

THE HIGH COURT

2002/08295 P

BETWEEN

LOWE TAVERNS (TALLAGHT) LIMITED

PLAINTIFF

AND

THE COUNTY COUNCIL OF THE COUNTY OF SOUTH DUBLIN

AND

THE SQUARE MANAGEMENT LIMITED

DEFENDANTS

Judgment of Mr. McGovern J. delivered on 28th day of November 2006

1. This matter comes before the court on foot of three notices of motion to review taxation of costs. The plaintiff has brought two motions. The first is a motion to review the taxation of the solicitor and client costs awarded on foot of the Taxing Master's ruling on the 25th July, 2005. The second is a motion to review the party and party costs allowed by the Taxing Master by his ruling on the 25th of July, 2005. The defendants have brought a motion to review the party and party costs on foot of the Taxing Master's ruling on the 25th July, 2005.

The Law

2. Section 27(3) of the Courts and Court Officers Act, 1995 governs the jurisdiction of the High Court on reviews of taxation. The section reads as follows:

"(3) The High Court may review a decision of the 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 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, or the Circuit Court is satisfied that the County Registrar, has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master or the County Registrar is unjust."

3. In *Superquinn Limited v. Bray Urban District Council and Others* [2001] 1 I.R. 459 Kearns J. referred to s. 27(3) of the 1995 Act and its impact on the process of review of taxation. At p. 475 he stated:-

"Under the old system, the court had a wide ranging remit and, in the context of a review under Order 99, r. 28, could "make such order as may seem just". Now under s. 27(3) of the Act of 1995 it can intervene "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".

"This wording seems to represent a significant shift of emphasis and to impose a heavier burden on any party seeking to challenge a ruling of the Taxing Master. This interpretation is acknowledged at p. 350 of the *Minister for Finance v. Goodman (No. 2)* [1999] 3 I.R. 333 and can scarcely be a matter of doubt. It would suggest (when taken in conjunction with s. 27(1) and (2) that the court should exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if a failure to do so would result in an injustice."

4. Taxation of party and party costs is governed by Order 99, r. 10(2) of the Rules of the Superior Courts. The rule provides that on a party and party basis "... there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed". In *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at

5. p. 119 Walsh J. said:-

"nothing can be recovered in party and party taxation unless three conditions are fulfilled, (a) that the court has made an order for costs in favour of the party, (b) that the matter claimed had been properly incurred, and (c) that the party in question is under legal liability to pay them".

6. In *Smith v. Boller* (1875) L.R.19 Eq 473 Malins V.C. stated at p.475:-

"It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs." In that case the plaintiff was unsuccessful. The judge went on to say "... I think he ought to bear no more than the necessary costs. I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid for by the party incurring them."

7. Solicitor and client costs are dealt with in Order 99 rule 11 of the Rules of the Superior Courts. The rule reads as follows:-

"(1) On a taxation as between solicitor and client, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.

(2) Any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs as between party and party shall, unless the solicitor shall have expressly informed his client in writing before they were incurred that they might not be so allowed, be presumed, until the contrary has shown, to have been unreasonably incurred.

(3) On a taxation as between solicitor and own client, all costs incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount". It is not necessary for the purpose of this matter to quote the rest of the rule.

8. On party and party costs the onus is on the party presenting the bill to prove that it is reasonable. In the case of solicitor and own client costs there is a presumption in favour of the solicitor. In *McGrory v. The Express Newspapers Plc* (Unreported, High, Court,

21st July, 1995) Murphy J. stated:-

"I accept that Order 99, Rule 11(1) imposes on a party opposing a bill on taxation of costs as between solicitor and client the onus of proving that any particular costs objected to were of an unreasonable amount or were unreasonably incurred."

9. I agree with the views expressed by Kearns J. in *Superquinn Limited v. Bray UDC* where he stated at p. 480:-

"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 counsels fees, particularly having regard to the powers and responsibilities imposed on the Taxing Master by s. 27(1)(2) and on the court by s. 27(3), given that the court may be called upon to review taxation."

10. In *Smith v. Tunney* [1999] 1 I.L.R.M. 211 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 his taxation was unjust."

