APPROVED **[2021] IEHC 15**

THE HIGH COURT

2010 No. 11215 P.

IN THE MATTER OF A REVIEW OF TAXATION PURSUANT TO SECTION 27(3) OF THE COURTS AND COURT OFFICERS ACT 1995

BETWEEN

KACPER ANTECKI

PLAINTIFF/
PARTY CLAIMING COSTS

AND

THE MOTOR INSURERS BUREAU OF IRELAND
ANDREI DRAGANUTA
ROBERT DELANEY

DEFENDANTS/
PAYING PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 20 January 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application to review a decision of the Taxing Master. The review concerns the amount allowed by the Taxing Master in respect of the solicitor's general instructions fee.

2. The underlying proceedings are personal injuries proceedings arising out of a road traffic accident. The solicitor acting on behalf of the injured party in the proceedings had claimed an instructions fee in the sum of €70,433.51. The Taxing Master, however, only allowed a sum of €36,000.

NO REDACTION REQUIRED

3. The injured party's side submits that the Taxing Master made a number of errors of fact in his assessment, and that he failed to give proper weight to the complexity of the personal injuries proceedings. The sum allowed is said to be "unjust".

4. For ease of exposition, the injured party's side will be referred to throughout this judgment as "***the party claiming costs***", and the party against whom costs are sought, i.e. the defendants in the underlying personal injuries proceedings, will be referred to as "***the paying party***".

HIGH COURT'S REVIEW JURISDICTION

5. The two rulings the subject-matter of the application for review of taxation were both made prior to the commencement, on 7 October 2019, of Parts 10 and 11 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***"). The review of taxation is thus subject to the "old" costs regime as provided for under section 27(3) of the Courts and Court Officers Act 1995. (See the transitional provisions under section 165 of the LSRA 2015).

6. Section 27(3) of the Courts and Court Officers Act 1995 provides as follows.

> (3) The High Court may review a decision of a Taxing Master of the High Court and the Circuit Court may review a decision of a County Registrar exercising the powers of a Taxing Master of the High Court made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the 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.

7. As appears, the High Court will only interfere with the Taxing Master's assessment where the court is satisfied that two criteria are met. First, the Taxing Master must have erred as to the amount, and, secondly, the error is such that the decision is "unjust".

8. The nature of the review jurisdiction has been summarised as follows by the High Court (Geoghegan J.) in *Bloomer v. Incorporated Law Society of Ireland* [2000] 1 I.R. 383 (at page 387 of the reported judgment).

> "[…] 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.
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> 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."

9. There has been some debate in the subsequent case law as to whether, in considering whether a decision is "unjust", a rule of thumb should be applied by reference to the monetary value of the erroneous allowance or disallowance relative to the correct allowance. In *Superquinn Ltd v. Bray U.D.C. (No. 2)* [2001] 1 I.R. 459, Kearns J. suggested (at page 477 of the reported judgment) that the High Court should adopt a similar standard to that traditionally taken by the Supreme Court in reviewing awards of damages, that is to say, that it should not intervene to alter a finding of amount made by the Taxing Master unless an error of the order of 25% or more has been established in relation to an item under challenge.

10. This approach has not been followed in a number of High Court judgments. In *Quinn v. South Eastern Health Board* [2005] IEHC 399, Peart J. suggested (at page 15) that the

question of what is just or unjust must be viewed on a case to case basis, since different factors may be at play, rather than by an arbitrary formula. Similarly, in *Revenue Commissioners v. Wen-Plast (Research and Development) Ltd (No. 2)* [2009] IEHC 453, Hedigan J. stated (at paragraph 31) that he did not find a mathematical or formulaic method of assessment to be attractive, and preferred a more flexible approach predicated upon a subjective examination of the circumstances of the individual case.

11. In determining whether an allowance is "unjust" in personal injuries proceedings, it is legitimate to have some regard to the amount of damages recovered. I will return to this issue at paragraphs 109 to 112 below.

SOLICITOR'S GENERAL INSTRUCTIONS FEE

12. The review of taxation in the present case is directed solely to the amount allowed by the Taxing Master in respect of the solicitor's general instructions fee. It may assist the reader in a better understanding of the issues in dispute between the parties to pause here, and to outline the nature of a general instructions fee. It should be emphasised, however, that the discussion which follows is concerned with the "old" legislative regime as it stood prior to the commencement of Parts 10 and 11 of the LSRA 2015, and prior to the amendments introduced to Order 99 of the Rules of the Superior Courts in December 2019.

13. Insofar as relevant to the present case, the format of a bill of costs is that prescribed under the pre-2019 version of Order 99. This requires that a bill of costs is to be set out in a series of columns. Each item is dated, and numbered sequentially; and the particulars of service provided are stated. In some instances, a fee for the particular type of work is prescribed under Appendix W, and where this occurs, the prescribed fee is recorded in the bill of costs against the item.

14. The prescribed fees have not changed substantively since they were fixed under the Rules of the Superior Courts 1962. The prescribed fees do not, therefore, reflect the reduction in the real value of money caused by inflation in the intervening fifty-five years. To take one example from the revised Bill of Costs in the present case: the fee recorded for the solicitor's attendance before the High Court (sitting in Ennis) is a mere €20.47.

15. Were the only costs recoverable by a party pursuant to a costs order to be calculated solely by reference to the prescribed fees, same would represent but a fraction of the legal costs actually incurred by that party. In practice, the bulk of the costs allowed on taxation in respect of a solicitor's work are attributed to the solicitor's general instructions fee. There is no fee prescribed under Appendix W in this regard.

16. This produces the anomalous result that a bill of costs typically consists of a series of very minor fee items (often less than €20) together with a single, much more substantial figure referable to the solicitor's general instructions fee. For example, the aggregate of the prescribed fee items in the present case comes to approximately €800, whereas the general instructions fee claimed is €70,433.51. (It should be emphasised that in highlighting this anomaly, no criticism is intended of the party claiming costs. Rather, this disparity between the prescribed fees and the discretionary fees is a function of the failure, prior to December 2019, to revise Appendix W).

17. This anomaly was criticised by the Supreme Court in *Sheehan v. Corr* [2017] IESC 44; [2017] 3 I.R. 252 ("***Sheehan***"). Laffoy J. (delivering the unanimous judgment of the court) stated that it is not satisfactory that, in relation to the largest charge in the bill of costs, i.e. the solicitor's instructions fee, the paying party is presented with pages and pages of narrative, at the end of which is a single omnibus charge for all of the work as set out. The judge went on, however, to explain that it is for the legislature—not the

courts—to produce a system which is more scientific, rigorous and, ultimately, better value for money. (See paragraph 122 of the reported judgment).

18. A solicitor's general instructions fee reflects paragraph 16 of Appendix W (Part II) of the Rules of the Superior Courts as follows.

> 16. Instructions for trial or hearing of any cause or matter, petition or motion, whatever the mode of trial or hearing (including the taking of accounts or making of inquiries) ... ...

