THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 396

Appeal No. 2015/652

The President
Baker J.
Costello J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995 AS AMENDED BY THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN/

H.M.

APPLICANT/

RESPONDENT

-AND-

S.M.

RESPONDENT/

APPELLANT

-AND-

THE PRIVATE TRUST CORPORATION LIMITED

NOTICE PARTY

JUDGMENT of the Court delivered on the 5th day of December 2018 by Ms. Justice Baker

1. This is the appeal of Mr. S. M. ("Mr. M.") from the decision of Noonan J. in *M. v. M.* [2015] IEHC 727, by which he dismissed Mr. M.'s application for review of the taxation of the costs of Mrs. H. M. ("Mrs. M.") in judicial separation proceedings had between them. The taxation of the costs of Mrs. M. took place, to borrow the phrase used by Noonan J. in his judgment, in "extremely unusual, and quite possibly unique" circumstances following the making of an order for judicial separation in lengthy proceedings in the High Court.

The matrimonial proceedings

2. The proceedings for judicial separation was an "ample resources" case of some complexity. In March 2006, Mrs. M. instructed Dermot Simms, of Rutherfords Solicitors, but Mr. Simms left that firm and established his own to which, on 17 July 2008, Mrs. M.'s instructions were transferred. At that time, by letter of 17 June 2008, Rutherfords Solicitors indicated that the outstanding professional fees owed to them was €12,705.

3. The separation proceedings were heard in the High Court before MacMenamin J. over eleven days between December 2009 and May 2010 and focused, *inter alia*, on the issue of asset division. MacMenamin J. gave judgment on 29 July 2010. Following a second hearing in regard to ancillary matters and to the costs of the proceedings, in a separate written judgment delivered on 22 July 2011 MacMenamin J., having taken the view that the trial had been lengthened by the action of Mr. M., directed that he pay his former wife a contribution to her costs in the measured sum of €100,000, 20% of costs then estimated, less the costs to be paid by Mrs. M. to her former husband for two interlocutory motions which the High Court had deemed unnecessary.

4. Mr. M. argued that he had a legitimate financial interest in the *quantum* of the costs payable by Mrs. M. to her solicitors, because the issue of whether proper provision exists or is still required to be made in respect of the spouses and their dependent children in a future application for divorce was likely to arise in an application by either of them for divorce. He sought in those circumstances to be permitted to engage in the process of the taxation of the costs of his former wife and MacMenamin J. gave him liberty to participate in the taxation process in the manner prescribed.

5. The order of 22 July 2011 provided for the following:

> "8. That the respondent would retain a Cost Drawer within one week of the date of the perfection of the within Order. That such Cost Drawer identify himself/herself to the Applicants Costs Drawer within ten days of the date of perfection of the within Order and that both Costs Drawer do apply to the Taxing Master for an early date for taxation.
>
> 9. That the applicant's costs for the substantive hearing and the preliminary motion be taxed and that the respondent's cost drawer will be permitted to make submissions to the Taxing Master in relation to the items of costs identified in the Bill of Costs which will be submitted by the applicant's solicitors."

6. The taxation process has been ongoing since 2011 and has, to date, produced four written rulings from the Taxing Master. The substantive ruling was given on 11 October 2012, and the ruling on the objection on 29 May 2014. The issues determined will appear in more detail in the course of this judgment and, broadly, related to the amount of the professional fee, the validly of the bill of costs, and an argument that Mrs. M's solicitor was estopped from claiming an instruction fee in excess of that identified in correspondence with his client early in the process.

7. Mrs. M. did not have any objection to the fees charged by her legal advisors or with the rulings of the Taxing Master.

High Court judgment by which Mr. M could engage in taxation
8. The matter came before Noonan J. on an application to review the ruling of the Taxing Master on 22 October 2015 and he delivered his reserved judgment on 20 November 2015.

9. Mr. M. had challenged the Taxing Master's final ruling on the six grounds set out by Noonan J. at para. 21 of his judgment:

> "1. The applicant's solicitor was bound by the terms of the Rutherfords' letter above referred to so that for the period in question, he could not recover costs of more than €12,705. Mr. Simms claimed a figure of €56,265 for this period and the Taxing Master ultimately allowed a figure of €25,000. In fact, the respondent went further at the hearing before me and contended that the entire bill was invalid. I will address this further below.
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> 2. The s. 68 letter previously referred to was invalid in that it failed to include any hourly rates and was issued 19 months after the taking of instructions.
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> 3. The applicant's solicitor's bill of costs was invalid because it failed to identify for each item the time spent on it, the person who worked on it and that person's hourly rate.
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> 4. The rulings of the Taxing Master did not constitute a 'root and branch' analysis of the bill of costs, which he was obliged to perform.
>
> 5. The applicant's solicitor is estopped from claiming more than €200,000 on foot of his bill of costs in circumstances where he gave an estimate of that figure to the applicant as being the likely costs of the proceedings.
>
> 6. The applicant ought have no liability for the costs of the two interim motions previously referred to which were characterised by MacMenamin J. as unnecessary. In respect of the first ground, Noonan J. held that the Taxing Master was correct in coming to the conclusion that he did not have jurisdiction to determine if an estoppel had arisen and that SM had not demonstrated an error arising from the Taxing Master's ruling."