11. Kelly J. agreed with that statement in *Tobin and Twomey Services Limited v. Kerry Foods Limited* [1999] 3 I.R. 483 and Laffoy J. agreed with it in *Minister for Finance v. Goodman (No 2)*. It was also approved by McGuinness J. in *Bula Ltd v. Flynn* (Unreported, High Court, 7th March, 2000). It seems to me that this is a correct statement of the law. In *Bloomer v. Incorporated Law Society* [2000] 1 I.R. 383 Geoghegan J. took a slightly different position as referred to by Kearns J. in *Superquinn Limited v. Bray UDC*. Although Kearns J. regarded "... the reasoning of Geoghegan J. as more correct" I do not see any significant difference in the reasoning of Geoghegan J. in that case. Geoghegan J. stated "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. These 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 been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision to which the court would have made but it cannot be described as unjust decision". Kearns J. suggested at p.476 – 477 of the *Superquinn Limited v. Bray UDC* that "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 challenged". I agree with Peart J. who said in *Quinn v. South Eastern Health Board* (Unreported, 30th September, 2005) that he would have some hesitations about such a pragmatic formula in the context of a costs item. For example in the present case on the solicitor client solicitor's instructions fee allowed at €320,000.00, 25% would represent €80,000.00 and it seems to me that that would be quite a significant sum and would not come within the "*de minimis*" rule. I would have thought that an error to the extent of €40,000.00 or €50,000.00 in a fee of that amount would be reviewable if, in all the circumstances, it could be said to be unjust.

12. In *Boyne v. Dublin Bus/Bus Áta Clíath* (Unreported, High Court, 14th June, 2006) Gilligan J. stated that:-

"the court should not interfere simply because it does not necessarily agree with the amount allowed on taxation. At page 32 of his judgment he stated "...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."

13. Section 27(3) of the Courts and Courts Officers Act, 1995 recognises that the Taxing Master is a person with special expertise in the area of costs and is, in effect, a specialist tribunal. The courts should be slow to interfere with the decisions of such a specialist tribunal and should operate on the basis of *curial deference and judicial restraint*.

Party and Party Costs

14. In the party and party costs the following matters are in issue between the plaintiff and the defendants:-

Senior and Junior Counsel for settling plenary summons and notice of motion (items 5 and 7).

Junior Counsel for application for short service of motion for injunction (item 15).

Senior and Junior Counsel for settling statement of claim (items 90 and 92).

Senior and Junior Counsel for application for early hearing (items 151 and 154).

Senior Counsel for advice on proofs (items 179).

Fees for Second Senior Counsel, for written submissions, brief and refreshers (items 183, 191, 204, 211, 218, 225 and 239).

Brief fees for one Senior and Junior Counsel (items 188 and 194).

Solicitor's instruction fee (item 261).

Postage and incidental outlay (item 262).

Tony O'Keeffe & Company Consulting Engineers (item 270).

The Approach of the Taxing Master

15. The Taxing Master delivered a ruling on both the solicitor and client bill of costs and the party and party bill of costs on the 2nd July, 2004. The plaintiff filed objections to the allowances made on taxation of the solicitor and client costs on the 30th September, 2004 and written submissions in support of the objections were filed on the 22nd December, 2004. The defendants filed objections to the allowances made by the Taxing Master on the 7th April, 2005 and submissions in support of the objections were made on that date. Replying submissions were filed on the 12th April, 2005 and the objections were heard on the 14th April, 2005. I have considered the Taxing Master's ruling of the 25th July, 2005.

16. This is quite an unusual case because in the course of taxation of costs extensive evidence was heard by the Taxing Master on the 19th and 20th November, 2003 and the 9th December, 2003. I am satisfied that the Taxing Master gave detailed consideration to the bills of costs which were being taxed and that he also carefully considered the arguments made by him on review of taxation after objections had been carried in. He considered all the relevant factors in this case such as the sums involved, the urgency of the matter and the nature of the work to be carried out by the solicitor, by counsel, and by the expert witness Mr. Tony O'Keeffe of Tony O'Keeffe & Company, Consulting Engineers. Having given careful consideration to the arguments made by the parties after objections had been carried in, he reviewed many of the figures and made alterations to the sums allowed on the party and party bill. I do not propose to go through the report as it speaks for itself but I am quite satisfied from reading the report and the papers associated with the original taxation that the Taxing Master did not err in principle or in law in coming to the decisions which he made on the party and party taxation. I am also satisfied that the sums allowed by the Taxing Master in his ruling of the 25th of July, 2005 are not of such amount as could be said to be unjust having regard to the matters referred to by him in his ruling and having regard to the facts of this case. In the circumstances it is not open to me to vary the sums which have been allowed on the party and party taxation and I refuse the relief sought by both the plaintiff and the defendants on foot of their respective motions to review the Taxing Master's decision on the party and party costs.

17. With regard to the solicitor and client costs the onus of proof is on the plaintiff to show that the cost objected to are of an unreasonable amount or were unreasonably incurred. The items objected to by the plaintiffs on the solicitor client bill are the following:-

Solicitor and Junior Counsels fees for application for early hearing (items 199 and 200).