19. This item has to be read in conjunction with the following note set out in Appendix W.

> Notes to items 16 and 17:
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> These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including:—
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> (a) taking instructions to sue, defend, counter-claim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or a reference under Order 64, rule 46;
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> (b) considering the facts and law;
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> (c) attending on and corresponding with client;
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> (d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
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> (e) arranging to obtain reports or advice from experts and plans, photographs and models;
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> (f) making search in Public Record Office and elsewhere for relevant documents;
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> (g) inspecting any property or place material to the proceedings;
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> (h) perusing pleadings, affidavits and other relevant documents;
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> (i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and
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> (j) the general care and conduct of the proceedings.

20. No specific fee is prescribed for item 16, rather it is said to be "discretionary". This means that it falls to be assessed by the criteria set out at Order 99, rule 37(22)(ii) as follows.

> (ii) In exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances, and in particular to—
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> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client;
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> (f) where money or property is involved, its amount or value;
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> (g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

21. The combined effect of these rules has been explained as follows by the Supreme Court in *Sheehan* (at paragraph 54).

> "On any reading of item 16 in conjunction with the notes and in the context of r. 12(1) and r. 37(22)(i), one must conclude, as counsel for the defendant suggests, that the Rules envisage the general instructions fee being an omnibus figure. In particular, the Rules do not envisage a specific professional charge in respect of each item of professional services within the general instructions fee, or the hourly rate for each solicitor by whom the work is done, being specified in the bill of costs. It is worth recalling the passage in the judgment of Herbert J. in *C.D. v. Minister for Health* [2008] IEHC 299, (Unreported, High Court, Herbert J., 23 July 2008) quoted earlier, which makes it clear that the Taxing Master is not required to value individual items making up the general instructions fee."

22. The Supreme Court in *Sheehan* confirmed that the correct approach to measuring a solicitor's general instruction fee is that set out by the High Court (Herbert J.) in *C.D. v.*

Minister for Health and Children [2008] IEHC 299. Herbert J. had stated the position as follows (at pages 32 and 33 of the unreported judgment).

> "The learned Taxing Master should have objectively examined each of the separate items in the Bill of Costs which together make up the claim for a General Instructions Fee. He should have ascertained precisely what work was done by the Solicitor's for the Costs, with particular reference to the documentation furnished in support, and by what level of fee-earner it was done. The learned Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The learned Taxing Master should have indicated what amount of time he considered should reasonably have been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The learned Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The learned Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a Party and Party taxation. In my judgment, this is the form of scrutinisation, measurement and evaluation which it is necessary for a Taxing Master to perform in the proper discharge of his or her statutory powers under the provisions of s. 27(2) of the Courts and Court Officers Act. Without such an analysis, his discretion to allow in whole or in part as fair and reasonable or, to disallow, any item in the General Instructions Fee would not be validly exercised.
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> In my judgment it is 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. While it is necessary for the Taxing Master to give reasons for his or her decisions, it is neither necessary nor desirable that this should take the form of a lengthy dissertation or legal discourse. It should be possible for the Paying Party and for this Court on review quickly and efficiently to identify at a glance the item of costs claimed, whether it has been allowed or disallowed and the reason or reasons why. It is not necessary for the Taxing Master to provide, nor is it desirable that the High Court on a review of taxation should have to consider, lengthy opinions referring to evidence given and submissions made before the Taxing Master and, citing and analysing numerous legal authorities. This would provide for clarity, the efficient use of court time, prevent delay and, result in a great saving of time and expense. It should present no insuperable problem as the Taxing Master is an expert as well as exercising a quasi judicial function under the statute."

23. The Supreme Court explained in *Sheehan* (at paragraph 48 of the reported judgment) that the correct approach to the assessment of a solicitor's general instructions fee must be wholly informed by the relevant rules and section 27 of the Courts and Court Officers Act 1995. In particular, the Taxing Master must examine the nature and extent of the work done by the solicitor in respect of which the instructions fee is claimed and to assess and determine the value of the work.

> "What an analysis of the passage from the judgment of Herbert J. in *C.D. v. Minister for Health* [2008] IEHC 299, (Unreported, High Court, Herbert J., 23 July 2008) quoted earlier discloses, in my view, is that what it stipulates the Taxing Master should have done in that case and, presumably, what the Taxing Master should invariably do in conducting taxation of a solicitor's instructions fee, is wholly informed by the requirements of s. 27 of the 1995 Act and O. 99, r. 37(22)(ii), which is the correct approach. Applying the provisions of s. 27, in order to exercise his discretion in a manner that is fair and reasonable in, say, disallowing part of an instructions fee, the Taxing Master must exercise the power conferred on him to examine the nature and extent of the work done by the solicitor in respect of which the instructions fee is claimed and to assess and determine the value of the work as provided for under s. 27(1). In the case of the instructions fee, as Herbert J. correctly stated, he or she should examine the separate items in the bill of costs which make up the instructions fee item, which, as Appendix W of the Rules envisages, is an 'omnibus' fee, as the defendant suggests. Obviously, in order to determine the value of the work done in respect of the various elements of the instructions fee, the Taxing Master should ascertain precisely the work done and by whom, and at what level it was done. The foregoing matters clearly go to the proper application of s. 27(1) and (2). The remainder of the matters outlined by Herbert J. reflect the matters which the Taxing Master is required to have regard to under r. 37(22)(ii). I consider that it is correct, as Herbert J. stated, that, without the type of analysis which he outlined should be carried out, the Taxing Master in disallowing part of the instructions fee would not be validly exercising the jurisdiction conferred by s. 27 and O. 99, and that the approach he stipulated the Taxing Master should adopt accords with s. 27 and O. 99."

24. These are the principles which must be considered by this court in determining whether the Taxing Master erred in his assessment under review in the present case.

THE PERSONAL INJURIES PROCEEDINGS

25. The personal injuries proceedings arose out of a road traffic accident on 20 September 2007. The injured party is a national of Poland but had been living and working in Ireland at the time of the accident. In brief, the circumstances of the accident are as follows. The injured party had, seemingly, been standing in the roadway beside his parked car as he was about to get into it, when he was struck from behind by another vehicle.

26. The driver of the vehicle which struck the injured party left the scene of the accident without stopping. Witnesses were, however, able to provide An Garda Síochána with details of the car's make, model and registration number. An Garda Síochána were also furnished with the wing mirror of the vehicle which had broken off with the force of the impact. The owner of the vehicle has since been traced, but the actual driver has never been formally identified.

27. The injured party sustained injuries to his back, head, neck and elbow. In consequence of these injuries, the injured party was unable to return to his employment in the construction sector. The injured party was, seemingly, ineligible to claim social welfare benefits here because he had not been employed in the Irish State for the requisite period of time. The injured party returned to his home country of Poland. Relevantly, the injured party was subsequently found to be unfit for compulsory military service in Poland on account of his injuries.

