Neutral Citation Number: [2009] IEHC 146

THE HIGH COURT

2004 18545 P

BETWEEN

MICHAEL KENNY

PLAINTIFF

AND

IRELAND ROC LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian McGovern delivered on the 31st day of March, 2009

1. This application comes before the court by way of notice of motion for an order reviewing the determination of the Taxing Master on 9th October, 2008, disallowing the defendant's objections to the plaintiff's Bill of Costs taxed in these proceedings on 8th November, 2007, and, in particular, the Taxing Master's ruling on the instruction fee of the plaintiff's solicitor and his ruling that the plaintiff was entitled to recover Value Added Tax on his legal costs.

The law

2. There is general agreement among the parties concerning the legal position where the High Court is asked to review taxation of costs pursuant to O.99, r.38 of the Rules of the Superior Courts. Under that rule, the Taxing Master may be asked to review the taxation by a party who is dissatisfied with the allowance or disallowance made by the Taxing Master of the whole or any part of any items in a Bill of Costs. When the Taxing Master is asked to review his taxation, he may receive further evidence in respect thereof. A party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to, may apply to the High Court for an order reviewing the taxation and the court may make such order as may seem just.

3. The application to the court shall be made by motion on notice and

> *". . . the motion shall be heard and determined by the Court upon the evidence which shall have been brought in before the Taxing Master. And no further evidence shall be received upon the hearing thereof, unless the Court shall otherwise direct." O.99, r.38 (4).*

4. Section 27 (3) of the Courts and Court Officers Act 1995 ("the 1995 Act"), states:

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

5. In *Re Kevin J. Walshe* [1960] 96 I.L.T.R. 173 at 177, Budd J. stated:

> *"The proper person to tax a Bill of Costs is the Taxing Master, an official with very specialised knowledge in such matters. Save as to matters objected to, his Certificate is final and conclusive. The power of the court is to 'review' the taxation as to any item that may have been objected to. If the court were to consider other new and fresh grounds not taken on the objections before the Taxing Master, the court would be acting as a tribunal of first instance and such a course is not, in my view, contemplated by the sub-rules in question and one that would seem to be tantamount to usurping the functions assigned to the Taxing Master."*

6. He also added:

> *"If the court were, on the hearing of such an application, to consider new and fresh grounds of objection and uphold them, the court would, in fact, be overruling the Taxing Master on grounds and reasons that were never before him and never considered by him."*

Section 27 (3) of the 1995 Act, was considered in *Smyth v. Tunney* (No. 3) [1999] 1.L.R.M. 211. At p. 213, McCracken J. stated:

> *"The principle, upon which I must act, therefore, is not simply to decide whether the Taxing Master erred, but also, if I am to alter his decision, I must find that his taxation was unjust. I cannot approach this issue on the basis of trying to assess what costs I would have awarded, had I been the Taxing Master."*

This statement of the law has been followed in a number of other decisions which were opened to the court. I am satisfied that the principles set out above represent the law and determine the proper approach to be taken by the High Court in a review of taxation.

7. The onus is on the party seeking a review of the Taxing Master's decision to show that the Taxing Master erred, in principle, and that his decision was unjust.

The instruction fee
8. The plaintiff's solicitors originally claimed an instruction fee of €425,000. The defendant submitted a figure of €125,000 as being appropriate in the case. The figure finally assessed by the Taxing Master was €285,000. Order 99, rule 37 (22)(ii) sets out the matters which the Taxing Master shall have regard to in exercising his discretion in relation to any item.

9. This action concerned a claim by the plaintiff that he was a commercial agent and concerned, *inter alia,* the commercial agent's Directive 86/563/EC. The matter was admitted to the Commercial Court. The case was settled on 10th October, 2006, following a finding in favour of the plaintiff. The action was settled for €66,000 and costs.

