

**THE HIGH COURT**

**[2008 No. 962 S.P.]**

**IN THE MATTER OF THE ESTATE OF L.C. (OTHERWISE L.) LATE OF W. AND IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1965**

**BETWEEN**

**A.H.**

**PLAINTIFF**

**AND**

**R.B.**

**DEFENDANT**

**JUDGMENT of Mr. Justice Michael White delivered on the 17th day of April, 2015**

1. This matter comes before the Court by way of motion of the 30th May, 2014 issued by the Defendant to review a certificate of taxation of costs as between solicitor and own client. The motion was heard by this Court on affidavit on the 19th February, 2015.

2. The taxation of costs as between solicitor and own client was ordered by the High Court on the 5th March, 2012. The order stated:-

"And it is ordered that the costs, charges, expenses and outlay of K.J.B & Co., solicitors former solicitors for the Defendant are to be referred to the Taxing Master of the High Court to tax such costs, charges, expenses and outlay as between solicitor and own client."

3. The Applicant in this motion, the Defendant and the Plaintiff in the substantive proceedings are both daughters of L.C. who died in December, 2007 having made his will on the 12th November, 1997. The Plaintiff issued High Court proceedings on the 20th October, 2008 pursuant to the provisions of Section 117 of the Succession Act 1965 alleging the deceased had failed in his moral duty to make proper provision for her in accordance with his means.

4. K.J.B. & Co., Solicitors were retained by the Defendant. These proceedings are not finalised.

5. Difficulties developed in the solicitor and client relationship between Mr. B. and the Defendant. The reasons for that breakdown are in dispute between the parties but the professional relationship terminated in or around June 2011. K.J.B. & Co., Solicitors issued two Fee Notes totalling €79,436.84 inclusive of VAT. The Defendant did not discharge this account.

6. A motion issued on the 16th February, 2012 on behalf of K.J.B. & Co., Solicitors seeking various reliefs, as a result of which the matter was referred to taxation.

7. Declan O'Neill, Taxing Master of the High Court taxed the costs on the 10th December, 2013.

8. The Defendant lodged objections to the Taxing Master's ruling and these were heard by the Taxing Master on the 14th May, 2014, when the objections were overruled.

9. Subsequently the Defendant issued this motion to review.

10. The grounds of the Defendant's objection to the bill of costs and the Taxing Master's order are set out in her Affidavit sworn on the 29th September, 2014.

11. The Defendant does not challenge the quantum of the costs, nor the nature of the work carried out by the solicitor, nor takes issue with any of the specific findings of the Taxing Master in respect of the sums allowed, but has a general concern about the injustice of the claim for costs in the first place.

12. This is set out at paragraphs 3, 4, 5 and 6 of her Affidavit:-

"3. The root of the injustice of this claim for costs is the referral agreement between K.B. and a struck off Solicitor M.O'C. (Exhibit RB 1). M.O'C. the Solicitor who undertook to draw up my father's Will was negligent, and as a direct result of his negligence the Will was challenged. The challenge to the estate came from my sister A.H. (Plaintiff) as can be seen from the attendance notes of Mr. O'C. (RB 2) this is exactly what Mr. O'C. warned my father could happen, my father took Mr. O'C.'s advice and as can be seen by the attendance notes instructed Mr. O'C. to draw up the Will in a manner that would protect his estate from that particular challenge and to avoid any family feuding.

4. M.O'C. accepted instructions to draw up my father's Will, M. owed a duty of care to my father. It is essential, and I believe any right minded person would agree that a Solicitor's duty of care to a client should survive any referral, and that that duty should transfer to the Solicitor taking up the referred file. The secret arrangement between K.B. and M.O'C. is an unconscionable betrayal of the duty of care owed to my father and my father's intended beneficiaries. But for M. O'C.'s negligence in drawing up my father's Will there would not have been any challenge. No challenge, no litigation and no fees. Their usual arrangement, as can be seen from the e mail, was to split fees on a 50/50 basis. At the time of the challenge (20th October, 2008) K.B., Solicitor was already acting for me in the proposed sale of my father's house. K.B. never informed me about his arrangement with M. K.B. should have seen at once that the attendance note put him in a position where there was an obvious conflict of interest between the interests of his client and his arrangement with

M.O'C. It can be assumed that such an agreement with regard to fees, is predicated on there being fees to share.

5. But for their secret arrangement M. would almost certainly have been made accountable for his negligence. Precedent can be found in cases such as *Ross v. Caunters* and *White v. Jones*. In *White v. Jones* Lord Nolan said: "*The moral that Solicitors, when preparing a Will, owe a duty to intended legatees as well as to the Testator must by now have become familiar to them and to their insurers*". Plaintiff's action would have to be against Mr. O'C., and/or Mr. B. since Mr. B. took up the referral willingly.

6. To allow either Mr. B. or Mr. O'C. to profit from their arrangement would be an injustice. In practice the public relies on the skill of Solicitors to prepare effective Wills, it is a vital function that secures the transfer of assets and property from one generation to another. A Will comes into effect when the Testator dies, it is a unique situation that relies on a Testator's trust in the Solicitor".

## The Law

13. The law is helpfully summarised in the High Court Judgment of *Kenny v. Ireland Roc Limited*, a judgment of McGovern J. delivered on the 31st March, 2009 [2009] IEHC 146.

14. At p. 1 the judgment states:-

"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] I.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."

15. Unfortunately the reasons for the motion to review the taxation of the solicitor and client bill are misconceived. Mr. B. denies the allegations made by the Defendant about his conduct. He avers in his affidavit that the Defendant made a complaint to the Law Society about his conduct which was rejected by the Society and an independent adjudicator.

16. All of the matters except some minor procedural complaints are matters which are outside the ambit of the jurisdiction of the Taxing Master to tax the costs and the duty of this Court to review the taxation.

17. It is not open to this Court to interfere with the Certificate of Taxation.