28. Initial instructions were taken from the injured party by his solicitors in September 2007. Application was subsequently made to the Personal Injuries Assessment Board in September 2008. The Board issued an authorisation to bring proceedings in June 2009. Thereafter, a personal injuries summons was issued on 9 September 2010.

29. The proceedings were ultimately listed for hearing before the High Court (sitting in Ennis) in June 2016. The parties entered into settlement negotiations a number of days

before the hearing date, and the case was settled for the sum of €175,000. On 7 June 2016, the High Court (Barr J.) made an order, on the consent of the parties, directing that the injured party's costs be taxed, and paid by the defendants when taxed and ascertained. The order includes all reserved costs and the costs of discovery.

30. The costs of counsel have since been agreed, with a brief fee for senior counsel of €6,750, and a brief fee for junior counsel of €4,500. (In fact, the injured party had been represented by two senior counsel and one junior counsel but the costs of only two counsel were recovered. The three counsel agreed to apportion the fees between themselves in accordance with the usual convention).

31. As discussed presently, the party claiming costs places much emphasis on two aspects of the personal injuries proceedings as follows. First, there had initially been confusion as to whether the driver of the vehicle which had struck the injured party had the benefit of insurance. It seems that An Garda Síochána had mistakenly thought that there was a policy of insurance in place. In fact, the policy of insurance had been cancelled prior to the date of the accident. The confusion seems to have stemmed from the fact that there had been a change in ownership of the vehicle shortly before and again after the accident. The initial confusion is said to have necessitated the carrying out of additional work on behalf of the solicitor, over and above that which might be entailed in a typical personal injuries action.

32. The second aspect of the proceedings emphasised is that the injured party had returned to reside in his home country of Poland. This is said to have created logistical difficulties, which were compounded by the fact that the injured party had poor English.

REVISED BILL OF COSTS

33. An initial Bill of Costs had been prepared on behalf of the party claiming costs on 27 April 2017. This is a lengthy document running to some 68 pages. This version of the Bill of Costs had been prepared during the interregnum between the judgment of the Court of Appeal (10 June 2016) and that of the Supreme Court (15 June 2017) in *Sheehan v. Corr*. The judgment of the Court of Appeal (*Sheehan v. Corr* [2016] IECA 168) had indicated that a bill of costs should set out not only the nature of the professional legal service rendered (e.g. consultation, discovery etc.), but also the number of hours spent on that particular item, the level of seniority of the person carrying out the activity (i.e. whether they are a partner or an assistant solicitor or administrative assistant), and the total professional charge for that service (which may include the hourly charge for the relevant solicitor).

34. The Supreme Court, on 15 June 2017, overturned the judgment of the Court of Appeal. The Supreme Court held that the methodology which the Court of Appeal directed should be adopted by the Taxing Master in assessing the general instructions fee is not the correct methodology. In particular, the Taxing Master does not have to value each of the individual items making up the general instructions fee. The Rules of the Superior Courts (pre-2019 version) did not envisage a specific professional charge in respect of each item of professional services within the general instructions fee, nor the hourly rate for each solicitor by whom the work is done, being specified in a bill of costs.

35. The initial Bill of Costs in the present case had been prepared by reference to the judgment of the Court of Appeal, and seeks to identify the time spent on each item together with a professional charge calculated by reference to a partner solicitor's hourly rate. The hourly rate had increased over the nine year life of the case from €300 to €350.

36. Subsequent to the judgment of the Supreme Court, a revised Bill of Costs was prepared and submitted on 12 October 2017. This is a more concise document, running to some 32 pages. A total of 168 items are identified. The overall amount claimed is broadly similar to that in the initial Bill of Costs. (There is a very slight increase, and this appears to reflect the fact that where a fee is prescribed for a particular item of work under the pre-2019 version of Appendix W of the Rules of the Superior Courts, this has now been included).

37. It should be emphasised that the rulings of the Taxing Master relate to the *revised* Bill of Costs (see paragraph 25 of the first ruling). This is the bill of costs which the Taxing Master had been asked to assess. The review of taxation to the High Court, pursuant to section 27(3) of the Courts and Court Officers Act 1995 is directed to item 141 in the revised Bill of Costs, i.e. the solicitor's general instructions fee.

38. The Taxing Master had not been asked to—and did not—tax the initial Bill of Costs. Moreover, as discussed presently, the Taxing Master expressed a concern that it would be safer not to rely on the time estimates in the initial Bill of Costs in circumstances where he had not been given any list or a printout of records from a time recording system. Counsel for the party claiming costs confirmed at the hearing before me that the figures in the initial Bill of Costs for time were estimates, and not based on a contemporaneous recording system.

THE TAXING MASTER'S RULINGS

39. The Taxing Master issued his first ruling on 11 July 2018 ("***the first ruling***"). A second ruling subsequently issued on 11 April 2019 ("***the second ruling***") in respect of objections made to the first ruling by the party claiming costs.

40. To assist the reader in understanding the criticisms which the party claiming costs makes of the first ruling, it is necessary to explain that the Taxing Master had divided the work into three time periods for the purpose of his analysis. (This was, seemingly, done by reference to the submissions made by the paying party which had adopted a similar approach). The three time periods are as follows. Period One covers work undertaken in the period from taking initial instructions from the injured party up to the time that the personal injuries proceedings issued. Period Two covers work undertaken from the time that the proceedings were issued until the notice of trial was served. Period Three covers work undertaken thereafter, to include trial preparation, the briefing of counsel and negotiating the terms of the settlement and having it ruled.

41. The dates of the relevant periods and a narrative of the work being carried out during each period have been summarised as follows at page 12 of the first ruling. This table also indicates the amounts which the respective parties submitted should be allowed, together with the Taxing Master's own determination.

Narrative and period	Defendant	Plaintiff	Taxing Master's determination
Period One 21st of September 2007 to 9th September 2010 Taking initial instructions, engaging in all preliminary investigation, commissioning medical reports and engaging counsel to settle the High Court Proceedings	€3,500	€13,955	€4,250
Period Two 9th September 2010 to 9th September 2014. Issuing proceedings, dealing with verification, replying to particulars, pressing for and considering Detailed Defence, raising particulars of Defence, considering replies, making voluntary discovery, Reply to Defence and setting down for Trial	€10,000	€14,555	€10,000
Period Three 3rd September 2014 to 7th June 2016. Updating Medical Reports, Engineers Report, SI 391/98 compliance, call over and call case on and preparation of the Brief for Counsel, dealing with loss of earnings computation, arranging and dealing with final trial preparation, issuing subpoenas and negotiating a settlement and ruling same	€12,500	€41,923	€21,750
Total	€26,000	€70,433	€36,000

42. The rationale for the Taxing Master's determination is to be found on the preceding three pages of the first ruling (paragraphs 38 to 48). One of the principal issues addressed in the ruling had concerned the level of seniority of the solicitor carrying out all of the work in respect of the proceedings. More specifically, all work had been carried out by a

partner in the firm of solicitors, who commanded an hourly rate which ranged from €300 to €350 over the life of the proceedings. The Taxing Master stated as follows at paragraph 41.