Brief fees for two Senior and one Junior Counsel (items 344, 347 and 350).

Solicitor's instruction fee (item 358).

Tony O'Keeffe & Company Limited, Consultant Forensic Engineers (item 264).

18. It was clear at the hearing that Counsel for the plaintiff was opposing the solicitor and client costs allowed by the Taxing Master principally as a defensive measure. This was explained as necessary to ensure that if the plaintiff's party and party costs were reduced that the discrepancy between them and the solicitor client costs would not become greater.

19. There is no doubt that the solicitor client costs allowed by the Taxing Master are substantial and that there is a reasonably significant difference between the Brief fees allowed for counsel and solicitors instructions fee and the fees for Tony O'Keeffe & Company Limited in the party and party costs allowed, and the solicitor and client costs allowed. The difference between the figures on each bill in respect of the other items is not, in my view, of great significance.

20. Detailed evidence was heard by the Taxing Master from both senior counsel involved for the plaintiff and this was rather unusual. From the evidence which was given and from the submissions which were made he was entitled to conclude that it was appropriate for two senior counsel to be briefed and that the brief fees of €75,000.00 for each senior should be allowed. In the course of his evidence to the Taxing Master on the 20th November, 2003, Mr. Gallagher S.C. dealt with the payment of counsel's brief fees and the delay in paying same. Mr. Gallagher informed the Taxing Master that the reason for the delay in paying counsel's fees was because the client was having a row with the solicitor about the solicitor's fees. The client paid counsel's fees directly. (Transcript 20th November, 2003 pages 11-12). The fees paid to counsel appeared to have been paid voluntarily and there is nothing to indicate they were paid under protest even though it is clear from the evidence that the plaintiff was hoping to get a reduction in counsel's fees at one point but was firmly told that this was not going to happen. Mr. Gallagher was not cross examined on the issue of the payment of his fees as to whether they were voluntary or made under protest or subject to taxation. In the circumstances it seems to me that it must be conclusively presumed that these fees were reasonably incurred and the amount of the fees were reasonable having regard to the provisions of Order 99, r. 11 (3).

21. Item 264, the fees for Tony O'Keeffe & Company Ltd., Consultant Forensic Engineers was allowed at €54,692.00. This is undoubtedly a substantial sum. However, I am satisfied that the Taxing Master took into consideration all the points which were made before him with regard to the fees charged and that the amount ultimately allowed, while large, is not unjust to the plaintiff. It is clear that Mr. Tony O'Keeffe devoted an exceptional amount of energy, care and attention to his brief and was pivotal in enabling the plaintiff's case to be properly argued within a very short time frame. The Taxing Master deals with these issues at page 12 and 13 of his ruling. It is clear that Mr. O'Keeffe was dealing with issues of health and safety, structural matters, traffic management, traffic planning, and planning issues. If he had not been so comprehensive in his approach it is likely that the services of a second or third expert would have been required. In the circumstances I do not propose to alter the sum allowed by the Taxing Master.

22. The solicitor's instruction fee (item 358) was claimed at €394,273.35. The sum ultimately allowed was €320,000.00. The Taxing Master was given a comparator (*Ahern v. The Minister for Food and Agriculture*). While the circumstances were somewhat different in that case it had features which made it reasonable for him to take it into account. The Taxing Master stated that in his view his allowance on a party and party basis of €260,000.00 compares favourably with it.

23. It seems to me that the Taxing Master did not err in principle in the manner in which he arrived at the figure. I accept the argument made on behalf of the solicitors in the solicitor and client taxation that the court should not consider whether or not there is an equivalence between the party and party costs allowed and the solicitor and client, although I would add one qualification to that. It seems to me that if the difference was so great as to be unjust the court might interfere with it. I think if I was looking at the solicitors instructions fee on a solicitor and client basis, I might have come to a somewhat lower figure than that allowed by the Taxing Master. But two points arise here. In the first place, the Taxing Master is the expert in this area and I am satisfied that the courts should not interfere with his decision, made within his area of expertise, unless he erred in law or in principle and the sum allowed was unjust. Secondly, I am not satisfied that the sum allowed was unjust and while it might be somewhat different to what I would have allowed, the difference is not of such significance that I would feel entitled to interfere with it. In the circumstances therefore I am not varying the amount allowed.

24. I am satisfied that the allowances made on solicitor and client items by the Taxing Master should stand.

25. To summarise the position, therefore, I am not prepared to vary the Taxing Master's Order either on the party and party items or the solicitor and client items.