10. In regard to the argument concerning the letter made pursuant to s. 68 of the Solicitors (Amendment) Act 1994 ("the 1994 Act"), henceforth, a "s. 68 letter", Noonan J. began by noting that the authorities he quoted show that a failure of a solicitor to write a s. 68 letter was not grounds for denying payment of fees which would otherwise be due. Noonan J. considered the Taxing Master had made no error on the facts of this case in making a determination that a letter was sufficient to satisfy the requirements of s. 68 of the 1994 Act. A letter had, in fact, been written.

11. In respect of the third ground, Noonan J. found no error in the approach of the Taxing Master that there was no requirement to record time on an hourly or particular basis.

12. Noonan J. considered that there was no failure to carry out a "root and branch" analysis, the language used in the authorities, as the Taxing Master had adequately taken account of the six different phases of the litigation and estimated the amount of work done in line with an appropriate hourly rate.

13. Regarding the alleged €200,000 estoppel, at para. 5.2 of his judgment, Noonan J. began by noting the unusual circumstances of the review and of the engagement in the taxation process by a third party with no liability to the bill *per se*. He found that a third party could not legitimately argue that a contractual agreement as to the limits of fees could be said to exist where the parties to the contract did not so contend.

14. Noonan J. also pointed at the "extremely serious allegations" that had been made by Mr. M. against Mr. Simms without evidence and which were contradicted by the very person liable for the bill of costs. Noonan J. considered that the order of MacMenamin J. which permitted Mr. M. to retain a costs drawer for the purpose of making submissions regarding the bill of costs of his former wife did not entitle him to engage in the taxation in the manner for which he contended.

15. Noonan J. found that Mr. M. had not demonstrated any error made by the Taxing Master in the taxation of Mrs. M.'s bill of costs. Further, if there had been such an error, he was nonetheless satisfied that there had been no injustice in the case.

16. By order dated 25 November 2015, Noonan J. affirmed the decision of the Taxing Master and granted the costs of the review to Mrs. M.

The question of *locus standi*
17. Before dealing with the grounds of appeal, I briefly consider that argument made by Mr. M. at the commencement of the hearing of the appeal regarding the role of counsel and solicitor who appeared for Mrs. M. Mr. M. argued that he was, for the purposes of the taxation, the review before Noonan J, and on appeal, to be treated as "standing in the shoes" of his former wife and that she therefore had no role to play in the processes before the Taxing Master, the High Court, or this Court.

18. It was also contended that a conflict of interest arises in that Dermot Simms Solicitors has instructed counsel to appear to defend the bill of costs, and that the defence of the bill of costs, which itself incurs further expenditure, is purely in the interest of Dermot Simms Solicitors.

19. In my view, these propositions misunderstand the effect of the order of MacMenamin J. by which he permitted the engagement of Mr. M. in the taxation process, but did not permit him to replace or be substituted for his former wife for all purposes in the processes. Such an order would have been unusual even in relatively non contentious matters, and clearly, not at all one suitable for the measurement of costs in a highly acrimonious and personal dispute between former spouses, and where Mrs. M. argues that her former husband is using the processes as a means of controlling her personally.

20. The order of MacMenamin J. permitted submissions that could be made on behalf of Mr. M. to the Taxing Master regarding the bill of costs. He did not, in my view, as is contended by Mr. M., put Mr. M. in the position of his former wife for the purposes of taxation. Indeed, the order envisages that both the applicant and the respondent would engage a cost drawer who would engage with one another. Because of the unusual nature of the order the express terms of para. 9 permitted, what would not normally be the case, that a party other than the party paying the costs would have liberty to address and make submissions to the Taxing Master regarding the costs of that order. Mr. M. is not "representing" his former wife in the present appeal nor does he, in the course of the taxation or for the purposes of the review, act "in place of" his former wife, as he argues. Mrs. M. was represented by solicitor and counsel at the review before Noonan J. and before this Court, and that is entirely appropriate.

21. The preliminary objection must be rejected, and furthermore, it was not argued before the High Court, is not included in the grounds of appeal, and may not form the basis of appeal.

22. I turn now to consider the grounds of appeal.

Grounds of appeal
23. The grounds of appeal upon which Mr. M. relies in his notice of appeal are lengthy and were reduced to eleven grounds following directions by Finlay Geoghegan J.

24. It is convenient to group the grounds of appeal, and in line with the argument of counsel for the respondents in his written submissions, the grounds may be set out as follows:

> (i) *The time factor:*
>
> The appellant appeals the decision of Noonan J. on the grounds that he erred in failing to have regard to the fact that the Taxing Master did not properly tax the costs by reference to the time spent on the individual items under consideration.
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> (ii) *The Section 68 ground*:
>
> The appellant argues that the trial judge erred in the approach he took to the alleged failure on the part of the solicitors for Mrs. M. to comply with s. 68 of the 1994 Act, and that the correct approach ought to have been to either refuse to award costs or to award costs on a *de minimis* basis.
>
> (iii) *The Rutherfords fee estoppel*:
>
> The appellant argues that the costs payable in respect of the involvement by Messrs. Rutherford in the early stages of the proceedings are to be limited to €12,705 (including VAT) and that the letter sent by Mrs. Rutherford to Mrs. M on 17 June 2008 created an estoppel such that higher fees for that period could not be claimed.
>
> (iv) *The €200,000 estoppel*:
>
> The appellant argues that the solicitors acting for Mrs. M. had estimated the likely fees of the litigation at €200,000 and that this estimate either acts as a limit on the amount that may be claimed in respect of costs or as an estoppel.
>
> (v) *The ancillary orders*:
>
> The appellant argues that the trial judge erred in awarding the costs of the taxation to Mrs. M. and in refusing to reduce the contribution of €100,000 payable by Mr. M. *pro rata* having regard to the fact that the results of the taxation process was to reduce Mrs. M's total legal costs.