10. In the affidavit grounding this application for review of the Taxing Master's decision, the defendant's solicitor avers that the plaintiff's solicitor sought to assert that he was entitled to a premium in respect of the instruction fee on the basis that it was a *"test case".* This issue was referred back to the Commercial Court and I have had the benefit of reading the transcript of Kelly J. when he ruled on this issue on 30th March, 2007. In the course of his ruling, Kelly J. stated:

> *"On 18th October, 2004, there was listed before me, as the judge in charge of the Commercial List, an application in this and four other cases, to have them admitted to the Commercial List. All of the cases were brought against Ireland ROC Ltd. I had the opportunity of reading the papers in advance in all of the cases, and if my recollection is correct, it was at my suggestion that only one of the cases should be admitted to the List, because they seem to me to raise broadly similar issues and I could see little point in costs of five full-blown actions being incurred when, perhaps, much benefit would be had from trying one of those cases. Nobody dissented from that proposition . . ." (transcript 30th March, 2007, p. 15).*

11. At p. 16 of the transcript, he stated:

> *"I exercised the discretion given under rule 1B to admit the case. I did so because I was fairly confident that the issues in this case would, to a significant degree, have a bearing upon the four other cases which were in the List and twelve further cases which I was told about.*
>
> *The issue for determination by the court was whether the European Directive dealing with general agents was applicable and whether it actually applied in the case of Mr. Kenny. Those were issues which fell for determination in the four other cases, which I did not admit to the List, but simply stood them down to abide the result of Mr. Kenny's case."*

12. At p. 17 of the transcript, the learned judge stated:

> *"The question which I was asked to decide was: whether the Kenny proceedings were a 'test case'? That is the expression that is used in the letter of 26th March, 2007. It is, of course, not a 'test case' . . . and it is accepted by counsel on both sides that this was not a test case in the way in which that term is sometimes used in other jurisdictions. There is really no such thing as a test case in this jurisdiction, though I suppose there could have been if all of the other plaintiffs had agreed to be bound by the decision in Mr. Kenny's case, but even then, their ability to so agree would be limited only to certain legal issues which would arise.*
>
> *So, it is not a test case in the sense in which that term is used in other jurisdictions, but it is a test case in a rather more loose and less binding way, in that it gave the court an opportunity to have ventilated before it legal questions as to the applicability of this Directive, in circumstances where it was highly likely that the decision in Mr. Kenny's case would have application in many, if not all, of the other cases. So, to that extent, there was an element of the test about it. It was also the first occasion upon which an Irish court was asked to consider questions pertaining to the applicability of the Directives. To that extent, it is a test case also because it was the first case, but it has to be said that it was the first of a number of specific cases which were all taken against Ireland ROC Ltd."*

In reaching his decision on the taxation of the instruction fee, having heard the defendant's objection, the Taxing Master stated:

> *"The instant case was conducted and was chosen by the Court to be conducted because it had implications for four other cases which were listed before the Commercial Court and for twelve other cases in the wing, and this was the first time in which the European Directive fell for consideration before the Irish Court. These aspects are not to be found in the comparator case submitted by the defendant and have a significant bearing on the cost allowed in the instant case."*

13. The onus of proof is on the defendant/applicant to show that the Taxing Master erred and that as a result of his error, his decision is unjust.

14. In making his decision on the instruction fee for the plaintiff's solicitor, the Taxing Master appears to have properly considered the ruling of Kelly J. on the matter. His adjudication on the instruction fee is entirely consistent with the ruling of Kelly J. and I cannot see any basis on which I could hold that he was in error in the way in which he taxed the instruction fee. It follows that the question of whether there was an injustice or not does not arise. Accordingly, I will not allow the objections to the plaintiff's Bill of Costs so far as the instruction fee is concerned.

The Value Added Tax issue
15. An issue arose on the taxation of the plaintiff's costs as to whether or not he was entitled to recover the VAT which would be due in respect of his legal fees. The defendant/applicant argued -

> *". . . that the plaintiff is entitled to recover the VAT incurred by him in respect of legal fees in his claim to*

compensation commission payments and therefore his costs should not include a sum in respect of VAT."