> "41. It appears to me, that it must be the case, on a party and party basis, that not all work will require to be undertaken by a Partner Solicitor. It follows therefore, that not all work could permissibly be chargeable as against the Defendant at such a high rate. If the tasks are mundane or involve routine work or areas of work, where it would be unreasonable to have a Partner Solicitor or where two solicitors attended to issues where as between party and party, it may be more reasonable to only have one, having regard to the general *de minimis* principles attaching to party and party costs."

43. The Taxing Master went on then to state that, in the particular circumstances of the case, it would be safer not to rely on the time estimates. The Taxing Master explained that he had not been informed whether the various time records were estimates, or, alternatively, were accurate time recordings made on a contemporaneous basis as the work was undertaken. The Taxing Master had not been given any list or a print-out of any records from a time recording system, and over the two days of the taxation of costs, there were no submissions at all from the party claiming costs in that regard. The Taxing Master summarised his conclusions on the time estimates as follows.

> "43. Having read and considered the solicitor's files and papers in detail, I am satisfied to conclude that it is safer not to rely on the time estimates. There are no contemporaneous records on the file. The files that were made available to me capture all of the relevant work identified within the bill of costs. I am satisfied that I have gained a good understanding of the nature and the extent of the work undertaken."

44. Given that the criticisms made by the party claiming costs involve a parsing of language used by the Taxing Master, it is necessary to set out the following passages from the ruling in full.

> "45. Having read and considered the files and papers in detail, I conclude that this case was both difficult and time consuming.

> 46. Period One. The solicitors were instructed in November, 2007 (*recte* September 2007), shortly after the accident occurred on 20th September, 2007. It would be wrong to suggest that this file was active at all times between instructions being given in November, 2007 to settlement of the case in 2016, there were significant gaps. For example, the Authorisation did not issue from PIAB until June 19th 2009 with proceedings being issued on September 9th 2010. Allowing for the work which is properly recoverable between those periods I think the allowance below is a fair allowance. The Defendant is not obligated to discharge any legal costs associated with the application to PIAB. I do consider the Defendant's evaluation to be too low and not reflecting the ongoing contact and follow up with the Gardai.
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> 47. Period Two. Following the issue of the Proceedings, there was a detailed notice for particulars, which necessitated a considerable amount of explanation in order to get replies from the Plaintiff. There was also a considerable gap between 2011 until March/April, 2014, when the file became active again. Then the affidavit of verification was completed and there was considerable work in making arrangements to have the Plaintiff medically examined both by the Defendant and also by his treating doctors and the Engineer, this also transcends into the third period, as there was overlapping work, if one takes the Defendant's cut off date of 9th September, 2014. There is a lot of work undertaken in this period which I feel did not and would not warrant the requirement of a Partner Solicitor to engage with, much of the work is routine and administrative and it would be the norm that medical examinations and the required arrangements would be undertaken at a more junior level. Of· course, it is perfectly fair for a client to have a Partner Solicitor undertake such work but it would not automatically follow that a Defendant should have to pay for it on a party and party basis. It follows therefore that I conclude that the Defendant's evaluation for this period is adequate.
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> 48. Period Three. As stated above, there are elements of work catered for in the Defendant's evaluation in period two, that fall to be determined within this category by virtue of the dates that the work was done. This was the most intensive aspect of the file. There was considerable work in Trial preparation, compliance with request for Voluntary Discovery, obtaining details and calculating loss of earnings estimates and all of the associated work relating to the independent medical examination and attending at the locus with the Engineer. Briefing Counsel, obtaining written directions on proofs, compliance therewith and making all arrangements with witnesses and arranging service of Subpoenas and putting witnesses on standby."

45. Following on from the Taxing Master's first ruling, the party claiming costs "carried in" objections in accordance with Order 99, rule 38. (In effect, the "carrying in" of

objections represents a form of internal review whereby the Taxing Master is to reconsider and review his taxation upon such objections against his initial ruling. See, generally, *D.M.P.T. v. Moran* [2015] IESC 36; [2015] 3 I.R. 224).

46. One of the objections related to item 142 in the revised Bill of Costs, i.e. the solicitor's general instructions fee. An oral hearing into the objections was held before the Taxing Master on 28 February 2019. The Taxing Master delivered his ruling on 11 April 2019. The ruling upheld certain objections to reductions in the amount paid in respect of medical report fees. The objection in respect of the solicitor's general instructions fee was disallowed.

47. The Taxing Master confirmed that he had read and reviewed all the documentation submitted to him. He described the documents as containing familiar material which would be generated by any solicitor engaged in a case of this nature. See paragraph 22 of the second ruling as follows.

> "22. Having reviewed the material again and consulted the submissions made by both parties, I have concluded that there is no basis to alter the conclusions that I have reached. I conclude that having examined the nature and extent of the work, that the fee allowed was fair and reasonable and adequately covers the nature and extent of the work undertaken on a party and party basis."

48. The Taxing Master went on then to clarify the point made in his first ruling as to all of the work having been done by a solicitor at partner level. See paragraph 23 of the second ruling as follows.

> "[…] In so far as the Plaintiff expressed concerns that in reaching my conclusions, that I was in some way being prescriptive as to how a Solicitor should go about representing a client. If that is the conclusion reached, respectfully I say that was not what either I intended or what the Ruling states. I was relying on a quote from Cafolla v. Kilkenny & Ors. [2010] 2 ILRM 207; [2010] IEHC 24 ('the Cafolla case') Ryan J., concluded '*it is obvious that not every piece of work is going to be charged at the highest rate. Or, rather, not every piece of work can be recovered from the paying party at the highest rate ... thus for example, purely routine work would be charged at one rate for whatever time was appropriately and*

> *reasonably taken up by it, whereas other work would call for a higher level of remuneration because the responsibility taken in doing that work was higher and because it needed a much more qualified person to do it*'. In so far as the Plaintiff feels that I was being prescriptive or that these findings were prejudicial, I most certainly did not intend same to be such, it was merely an extract from a decision of the Court that I was making reference to. It goes without saying that the Plaintiffs Solicitors' firm are held in the highest esteem and regard."

APPLICATION FOR REVIEW OF TAXATION

49. The party claiming costs issued a notice of motion on 1 May 2019 seeking a review of the taxation of the revised Bill of Costs dated 12 October 2017. The application came on for hearing before me on 17 December 2020.

50. The hearing took the form of a remote or virtual hearing, and, accordingly, the motion papers grounding the application for the review of taxation had been filed in advance by the party seeking the review. At the hearing, the parties were in agreement that a full set of papers in the underlying personal injuries proceedings, and the solicitor's case file, should also be made available to the court. These additional papers were subsequently sent to the Central Office of the High Court early in January 2021, and have been reviewed by me in preparing this judgment.