The basis of review
25. The review of the decision of the Taxing Master is brought pursuant to O. 99, r. 38(3) of the Rules of the Superior Courts ("RSC") and s. 27(3) of the Courts and Court Officers Act 1995 ("the 1995 Act") which provides:

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

26. The review is not an appeal on the merits but rather, is conducted in the light of the statutory conjunctive test that an error be established in the approach of the Taxing Master and that an injustice has resulted. That a result be unjust is more than a test that the costs are more or less than that for which either party contends and injustice must be tested in the context of an assessment of the nature of the litigation, the amount of expertise engaged, and all of the other factors that might be relevant in the case in issue. Findings of fact are not to be reversed unless a manifest error or error in approach is found.

27. The test to be applied on review is well established. In *Cafolla v. Kilkenny* [2010] IEHC 24, [2010] 2 ILRM 207, at p. 4 of his judgment, Ryan J., set out the limits of the jurisdiction on review:

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

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

29. Geoghegan J. in *Bloomer v. Incorporated Law Society of Ireland (No. 2)* [2000] 1 IR 383, at p. 387 described in some detail the exercise of the review jurisdiction as follows:

> "In considering whether the taxing master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the taxing master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in the consideration of the facts but of course the court must also consider whether the taxing master has fallen into error in either law or jurisdiction. If this court finds that the taxing master has erred in the sense described, this court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the taxing master in fact arrives at the correct figures or at figures within a range which it might have reasonably have been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision".

30. In *Superquinn Ltd. v. Bray Urban District Council (No. 2)* [2001] 1 IR 459, at p. 476, Kearns J. agreed with the approach of Geoghegan J. in *Bloomer v Incorporated Law Society of Ireland (No. 2)* and at p. 475 considered that the High Court must "exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice".

31. In *Sheehan v. Corr* [2017] IESC 44, [2017] 3 IR 252, at para. 98, Laffoy J. also considered that the reviewing court should show deference to the expertise of the specialist Taxing Master.

Taxation without reference to the time spent on every item
32. Mr. M. argues that the Taxing Master should have required that Dermot Simms Solicitors provide time records for each item on the bill of costs. Instead, it is argued that the Taxing Master relied on his own subjective assessments and the sums listed in the bill of costs. The written legal submission and the notice of appeal were prepared in the light of the decision of this Court in *Sheehan v. Corr* [2016] IECA 168, and before the Supreme Court allowed the appeal from its order.

33. Cregan J. noted, at para.40 of his judgment, that:

> "[…] a […] bill of costs should include a date on which a service was delivered, the nature of the work done, the time taken to perform that work, the seniority of the solicitor who undertook that work and the professional charge being levied based on this work (which might also include an hourly rate)." See also paras. 91 to 94.

34. That decision was overturned on appeal to the Supreme Court in *Sheehan v. Corr* [2017] IESC 44, and the respondent relies on the judgement of Laffoy J. as giving a sufficient basis to conclude that the approach of the Taxing Master was correct.

Time as a relevant factor: The weight to be given
35. Laffoy J., giving the judgment of the Supreme Court on the appeal in *Sheehan v. Corr* [2017] IESC 44, considered the relevant RSC governing the taxation of costs and held that the amount of time actually spent should not be elevated above all other relevant criteria mandated by the Rules. At para. 73, she stated:

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

36. Laffoy J. concluded, at para. 81 of her judgment, that the Court of Appeal erred by positioning the analysis of time actually spent in the assessment of the costs and held that time is "only one element of the relevant circumstances by reference to which the nature and the extent of the work done is assessed".

37. At para. 74 of her judgment, Laffoy J. summarised the conclusions with regard to the importance of time as a factor in the assessment of costs:

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

38. Mr. M. makes the argument that the trial judge erred in failing to conclude that the Taxing Master had incorrectly approached the taxation process and, in particular, had failed to assess both the nature and extent of the work done on behalf of Mrs. M. He argues that what is required, as a matter of law, is that the Taxing Master should objectively examine each of the separate items in a bill of costs and that, for that purpose, each item is to be identified, assessed, and measured by reference to an assessment of the length of time taken for each task, by whom the task had been done, and the appropriate hourly rate to be applied to such tasks.

39. Mr. M. makes the uncontroversial argument that the correct approach to the taxation was changed "fundamentally" by the 1995 Act and that, for that reason, the court is not constrained by the RSC having regard to the changes in the law brought about by the 1995 Act, as was recognised by the judgment of Laffoy J. in *DMPT v. Moran* [2015] IESC 36, [2015] 3 IR 224, at paras. 26 *et seq*.

40. As a matter of law, if there is a difference in approach between that mandated by the RSC and that mandated by statute, the Act must always prevail. That proposition is clear from the authorities including, inter alia, the judgment of the Supreme Court in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] 1 IR 381, and is of such authority that it does not need to be further considered here.

