allow the claim as made on behalf of Peelo and Partners in the sum of €7,920.27, less his deduction of €968.00. It does appear to me that there may be an injustice if the Taxing Master allowed a sum of IR 3,000 in respect of Mr. Peelo's report on this occasion, whereas on previous occasions the same or a similar report had been taxed at a sum of €952.30. It also has to be borne in mind that of the total amount claimed in the sum of €7,920.27 the defendants are only questioning the entitlement of the report fee in the sum of IR 3,000.

102. There is not in effect sufficient information available to me to come to a clear conclusion on this aspect of the bill of costs and in order to do justice by the parties I have come to the conclusion that this particular aspect of the claim should be referred back to the Taxing Master for clarification as regards the exercise of his discretion as to the appropriate amount to be allowed for the report as prepared by Peelo and Partners against the background where on previous occasions the report or a similar report had been taxed at a lesser amount.