51. Leading counsel on behalf of the paying party has expressly invited me to consider certain of the pleadings, including, especially, the request for, and response to, the notice for particulars of claim.

DECISION ON REVIEW OF TAXATION

52. Counsel for the party claiming costs provided very helpful written submissions to the court on the morning of the hearing, and supplemented these by oral submission. The overarching submission was to the effect that the reductions applied by the Taxing Master to the three time periods identified were severe and, thereby, in error; and were "unjust"

in all the circumstances having regard to the nature and complexity of the work on the case itself.

53. It should be explained that no complaint has ever been made by the party claiming costs to the effect that the Taxing Master erred in subdividing the solicitor's general instructions fee into figures referable to the three time periods identified. This subdivision was not challenged in the objections of 30 July 2018, and no criticism was made of the subdivision at the hearing before me.

54. Strictly speaking, it is not necessary for the Taxing Master to value individual items making up the general instructions fee. This is because, as explained in detail by the Supreme Court in *Sheehan*, the pre-2019 version of Order 99 envisaged the general instructions fee being an omnibus figure. I am satisfied that the approach adopted by the Taxing Master in the present case of identifying the allowance made for work carried out in three broad time periods, whilst not mandatory, is certainly not inconsistent with the judgment in *Sheehan*. The approach is of assistance given that the work had been carried out over a relatively lengthy period, spanning some nine years. The subdivision affords the parties—and ultimately the court in exercising its review jurisdiction—a fuller understanding of the assessment of the value of the work.

55. The grounds of review pursued by the party claiming costs can conveniently be addressed under a number of broad headings as follows.

(i) Identifying the appropriate defendants

56. Much emphasis has been placed on the work necessitated in identifying the appropriate defendants to the proceedings. The ownership of the vehicle, which struck the injured party, had changed a number of months before the accident, only for the vehicle to be transferred back into the name of the original owner shortly after the accident. An Garda Síochána had initially indicated that the car had been covered by a policy of insurance as

of the date of the accident. This transpired to be incorrect: the policy of insurance had been cancelled a number of months after the first change in ownership.

57. The approach ultimately taken by the injured party's solicitor was to name the Motor Insurers Bureau of Ireland, and both of the individuals who had owned the car, as respondents to the application to the Personal Injuries Assessment Board. All three were subsequently named as defendants to the personal injuries proceedings.

58. Counsel drew my attention to the summary, at page 23 of the revised Bill of Costs, of the work referable to the insurance issue.

> "In particular, the Gardai having located the car and inspected the insurance disc, informed the Plaintiff's Solicitors that the car involved in the accident was insured from the 14th June 2007 until the 13th June 2008, which the Plaintiff's Solicitors following enquiries discovered was not the case. It later transpired that the second defendant was actually a named defendant (*recte*, driver) on the third defendant's insurance policy which was cancelled in August 2007, (date of accident 20th September 2007) and car ownership was transferred to the second defendant in May 2007 and transferred back to the third defendant on the 1st October 2007.
>
> Proposed defendants were requested in early course to admit responsibility for the accident, but none did so.
>
> Companies office searches and Land Registry searches etc. were later required in order to serve the third defendant personally with proceedings when issued.
>
> It was necessary for the Plaintiff's Solicitors to conduct its own investigation enquiries due to delays and difficulties obtaining the necessary information from Gardai. The necessity for these independent enquiries was borne out by the fact that the Garda information proved inaccurate and in particular, the vehicle was not insured contrary to the position notified and confirmed by the Gardai."

59. The first ground of review advanced is that the sum of €4,250 allowed for Period One did not properly reflect this work. Counsel submits that the Taxing Master fell into error. Specifically, it is submitted that the Taxing Master did not evaluate the work in correct

terms because he did not "go back and assess" that this was a case with complexity over and above a straightforward personal injuries case.

60. Counsel accepted that the Taxing Master is not required to carry out a "minute assessment" of each item, but can come to a "global" or "overall" assessment of different matters. It is submitted that the Taxing Master's reasoning must be discernible on each "topic" which the ruling is covering.

61. Counsel further submitted that the question of whether the driver had been insured had been resolved by 16 September 2008, and that this represents the appropriate "cut off" date in assessing the work attributable to this issue.

62. My conclusions are as follows. The party claiming costs has failed to establish that the Taxing Master erred in his assessment. The Taxing Master's first ruling expressly recognises that the case was "both difficult and time consuming" (paragraph 45), and the Taxing Master increased the amount allowable for Period One from the sum suggested by the paying party to reflect what the Taxing Master described as the ongoing contact and follow up with An Garda Síochána (paragraph 46). The Taxing Master has also confirmed in his second ruling that he has read and reread the solicitor's file. It cannot be said, therefore, that the Taxing Master failed to have regard to this matter. No error of the type described in *Bloomer v. Incorporated Law Society of Ireland* (cited at paragraph 8 above) has been established.

63. The initial confusion on the part of An Garda Síochána as to whether or not there was a policy of motor insurance in place, and the revolving ownership of the vehicle, were certainly unusual features of the case. However, the additional work attributable to these matters is adequately compensated for in the overall sum of €4,250 allowed by the Taxing Master. It is evident from both the terms of the revised Bill of Costs, and from my own perusal of the solicitor's file, that the amount of additional work created by these matters

during the period 21 September 2007 to 9 September 2010 was not extensive. Hibernian Insurance had, in fact, written to the injured party's solicitor as early as 20 November 2007, confirming that the policy of insurance had been cancelled on 10 August 2007, and the vehicle was thus not insured as of the date of the accident on 20 September 2007. Indeed, even before receipt of that letter, the injured party's solicitor had already submitted a notification to the Motor Insurance Bureau of Ireland on 14 November 2007 to address the contingency of an uninsured driver.

64. Whereas a number of telephone calls were made to An Garda Síochána during this period, these were administrative in nature and cannot be said, for example, to have required a level of skill or specialised knowledge such as to justify the high level of fees contended for.

65. Even if one takes the later "cut off" date suggested by counsel, i.e. 16 September 2008, the number of hours actually spent on this specific issue is relatively small. (Much of the correspondence during this period is directed to the separate issue of the logistics of the injured party returning from Poland for a medical examination). The most significant item of work directly relevant to the insurance issue was the sending of a short letter to An Garda Síochána on 28 August 2008 seeking clarification of the position in respect of insurance. The operative part of the letter reads as follows.

> "After making enquiries we were informed by your office of the following:
>
> The owner of the car is Andrei Dragantu of 23, Ballytyne Place, Steamboat Quay, Limerick. We were also informed that the owner was insured with Hibernian insurance and we were provide with the following Policy No: MR440760618.
>
> On making further enquiries with Hibernian Insurance we have received conflicting information, whereby Hibernian assert that it did not insure vehicle 00 L 2616 on the date of the accident, 20th September 2007 and that the policy was cancelled with effect from 10th August 2007.