41. Laffoy J. said as much in her decision in *Sheehan v. Corr* [2017] IESC 44. As Mr. M. placed some emphasis on her analysis, I will set out para. 71 of her judgment, to which he refers in full:

> "The function of the Taxing Master, as prescribed in s.27(1), is to examine the nature and extent of the work done, and to assess and determine the value of it. In the exercise of his or her discretion under s.27(2), to allow or disallow costs claimed, he or she must do so in a manner that is fair and reasonable. The rules contained in Order 99 in relation to taxation of costs are more specific than the statutory provisions in relation to the performance by the Taxing Master of his function, in particular, as to the exercise of his or her discretion. Of course, the relevant rules, for example, rule 37(18) and rule 37(22)(ii) must now be construed and applied, having regard to the provisions of s.27(1) and (2) of the Act of 1995. It has not been asserted on this appeal by any of the parties that that presents a difficulty. As regards the application of the rules to this appeal, in my view, it does not."

42. Mr. M. argues that Laffoy J. left open a "door" in this paragraph of her judgment in *Sheehan v. Corr* and that the argument he now makes regarding the inter-play between the RSC and s. 27 of the 1995 Act was not argued before her. I do not agree. Laffoy J., having taken the view that the RSC must be construed and applied in the light of the statutory provision, concluded, as was

conceded by the parties, that the construction and application of the RSC on that basis was not difficult nor contentious. Laffoy J., in my view, did not leave open the question of whether the Act or the RSC must prevail, but rather, expressed the view that no conflict or interpretative difficulty arose in the employment of the correct interpretative methodology.

43. Mr. M. argues that the correct approach to be taken by the Taxing Master in the taxation of costs required that two primary factors be taken into account when assessing the value of work in a bill of costs, and that the language used in s. 27(1) of the 1995 Act that requires consideration to be had as regards the "nature and extent" of the work done must be equated to the taking of a time estimate. He argues, from the definition of "extent" in the Cambridge Dictionary, that that word must be taken to mean "amount" and that the Oireachtas intended the Taxing Master to primarily consider the amount of labour, skill, or responsibility engaged by the person doing the work, and that for that purpose the appropriate methodology is to approach the matter on the basis that the unit of measurement for the *amount* of labour must be time. He argues that work is valued throughout the world by reference to an hourly or daily rate which is applied to the actual hours or days worked.

44. He argues, also from the fact that the language of s 27(1) of the 1995 Act uses the word "measurement", that what was required was a taxation methodology that requires a mathematical formula by which the value of work must be understood as capable of being measured in money's worth.

45. Counsel for the respondent correctly, in my view, argues that the methodology provided in s. 27(1) of the 1995 Act is as explained by the Supreme Court judgment in *Sheehan v. Corr*. Laffoy J. clearly set out a position where time was not to be "elevated above the other circumstances" in the RSC, such as complexity and difficulty, and indicated that the correct approach was that identified by Herbert J. in *D v. Minister for Health* [2008] IEHC 299, at p. 33, where he described the exercise to be engaged as the complex exercise of "scrutinisation, measurement and evaluation", one not necessarily done by the preparation of a time costing system. Indeed, Herbert J. went on to express his view it was "neither necessary nor desirable and, indeed in the absence of a time costing system, it would usually be impossible for the Taxing Master to value individual items making up a claim to a General Instructions Fee", and his approach was endorsed by the Supreme Court.

46. The argument of Mr. M. that time records and scrutiny of the type for which he contends are essential for the proper taxation of costs and that a bill of costs which fails to itemise the time spent on each individualised is invalid is not sustainable in the light of the clear and authoritative analysis of Laffoy J. The appeal in this case and the review by Noonan J. are to be considered in the light of the provisions of s. 27 of the 1995 Act and I reject the argument of Mr. M. that the appropriate approach by the Taxing Master is to identify and measure each item in the bill of costs by reference to the time spent on each item at the appropriate rate applicable to the person who expended this time. Time is not the only factor that bears on the analysis. The appeal on this point must be decided against Mr. M. in the light of the authoritative decision of the Supreme Court in *Sheehan v Corr*.

47. The judgment of Noonan J. was delivered before the Supreme Court gave its judgment in the appeal from the Court of Appeal in *Sheehan v. Corr*, and accordingly, Noonan J. did not come to consider the arguments of Mr. M. regarding costs and the correct approach to time in the light of that judgment. However, in my view, Noonan J. correctly approached the question at para 21.3 of his judgment where he rejected the argument of Mr. M. that a bill of costs that is not accompanied by time records was invalid on account of the factors for which Mr. M contended.

48. Noonan J. also considered that the Taxing Master had carried out a sufficient analysis, or what is called "a root and branch" analysis, of the bill of costs submitted and noted, in particular, at para 22.4.2 of his judgment, that the Taxing Master had arrived at the figure for the solicitor's instruction fee by "analysing six different periods of phases of the litigation in a detailed manner". I agree with the reasoning of Noonan J. and his conclusion on this point.

The s. 68 letter

49. Mr. M. argues that Noonan J. fell into error in his approach to the question concerning the service by the solicitors for Mrs. M. of a s. 68 letter. After the file was transferred to Dermot Simms Solicitors, that firm wrote the letter of 28 April 2010 setting out estimated likely future costs and an estimate of costs incurred to date.