16. Order 99, rule 1 (6) of the Rules of the Superior Courts provides:

> *"An award of costs pursuant to sub-rules 1 to 5 of this rule shall include any sum payable by the party in favour of whom such an award is made by way of Value Added Tax on such costs where, and only where, such party establishes that such sum is not otherwise recoverable."*

17. The submissions of the defendant in support of the objections filed on 22nd November, 2007, are dated 15th April, 2008. On the VAT issue, the defendant/applicant states that while the plaintiff was employed by the defendant as a commercial agent, he was registered for Value Added Tax and maintained such status when the business arrangement was terminated by the defendant. The defendant objected to the payment of VAT on the plaintiff's costs at taxation on the basis that they were otherwise recoverable and this was disputed by the plaintiff. At the Taxing Master's direction, both sides wrote to the Revenue Commissioners to clarify the position. On 17th August, 2007, the plaintiff's solicitors received confirmation from Ms. M. Sorohan of VAT Customer Services in the Revenue Commissioners that their understanding of the position was correct and that the question of a refund to the plaintiff did not arise. A conflicting opinion was furnished by Ms. Mary Quirke of the Revenue Commissioners to the defendant/applicant's solicitors in what appears to be an undated letter but was received on 17th September, 2007. In this letter, it was stated, with regard to the plaintiff, that:

> *"He may deduct Value Added Tax in respect of the legal fees."*

In a further letter of 18th October, 2006, Ms. Sorohan wrote to the plaintiff's solicitors stating, *inter alia*:

> *". . . the solicitor's fees incurred by Mr. Kenny were not used by him for the purposes of his taxable activity. Therefore, the VAT chargeable on those fees does not qualify for deduction under sect. 12 (1)(a) VAT Act 1972."*

This was by way of further clarification.

18. In the submissions of the defendant in support of objections filed, it is stated at page 12:

> *"The response which the defendant received was to confirm that a registered person may deduct the VAT charged on most goods and services which are used for the purpose of his or her taxable business which included legal fees."*

For some reason, no reference is made to a further letter received by the defendant's solicitors on 23rd October, 2007. This was a letter dated 19th October, 2007, from Ms. Sorohan of the Revenue Commissioners in which she stated as follows:

> *"I refer to your correspondence of 18th July and 29th August. I wish to state that Ms. Quirke's reply of 17th September, relates to a position in general terms where the matter concerned is a business matter in the course of business. These conditions are not applicable in this case and I attach a copy of my letter to M/s. L.K. Shields, solicitors for your reference."*

19. The defendant's submissions in support of objections filed on 2nd November, 2007, are dated 15th April, 2008. In the report of the Taxing Master, he says that these submissions were filed on 15th April, 2008. It is difficult to understand how the submissions contained the paragraph on page 12 that reads as follows:

> *"The response which the defendant received was to confirm that a registered person may deduct the VAT charged on most goods and services which are used for the purpose of his or her taxable business which included legal fees."*

There is no mention of the letter of 19th October, 2007, received by the plaintiff's solicitors from Ms. Sorohan which seems to repudiate that position. That letter should, in my view, have been before the Taxing Master and if it was, it is almost certain that it would have reinforced his decision on the VAT issue.

20. In his ruling on this matter, the Taxing Master stated:

> *"The defendant has not introduced expert evidence disputing that advanced by the plaintiff. I allow the VAT on the evidence submitted by the plaintiff as the position has not altered. I accordingly disallow the objection to this item."*

Conclusion

21. In the light of the evidence from the Revenue Commissioners, it is difficult to see where the Taxing Master was in error in his ruling. What he had before him were two apparently conflicting opinions from the Revenue Commissioners and the onus is on the defendant to establish that he was in error in choosing the opinion which was given to the plaintiff. In my view, the defendant has failed to discharge the onus of proof in that regard. No expert evidence was adduced and insofar as there was evidence from the Revenue Commissioners, it should have been put, in its entirety, before the Taxing Master. If the defendant had put before the Taxing Master the letter of 19th October, 2007, the position would surely have been no different, because he would then have been approaching the matter on the basis that the apparent conflict between the opinions of the Revenue Commissioners had been resolved. That letter should have been brought to the Taxing Master's attention.

22. In the circumstances, I refuse to make an order allowing the objections of the defendant to the Taxing Master's ruling

on the VAT issue.

23. In view of my findings as set out above, I do not propose making the directions sought in paragraph 2 of the notice of motion.

24. I refuse the reliefs sought.