> We would be grateful if you could please clarify the position in light of the above."

66. It is important to recall that Period One refers only to the work done up to the point of the issuance of the personal injuries summons. Given that the work incurred in making the application to the Personal Injuries Assessment Board is not reckonable for taxation purposes, the sum of €4,250 allowed by the Taxing Master is much higher than one would expect for such an early stage of personal injuries proceedings. The sum allowed is generous, and more than compensates the work referable to the insurance issue.

67. For the sake of completeness, it should be recorded that counsel for the claimant solicitor confirmed that no objection is taken to the exclusion of the costs associated with the making of the application to the Personal Injuries Assessment Board. This is consistent with section 51B of the Personal Injuries Board Assessment Act 2003.

68. On a separate point, there was some suggestion at the hearing before me that, on a literal interpretation, paragraph 46 of the first ruling might be read as confining costs to the period of June 2009 to September 2010. This interpretation necessitates reading the phrase "those periods" as referring to the two dates in the preceding sentence. With respect, this would be a highly artificial interpretation of the paragraph, and would ignore the fact that the Taxing Master expressly refers to the "ongoing contact and follow up" with An Garda Síochána. Given that the contact and follow up occurred principally prior to September 2008, it is obvious that the costs allowed under Period One are intended to include all costs properly and necessarily incurred during the entirety of the period, i.e. between the dates of 21 September 2007 and 9 September 2010.

69. It is inappropriate to attempt to read single sentences, in what is a coherent and logically structured ruling, in isolation. It is also telling that no complaint had been made in the objections of 30 July 2008 to the effect that the costs allowed for Period One were confined to a shorter period.

(ii) Reference to file not being active at all times

70. The next ground of review advanced is to the effect that the Taxing Master was in error in implying that the solicitor's file was inactive for a period between 2011 and March/April 2014. This ground is based on a parsing of paragraph 47 of the first ruling. The paragraph has been set out in full earlier, and, as appears, the Taxing Master observed that there had been a considerable gap between 2011 until March/April 2014, when the file became active again.

71. To assess this complaint properly, it is necessary to consider the terms of the revised Bill of Costs in order to identify the items of work claimed for the relevant period. It is to be reiterated that this is the version of the Bill of Costs which was being taxed.

72. The relevant items have been extracted from the revised Bill of Costs, and are set out in tabular form below. (The numbered references are to the relevant item as per the revised Bill of Costs).

DATE	NO.	NARRATIVE
21 August 2012	36	Letter to Harrison O'Dowd enclosing Replies to Particulars. The Particulars raised were extensive comprising 37 separate particulars with an additional 12 sub-categories of particulars and necessitated a number of consultations with the Plaintiff and other investigations.
8 November 2013	37	Warning letter to Harrison O'Dowd re outstanding Defence to Personal Injuries Summons served on defendants in March and April 2011
21 November 2013	38	Received Defence from Harrison O'Dowd Solicitors and requesting compliance with S.I. 391 of 1998. Perusing, noting and considering 5 page full Defence entered by defendants comprising 19 separate paragraphs, denying liability, alleging issues of negligence, contributory negligence, breach of duty and breach of statutory duty by the Plaintiff, alleging Plaintiff in breach of conditions of MIBI agreement and alleging Plaintiff not entitled to compensation.

		Perusing, noting and considering same.
25 November 2013	39	Received letter from Harrison O'Dowd Solicitors wherein they requested Voluntary Discovery on Oath of all documents and records of the Plaintiff's hospital admissions records at the Mid Western Regional Hospital Limerick and in Poland including all X-Rays, scans and reports from the date of the accident. The Schedule attached thereto set out the reasons why discovery was sought. Perusing, noting and considering same.
25 February 2014	40	Letter to Harrison O'Dowd re failure to comply with s.14 of CLCA 2004 and requiring Affidavit of Verification, advising Defence not properly served

73. As appears, the only item of work claimed for the calendar year 2012 is the furnishing of a reply to the notice for particulars raised on behalf of the defendants. The request for particulars is typical of the type raised in personal injuries proceedings arising out of a road traffic accident. Particulars had been sought in respect of the circumstances of the accident, the medical treatment received immediately thereafter, and the reporting of the accident to An Garda Síochána. Particulars were also sought in respect of any previous road traffic accidents (there were none), medical treatment and prognosis, and employment and earnings history.

74. Replies were provided in respect of basic matters, such as the circumstances of the accident, the identity of witnesses, and the names of the medical practitioners who had treated the injured party. No details were provided in respect of the loss of earnings nor in respect of the special damages being claimed. A number of the particulars raised were contingent on the injured party having been involved in another road traffic accident, and did not require to be answered.

75. Even allowing that the preparation of the limited replies might have involved a number of hours' work, and will have necessitated liaison with the injured party in Poland, the

fact remains that only a single item of work is claimed in the revised Bill of Costs for the entire of 2012.

76. The next item of work claimed for is said to have been carried out on 8 November 2013, that is some fourteen months later. This consisted of the sending of a letter calling for the delivery of a defence. The solicitor received the defence on 21 November 2013, and a letter seeking discovery on 25 November 2013. It seems that the solicitor did not receive instructions in respect of (i) raising particulars on the defence, and (ii) the affidavit of discovery, until March and June 2014, respectively. (See items 41 and 44 in the revised Bill of Costs).

77. Counsel for the party claiming costs accepts, very properly, that the question of a file being "active" or "inactive" is not binary; and that, by the very nature of litigation, the work being done on a solicitor's case file will ebb and flow. Counsel also accepts that the term "active" implies some degree of *ongoing* work, and that a file in respect of which work had been carried out on a single day in a calendar year could not be said to be "active". Nevertheless, the position of his client is that it is "unfair" of the Taxing Master to refer to there being "gaps" in activity.

78. The submission of counsel ran as follows. There was work being done on the file during the referenced period. It may not have been active at all times, but neither was it a file which "had dust laying on it and had not been touched" for two-and-a-half years. The Taxing Master is said to have made an error to a "substantial degree" such that the assessment of costs is "unjust" as a result.

79. Counsel further submits that the "only inference" which the court can draw from the wording of paragraph 47 of the first ruling is that the Taxing Master effectively ignored or overlooked the limited work actually carried out during 2012 and 2013.

80. With respect, none of these criticisms of the Taxing Master's ruling is well founded. The interpretation which the party claiming costs seeks to attach to paragraph 47 of the first ruling is artificial. The simple fact of the matter is that a minimal amount of work had been carried out during the years 2012 and 2013. This is evident from the revised Bill of Costs (which is what the Taxing Master was being asked to measure), and from the correspondence file. It is also evident that the most intensive period of work on the file occurred between 3 September 2014 to 7 June 2016.