50. Mr. M. argues that, when the file was transferred by Rutherfords Solicitors to the firm of Dermot Simms Solicitors on 17 July 2008, a letter should have immediately been sent to Mrs. M. by that firm for the purposes of complying with the statutory requirements of s. 68. The Taxing Master, in his first ruling of 11 October 2012 ("the first ruling"), and ruling on the objections of 29 May 2014 ("the second ruling"), concluded that no basis exists for reducing the cost by reference to any perceived inadequacy in the letter sent on 28 April 2010 by reason of any argument that it failed to adequately set out the basis of the charge and did so only by reference to an explanatory pamphlet published by the Law Society setting out the broad approach to such fees.

51. Mr. M. highlights that the s. 68 letter, in the present case, was sent nineteen months after Rutherfords Solicitors were instructed. On that basis, Mr. M. submits that the letter in question failed to conform with the requirements of s. 68(1) of the 1994 Act, and was invalid.

52. Further, Mr. M. claims the s. 68 letter was invalid owing to its failure to properly set out the "basis of the charges" that would be sought and owing to a lack of information as to the solicitor's hourly rates which should include, as he put it, the solicitor's "skill, knowledge and responsibility". The only reference to charges was an attached Law Society pamphlet which outlined the basis on which solicitors usually charge. Mr. M. submits that this is insufficient. As the purpose of a s. 68 letter is the protection of the client in relation to costs, Mr. M. argues that no reasonable protection is offered where a letter does not include hourly rates, and refers to *A&L Goodbody Solicitors v. Colthurst* [2003] IEHC 74. Further, he argues the failure to include hourly rates prevents the client from understanding the reasoning behind charges and shopping around accordingly.

53. In his second ruling, the Taxing Master made a determination that a letter sufficient to the purposes of meeting the statutory requirements had, in fact, been sent by Dermot Simms Solicitors, albeit he did make a determination that the letter of 28 April 2010 was not issued as soon as was "reasonably practical" as required by law.

54. The Taxing Master took the view that, notwithstanding the late service of the letter, all work prior to that date had been done on the instructions of Mrs. M. and that "none of the work up to this stage could be described as in any way unusual", as a consequence of which he found that no prejudice had been suffered.

55. In the review, Noonan J. approached the matter by reference to the principle established in the authorities to which he referred, primarily the judgment of Peart J. in *A&L Goodbody Solicitors v. Colthurst*, and the judgment of Gilligan J. which approved that decision in *Boyne v. Dublin Bus/Bus Átha Cliath* [2006] IEHC 209, [2008] 1 IR 922. At para 21.2.5 of his judgment, Noonan J. concluded that the absence of a s. 68 letter could not "form a basis for depriving" a solicitor of his costs but that the point was "academic" in the

light of the finding of the Taxing Master that a letter had, in fact, being written.

56. Mr. M. argues that the Taxing Master and, in turn, Noonan J. were wrong in these conclusions, and that this Court should approach the question of the s. 68 letter from the point of view of the first principle that it is in the public interest that a client should know the basis on which his or her solicitor would charge, and that in the absence of a s. 68 letter which identified, at the very least, an hourly rate, it was incumbent upon the Taxing Master in the exercise of his investigative jurisdiction to identify the rates available in the market and to fix the lowest such rate. The argument is that the Taxing Master should, in the absence of a detailed and comprehensive letter, allow no costs as the retainer would be "so tainted with illegality" that it ought not to be enforced by a court. Mr. M. relies on the decision of the Supreme Court in *Quinn v. IBRC (in Special Liquidation)* [2015] IESC 29, [2016] 1 IR 1 and, in particular, the approach identified at para. 194.2 of the judgment of Clarke J. that, where a contract is to be regarded as void or unenforceable, the court should look to the policy of the legislation in determining the consequence of such illegality.

57. Mr. M. submits that Noonan J. erred in concluding that the Taxing Master had not erred in his finding of fact that a s.68 letter had been sent.

58. The appellant argues that there must be a penalty imposed on a solicitor who has failed to comply with the provisions of s. 68 of the 1994 Act. It is argued that the decision in *A&L Goodbody Solicitors v. Colthurst* that the absence of valid s. 68 letter did not automatically disentitle a solicitor to their fees, failed to give proper consideration to the public policy grounds underpinning the s. 68 requirement, namely the creation of a competitive marketplace for legal services and providing remedies for clients. It was further contended that Dermot Simms Solicitors acted illegally in taking instructions without issuing a valid s. 68 letter and, in effect, denying Mrs. M. her statutory right to be informed as to the basis of her solicitor's charges.

59. The appellant submits that public policy in this area demands that any bill of costs that is not supported by a fully compliant s. 68 letter should be deemed void and the Taxing Master should have refused to tax it. In the alternative, the bill of costs should be taxed on a *de minimis* basis.

60. Mr. M. argues that the Taxing Master has not followed uniform practice of his office in failing to tax the bill of costs on a *de minimis* basis where there is no valid s. 68 letter. In not doing so, it is contended they have breached O. 99, r. 23 RSC. It is said that it is within the Taxing Master's jurisdiction to penalise a solicitor or firm of solicitors in this manner.

Analysis of the s. 68 argument

61. The judgment of the Supreme Court in *Quinn v. IBRC (in Special Liquidation)* concerned an illegality deriving from failure to comply with mandatory provisions of the Companies Act 1963 by which a company was precluded from giving financial assistance for the purchase of its own shares. The Act expressly provided that a transaction was voidable at the instance of the company and also provided penalties for breach. The Supreme Court was considering the question of whether the plaintiff had any entitlement to rely on alleged breaches in aid of an argument that guarantees given by the plaintiffs were so tainted by illegality as to be unenforceable.

62. The court was there concerned with contracts which were unlawful or illegal, but the provisions of s. 68 of the 1994 Act are regulatory and provide an express disciplinary consequence for failure. That Act, as noted by Peart J. in *A&L Goodbody Solicitors v. Colthurst*, is not to be interpreted as depriving a solicitor of his right to receive his costs as taxed. Counsel for the respondent relies on the judgment of Peart J. in that case, as did Noonan J. in the review, who noted also that the Taxing Master can take into account the fact that a s. 68 letter was not written.

63. I find no error in the approach of Noonan J. to the findings of fact of the Taxing Master, nor to his reasoning or that of the Taxing Master with regards to the consequence of a failure to service a s. 68 letter.

64. Mr. M. has not advanced any argument of substance which might suggest that the judgments of Peart and Gilligan JJ. are incorrect, and his argument, being one regarding the policy of the legislation, was, in fact, dealt with by Peart J. in *A&L Goodbody Solicitors v. Colthurst* where, after considering precise public policy to be addressed by the legislation, namely the provision of a "greater protection to clients and solicitors in the matter of costs", Peart J. considered that the statute was not intended as a "substitute for the statutory role of the Taxing Master", and that the appropriate course of action for a party dissatisfied with the bill of costs sent by a solicitor is to have these taxed.

65. In that regard, I agree with the conclusion of Peart J. that s. 68(7) of the 1994 Act would be "meaningless and superfluous" were the argument of Mr. M. to be upheld. That section provides as follows:

> "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."

66. The legislature clearly did not, in the light of that subsection, intend to displace the role of the Taxing Master or to deprive the Taxing Master of his or her jurisdiction to tax costs, even where compliance with the balance of s. 68 was not met.

67. I consider that the points raised on appeal regarding the s. 68 letter must be rejected.

The alleged estoppels

68. Mr. M. makes two arguments regarding what he says is an operative estoppel in respect of two tranches of the fees. The first argument arises from the letter from Rutherfords Solicitors on 17 June 2008 at the time the files and papers held by that office were being transferred to the office of Dermot Simms Solicitors and sent by Mr. David Alexander, managing partner, on behalf of Rutherfords Solicitors, which identified a "fair professional fee for work done to date" as €10,500 plus VAT, making in total €12,705. Mr. M. argues that that letter has created an estoppel, what he terms an estoppel by representation or conduct, and has the legal effect that the fees chargeable for that period of June 2008 are capped at the figure mentioned in the letter.

69. The Taxing Master took the view that he had no jurisdiction to determine the question of whether an estoppel arose and that a determination on that point would have been outside his competence. The argument arose in the context of the assertion by Mrs. M. that she did not accept that an estoppel had been created by the letter and the Taxing Master found himself unable to make a determination on the legal and factual questions then arising.

70. Evidence was heard from Mr. Alexander in the course of the taxation and from Mrs. M. in regards to the letter. Mr. Alexander's evidence was that he was not an expert in matrimonial proceedings and that the figure he mentioned had been an "educated guess". The Taxing Master did reduce the relevant fee for the period from the claimed instruction fee of €45,000 to €25,000, and the factual

dispute at taxation, therefore, concerns a fee of approximately €13,000 which the respondent argues must, in the context of the overall figure, be regarded as a *de minimis* difference and not sufficient to establish that the final taxed costs could be characterised as unjust.

71. Noonan J. rejected the argument of Mr. M. that Mr. Simms had, in his evidence to the Taxing Master, fraudulently presented a claim for an instruction fee of €45,000 and deliberately ignored the figure mentioned in the letter of 17 June 2008 from Rutherfords Solicitors. The Taxing Master accepted the evidence of Mr. Simms that that letter had not being brought to his attention until after the commencement of the taxation process. Noonan J. rejected the submission of Mr. M. that the fact that Mr. Simms had not brought that letter to the attention of the Taxing Master so tainted the taxation process that the instruction fee was to be allowed in its entirety, and he described the contention of Mr. M. "scandalous, devoid of any merit and without any legal or evidential foundation".

72. With regard to the estoppel, Noonan J. accepted what he described as "uncontroverted evidence" before the Taxing Master that no fee agreement had been entered into between Mrs. M. and Mr. Simms, and noted also that Mrs. M. accepted her solicitor's bill of costs and had not sought to challenge it. Noonan J. considered that the Taxing Master was correct in coming to the conclusion that the Taxing Master did not have jurisdiction to determine whether an estoppel could be raised against Mr. Simms on account of a representation or assurance on which Mr. Simms is said to have relied such as to raise an estoppel.

73. This particular ground of appeal reflects the unusual nature of the taxation process in the present case. Mr. M. was given liberty by MacMenamin J. to engage in the taxation process notwithstanding that the contribution to be made by him to the costs of his wife was measured at €100,000.

74. The unusual nature of the taxation and review was made more complex by the fact that Mrs. M. did not wish to raise the matters disputed by her former husband in the course of taxation and she agreed to discharge in full the bill of costs presented by her solicitor. Had Mrs. M. sought to raise an argument that the bill of costs either had been agreed or capped or, in some way, limited by previous dealings between herself and her former solicitor, the Taxing Master would either have determined that matter or it would have come to be considered by a competent court. However, because Mr. M. was attending at the taxation for the purposes of protecting his own interest and not those of his wife, albeit his argument was that his wife could have reduced or limited the *quantum* of costs as a result of the arguments he made, he was not, in my view, competent to raise either before the Taxing Master, the High Court on review, or this Court on appeal an argument which was one for his wife to make. In that regard, I note I have already rejected the argument of Mr. M. that he "stands in the shoes" of his former wife in this appeal.