81. That the file had not been active is confirmed by the fact that the injured party's side had had to serve a notice of intention to proceed on 27 November 2013. A notice of intention to proceed is only necessary when there has been no proceeding in a cause for one year from the last proceeding (Order 122, rule 11).

82. Against this factual background, it was legitimate for the Taxing Master to observe that the file did not become active again until March/April 2014. The ruling simply contrasts the "considerable work" undertaken from March/April 2014 to the previous two years. The description of a file as not being "active" is not synonymous with there being no work at all carried out. It is reasonable to characterise a file where the only fee item recorded for a period of some fourteen months is the furnishing of a largely uninformative reply to particulars as not being "active" during that period. It can hardly be suggested that a case file which had been open for a period of some nine years is "active" throughout all of that time.

83. There is no warrant for inferring from the use of this language that the Taxing Master had, inexplicably, overlooked items 36 to 40 of the revised Bill of Costs.

84. Lest I be incorrect in this finding, even if the Taxing Master had overlooked these items, the error does not result in the decision on the taxation being "unjust". The items allegedly said to have been overlooked consist, in the main, of a largely uninformative

reply to particulars and the perusal of a defence and a request for voluntary discovery. Even if contrary to my earlier finding, these items were overlooked, the monetary value of same is very small relative to the overall instructions fee allowed (€36,000). These items would be recoverable on a party and party taxation at less than €1,000. An error which would be measured in hundreds of euros only is not unjust in this context.

85. The party claiming costs also makes criticism of the fact that paragraph 46 of the first ruling contains the general observation that it would be "wrong" to suggest that this file had been active at all times between instructions being given and the settlement of the case. The gist of the criticism is that such a general observation is out of place in that this part of the ruling should have been directed solely to the first time period identified, i.e. the time between the taking of initial instructions and the institution of the proceedings some three years later. It is alleged that the Taxing Master has made an unwarranted determination on work carried out in respect of the case file generally over the entire nine years.

86. Again, these criticisms are unjustified. As discussed earlier (at paragraph 54 above), there is no obligation on the Taxing Master to breakdown the instructions fee in the manner which he did. Accordingly, it is incorrect to suggest that it represents an error to make a *general* observation in the context of the discussion of the work done in Period One. The Taxing Master was not required to set out his rationale in hermetically sealed paragraphs.

87. More fundamentally, however, and for reasons similar to those explained above, it is entirely legitimate for the Taxing Master to observe that the level of activity and work being carried out varied during the nine year lifetime of these proceedings.

(iii). Description of certain work as "routine and administrative"

88. The next ground of review concerns the Taxing Master's description of certain work as "routine and administrative". As appears, in particular, at paragraph 47 of the first ruling, the Taxing Master suggests such work would normally be undertaken at a more junior level than partner level, and, as such, is not recoverable on a "party and party" basis. This point is elaborated upon by the Taxing Master in his ruling on the objections, by reference to the judgment in *Cafolla v. Kilkenny* [2010] IEHC 24; [2010] 2 I.L.R.M. 20.

89. Counsel for the party claiming costs criticises this approach, saying that insufficient weight was given to the fact that the solicitor was engaging with a client who had poor English, and was not resident in the jurisdiction. It is said that further account should have been taken of the "considerable work" which had to be done to guide the injured party through the proceedings.

90. My conclusions are as follows. The Taxing Master's approach was entirely correct. Section 27 of the Courts and Court Officers Act 1995 requires that the Taxing Master assess and determine the value of the work done by a solicitor. Order 99, rule 37(22)(ii) provides that, in exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances. Amongst the criteria to be considered are (a) the complexity of the item, and (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor. The Supreme Court in *Sheehan* suggested (at paragraph 78 of the reported judgment) that identifying the doer of the work, and his or her place in the hierarchy of fee earners, at the same time as identifying the work done, is a sensible approach.

91. It is evident from a review of the solicitor's file in the present case that the work ranged widely in complexity, and in the skill and specialised knowledge required to carry it out. Whereas issues such as the identity of the appropriate defendants, and the settlement

negotiations, did call for specialised knowledge (and for the assistance of counsel), the Taxing Master's characterisation of much of the work carried out in Period Two as "routine and administrative" is accurate. This work could have been done as effectively by a less experienced solicitor, or, in some instances, by a trainee solicitor or an administrator. As appears from the correspondence file, for example, much time was spent in attempting to secure an advance payment from the defendants' solicitors in respect of the injured party's expenses in travelling to Ireland for a medical examination. The Taxing Master's observation that such work is normally carried out at a more junior level is valid.

92. It is, of course, open to a client and solicitor to arrange to have all work carried out by an experienced solicitor at partner level. Where this occurs, however, the party claiming costs cannot expect to recover all of the costs at a scale applicable to a partner. Put otherwise, not all work performed by an experienced solicitor at partner level will be recoverable in a taxation of costs at the higher rates.

93. The party claiming costs in the present case has failed to demonstrate any error on the part of the Taxing Master in this regard. In assessing a solicitor's general instructions fee, the Taxing Master is required to examine not only the nature and extent of the work done, but must also determine the *value* of such work. This necessitates consideration of the complexity of the work, and of the skill and specialised knowledge required to carry it out. The underlying value of routine and administrative work is not increased merely because that work is done by a highly experienced solicitor.

94. The point may be illustrated by reference to the replies to particulars delivered on 20 August 2012. As discussed at paragraphs 73 to 74 above, the request for particulars is typical of the type raised in personal injuries proceedings arising out of a road traffic accident. The limited answers actually provided could have been readily collated, and

would not have called for significant skill or expertise on the part of a solicitor. Yet the value attributed to this work by the party claiming costs is in excess of €3,000. This is due, in large part, to the fact that the value of the work has been calculated on the basis of an hourly rate of €300. This fee is excessive and out of all proportion to the value of the work. It illustrates the folly of attempting to value work solely by reference to the experience and expertise of the person carrying out the work, without having proper regard to the routine nature of the work itself.

OTHER CONCERNS RAISED BY SOLICITOR

95. For the sake of completeness, it is necessary to address briefly a number of "concerns" raised belatedly by the solicitor acting for the party claiming costs. The concerns arise out of two statements made by the Taxing Master. These statements are referable to the judgment delivered on an application made to the High Court (Barr J.) for a payment out pending the completion of the taxation process. It may be helpful to explain what that judgment said, before returning to consider the two statements of the Taxing Master.

96. The pre-2019 version of Order 99, rule 1B(5) authorises the High Court to direct the payment out of a reasonable sum on account pending the taxation of costs. The High Court (Barr J.) acceded to such an application on behalf of the party claiming costs in the present case in a written judgment delivered on 28 July 2017, *Antecki v. Motor Insurers Bureau of Ireland* [2017] IEHC 503; [2018] 2 I.R. 232. There are two aspects of the judgment which were subsequently referenced by the Taxing Master, as follows. First, the recital of the procedural history set out in the judgment suggests that the Taxing Master had considered that there was "some problem" with the initial Bill of Costs in this case, and that the Taxing Master adjourned a proposed hearing until 18 October 2017 for

that very reason. In fact, the parties themselves had sought an adjournment in order to allow a revised Bill of Costs to be prepared.