75. Mr. M. has advanced no authority or argument to sustain his contention that he is entitled to raise an argument from a course of dealings between his former wife and her solicitors and to argue that that course of dealings gave rise to a consequence for which she does not contend. He is to be treated as a third party or outsider to the taxation process and to the contractual relationship between his former wife and her solicitors for that purpose, and may not raise any arguments regarding the limitation or alterations by reason of an estoppel in the contractual terms which might derive from representations in the course of dealings or in correspondence. Further, Mr. M. is not in a position to argue that, on the facts, his former wife relied on any representation as to the limit of the likely costs of the proceedings, as she is satisfied with the measure of costs and has advanced no proposition nor adduced any evidence that she relied in any way on alleged representation even had it been found to have been made.

76. For that reason, it seems to me that this ground of appeal must be rejected, and because it fails on its facts of this case, I do not propose to consider the broader question of the jurisdiction of the Taxing Master to make a determination on the estoppel argument.

The alleged €200,000 estoppel

77. Mr. M. makes broadly similar arguments that the bill of costs is to be capped at €200,000, arising from the fact that, in conversation with Mrs. M., Mr. Simms had said he was aware of matrimonial proceedings where the costs had been as high as €200,000. That conversation was considered by the Taxing Master and by Noonan J. as not amounting to a contractual limitation or representation.

78. For the reasons stated, Mr. M. must fail in this ground of appeal.

The costs of the taxation process

79. The order of Noonan J. was that Mr. M. should pay the sum of €61,822.48 in respect of the costs incurred by Mrs. M. in the preparation and defence of her bill of costs. That order was made by directing that Mr. M. comply with the undertaking that he gave to MacMenamin J. on 15 July 2011.

80. Mr. M. argues that the order of Noonan J. by which he was directed to discharge the costs of taxation is unjust, as Mrs. M.'s bill of costs was reduced in the taxation process by €127,038.

Mr. M. argues that the undertaking he gave to MacMenamin J. was an undertaking limited in a way that permitted the setting off from the costs of taxation on a *pro rata* basis to take account of any reduction in the bill of costs achieved as a result of the taxation process.

81. Mr. M. also makes a different argument, that his agreement or undertaking to pay the costs of taxation was a conditional agreement which, when properly understood, meant that he was entitled to deduct from the contribution payable in respect of his wife's costs of taxation such amounts as it cost him to engage in the taxation process. He says, therefore, that the final *quantum* of the costs payable by him for the taxation is to be assessed on a net basis.

82. In support of this argument, Mr. M. points to the transcript of the exchange between himself and MacMenamin J. on 15 July 2011, where he pointed out (at p. 12 of the transcript) that he had already suggested to his former wife's solicitor that he would "pick up any net additional costs of the process" of taxation so that his former wife would not be disadvantaged by his engagement with the taxation process. A further proposition was made on a later day, 22 July 2011 (at p. 5 of the transcript), where Mr. M. proposed that he would pay "the net costs".

83. MacMenamin J. gave a separate written judgment in regard to, inter alia, the taxation of Mrs. M.'s costs on 22 July 2011, and accepted the general contention advanced by Mr. M. that he did have a "genuine interest in the question of the applicant's costs", as the extent of those costs may come to "impinge on the question of whether adequate provision has been made" in the context of a possible application for divorce. MacMenamin J., therefore, directed that the costs of Mrs. M. be taxed and that Mr. M "be permitted to retain a cost drawer to make submissions to the Taxing Master" in relation to the items in the bill of costs. He noted the

undertaking of Mr. M. to pay for the costs of the taxation and also made orders to deal with any privileged documentation in the file of Mrs. M.'s solicitors.

84. The order was then drawn with regard to this aspect of the judgment of MacMenamin J. of 22 July 2011, where the undertaking of Mr. M. was noted as follows:

> "That the respondent will pay the costs relating to the taxation of the applicant's costs and will not seek access to any privileged documentation."

85. The order, in its plain terms, did not limit the quantum of the costs payable by Mr. M. in respect of the costs of taxation. The order in relation to the costs of the taxation was expressed in simple terms, not as either the net or the gross costs, and not as requiring the *pro rata* deduction in respect of those costs to take account of any reduction on costs that might be achieved at taxation for which Mr. M. had contended. Had Mr. M. sought to limit his exposure to the costs of taxation or to argue for a *pro rata* deduction on account of any reduction in the costs to be payable by his wife, and had he believed that the order did not correctly reflect the decision of MacMenamin J., he ought to have returned to that judge under the slip rule to seek alteration of its terms.

86. Noonan J. on the review, and this Court on appeal, have no competence to vary the order of MacMenamin J. or to direct any pro rata reduction in the contribution payable by Mr. M. in respect of the costs of taxation and Noonan J. was, therefore, perfectly justified in making an order directing Mr. M. to pay the sum of €61,822.48 "in compliance with the undertaking of the respondent to pay the costs relating to the taxation" of his former wife's costs and in pursuance of the order of MacMenamin J. made on 22 July 2011.

87. This ground of appeal must fail and the question of the fairness of directing that Mr. M. would pay the entire of those costs was not before Noonan J. nor before this Court, and therefore, the principles explained by Barron J. in *Best v. Wellcome Foundation Ltd. (No. 3)* [1996] 3 IR 378 are not engaged.

88. The order of Noonan J. was an order, in essence, that Mr. M. comply with his undertaking long since given to and relied upon by MacMenamin J. in making the order permitting the engagement by Mr. M. in the taxation process.

A *pro rata* reduction in the contribution of €100, 000

89. Mr. M. also argues that the determination of Noonan J. by which he was directed to pay, within a period of six weeks, the sum of €81,105.93 calculated as being the sum of €100,000 directed to be paid by MacMenamin J. as a contribution to the costs of the judicial separation proceedings, less the costs of two interim motions, is unjust, as it failed to proportionately reduce the contribution he was required to pay in the light of the reduction in the overall bill of costs by the taxation process.

90. The first argument made by the respondent regarding this ground of appeal is that the order of MacMenamin J. directed the payment of a fixed sum of €100,000 by Mr. M. in respect of his wife's costs. The order was not for the payment of a percentage of the costs as ultimately taxed, but rather for the payment of a fixed contribution towards those costs which MacMenamin J. measured. Mr. M. did not appeal that order made by MacMenamin J. on 12 November 2010, nor seek to apply under the slip rule if he considered it to be incorrect.

91. Noonan J. directed that Mr. M. pay the sum of €81,105.93 in respect of the costs of the judicial separation proceedings in pursuance of the order made on 12 November 2010 by MacMenamin J. The figure of €100,000 directed to be paid by Mr. M. was a liquidated sum calculated in the round in the light of the estimate of costs of approximately €500,000 given by counsel to MacMenamin J. in the course of the costs hearing. The reduced sum which formed part of the order of Noonan J. takes account of an allowed credit for costs payable by Mrs. M. to her former husband.

92. Mr. M. argues that, as the costs, when taxed, were less than 500,000, it was the intention of MacMenamin J. that the figure of €100,000 be reduced *pro rata*.

93. Again, the answer to this question must take as its starting point the order of MacMenamin J. which is clear in its terms and requires the payment by Mr. M. of a liquidated or fixed contribution irrespective of the figure that was ultimately taxed in respect of costs. At the time that that order was made by MacMenamin J., in November 2010, the question of the taxation of Mrs. M.'s costs was not in issue, and that remained the position until Mr. M. raised the argument that the costs incurred by his wife in the conduct of the judicial separation proceedings might ultimately have a bearing on the finances of the couple for the purposes of the assessment of proper provision by a court hearing a divorce application. The figure of €100,000 directed to be paid by MacMenamin J. was done in the context of his finding that Mr. M. had prolonged the hearing of the judicial separation proceedings and, as he said at para. 84 of his first judgment in this matter, the late provision of financial information by Mr. M. "added to the length of the case by a factor of three or four days" as did the fact that Mr. M. chose not to retain an accountant.

94. Whilst, in the written judgment, MacMenamin J. determined that Mr. M. would contribute 20% of the estimated figure of the costs of his former wife, the sum of €100,000 was identified as a liquidated amount in the order as drawn up on 12 November 2010 arising from that judgment, and again Mr. M. made no argument in regard to the correctness of the order at that time. It is of note too that MacMenamin J. directed the payment of 20% of the "estimated figure for the wife's costs" which was €500,000. Indeed, it is also of note that para. 9 of the order of 12 November 2010 specifically provided for the taxation of the costs of two interim motions, which were to be set off against the sum of €100,000 payable by Mr. M. in pursuance of the order. MacMenamin J. did not provide for the payment of 20% of the taxed costs of the judicial separation, but rather for the payment by Mr. M. of €100,000. The costs that were envisaged as being taxed at that stage were the cost of the interim motion.

95. In my view, Noonan J., therefore, had no jurisdiction to vary the amount payable by Mr. M. by reducing the starting sum of €100,000, and therefore, the approach he took and the order he made were correct.

96. Mr. M.'s argument must therefore fail and the contribution he is to make to the costs of his former wife in the judicial separation proceedings are not to be reduced pro rata as he contends.

97. Finally, the costs of Mr. Peelo, the cost accountant engaged by Mrs. M., did not become part of the taxation process, and accordingly, were not reviewed by Noonan J. and cannot therefore be the subject matter of an appeal to this Court. Insofar as those costs might be relevant to the issue of proper provision, they may come to be considered by the court hearing the application for divorce, as the evidence was that Mrs. M. directly discharged those costs to Mr. Peelo who was instructed by her as costs accountant for the purposes of the taxation.

Other arguments
98. I reject the contention of Mr. M. that Mr. Simms had misled the Taxing Master and the High Court in his affidavit evidence where he had averred that there was "no agreement" with Mrs. M. regarding the final fee and the Taxing Master had ample evidence on which he could reject the assertion that Mr. Simms failed in his professional duty of candour which, in my view, is not borne out by any reasonable view of the evidence. Indeed, all of the evidence pointed in the other way and the assertion by Mr. M was wholly unfounded.

99. The argument that the Taxing Master is bound by previous decisions of his or her Office does not fall for consideration as is not one of the revised grounds of appeal.

Conclusion
100. For all of these reasons, the appeal of Mr. M. must fail on all grounds.