97. Secondly, the judgment records a submission on the part of the party paying costs that they had been advised by their legal costs accountant that the solicitor's professional fee for the injured party would probably tax at circa €35,000 / €40,000.

98. A copy of the judgment had been included, as an appendix, by the party claiming costs at the time it submitted its revised Bill of Costs. The legal costs accountant acting on behalf of the paying party subsequently complained to the Taxing Master that his clients were prejudiced by the disclosure of this estimate in that the Taxing Master, as decision-maker, had been made aware of their advice. This, it was submitted, represented substantial grounds for recusal. The Taxing Master concluded that he should not recuse himself, for the reasons set out in a written ruling of 19 January 2018.

99. The first aspect of Barr J.'s judgment was subsequently referenced by the Taxing Master in his ruling of 11 July 2018. More specifically, at paragraph 25 of the ruling, the Taxing Master explains that the reason for the adjournment of the proposed hearing had not been due to any problem that he had with the initial Bill of Costs. The Taxing Master stated that it is "misleading" to suggest otherwise.

100. The second aspect of the judgment is referenced, indirectly, in the report of 10 May 2019 which the Taxing Master provided to this court in accordance with Order 99, rule 38. The report mistakenly states that it had been the *plaintiff* who had brought an application for recusal when, of course, it was the defendants who had done so.

The solicitor's concerns

101. Counsel on behalf of the party claiming costs submitted, on instructions, that the use of the word "misleading" by the Taxing Master at paragraph 25 of his first ruling is a cause of concern for the solicitor. It is further submitted that this may have impacted

subliminally on the Taxing Master's consideration of the case. Counsel very properly acknowledged that his side is <u>not</u> in a position to allege any objective bias on the part of the Taxing Master.

102. Referring to the mistaken reference to the plaintiff—rather than the defendants—having made the application for recusal, counsel submits that his solicitor has a concern that the Taxing Master may have misconstrued both the adjournment application and the recusal application.

103. With respect, there is no basis for the solicitor's concerns in either regard. First, as to the explanation of the circumstances leading up to the adjournment of the proposed hearing in July 2017, there is no reasonable basis for reading paragraph 25 of the Taxing Master's initial ruling as accusing the solicitor of having misled him. Rather, the Taxing Master is merely correcting an error which seemingly arose during the course of submissions made on behalf of the paying party during the course of the application to the High Court for a payment out. The reference to the adjournment appears in that part of the judgment where Barr J. is summarising a submission made to him *on behalf of the defendants*, i.e. the paying party. The passage in the Taxing Master's ruling cannot be read as implying any criticism of the solicitor claiming costs.

104. As to the mistaken reference to the plaintiff—rather than the defendants—having made the application for recusal, this is obviously no more than a slip of the pen. The Taxing Master, having delivered a detailed written ruling on the recusal application, can hardly be said to have forgotten which side made the application. It would be fanciful to assume, first, that the Taxing Master incorrectly thought that the party claiming costs had made the application, and, secondly, that the fact of a party having made a recusal application at an earlier stage should preclude the Taxing Master from having any further involvement in a taxation. The careful and considered ruling on the recusal application

by the Taxing Master confirms that he is fully cognisant of his obligations to discharge his role in a fair and impartial manner.

105. It is also telling that the concerns now raised by the solicitor are not articulated in her affidavit grounding the application for review to the High Court nor in the written legal submissions filed on her behalf. Indeed, the written legal submissions adopt the following pragmatic approach to the misstatement of the party making the recusal application.

> "7. Unfortunately, the Taxing Master's report to the Court (page 132 of the set of papers) records that the Plaintiff had applied for the Taxing Master to recuse himself. This seems to be in error, as such an application to recuse was brought by the Defendants. That application was rejected by the Taxing Master on the 19th January 2018. That is only a background factor (and is referred to as such by the Taxing Master himself in his report to the Court)."

106. The recusal application is, indeed, only a background factor. It could not possibly give rise to any reasonable cause of concern.

107. In summary, the concerns articulated on behalf of the solicitor are not well founded, and certainly do not represent grounds for setting aside the decisions on the taxation.

CONCLUSION AND PROPOSED FORM OF ORDER

108. The party claiming costs has not demonstrated any error on the part of the Taxing Master in his assessment of the sum properly allowable in respect of the solicitor's general instructions fee. The Taxing Master properly examined the nature and extent of the work done, and assessed the value of that work by reference to the provisions of section 27 of the Courts and Court Officers Act 1995 and the pre-2019 version of Order 99, as interpreted by the Supreme Court in *Sheehan v. Corr* [2017] IESC 44; [2017] 3 I.R. 252.

109. The allowance of €36,000 made by the Taxing Master for the solicitor's general instructions fee is a reasonable allowance, and could not conceivably be said to be

"unjust" within the meaning of section 27(3) of the Courts and Court Officers Act 1995. The rationale for awarding the successful party in litigation its costs is that a party who has had to pursue proceedings in order to establish their rights is entitled to an expectation that, if successful, they will not have to suffer costs in so doing (*Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535). However, an award of costs is not intended as an indemnity against *all* costs incurred: rather a party claiming costs shall be allowed such costs as were necessary or proper for the attainment of justice or for enforcing or defending their rights.

110. One of the factors to be considered in assessing costs is the importance of the cause or matter to the client, and, where money is involved, its amount. In determining whether an allowance for costs is "unjust" in personal injuries proceedings, it is legitimate to have some regard to the amount of damages recovered. Generally speaking, there should be some proportionality between the level of damages which were recovered by the injured party and the level of legal costs. There will, of course, be exceptions to this: a case might, for example, present difficult legal issues with the consequence that the costs are higher than normal relative to the damages recovered. The present case is not, however, such a case. Whereas the fact that the injured party was resident outside the jurisdiction and did not speak English fluently may have necessitated additional work, the proceedings were not legally complex.

111. These personal injuries proceedings were ultimately settled in the sum of €175,000, together with an award of costs. It would be out of all proportion to the value of, and complexity of, the case were the solicitor's general instructions fee to be allowed in the sum of €70,433.51. This is especially so where the solicitor had instructed senior and junior counsel for the hearing of the action and had the benefit of their assistance in the

settlement negotiations. (The costs of counsel have since been agreed, with senior counsel being allowed a brief fee of €6,750, and junior counsel a brief fee of €4,500).

112. Were the sum claimed in respect of the solicitor's general instructions fee to have been allowed by the Taxing Master, then the overall legal costs (exclusive of VAT) would be close to €90,000, that is, roughly equivalent to half the value of the sum of damages recovered by the injured party. The figure actually allowed has the result that the injured party will recover costs of approximately €55,000 (exclusive of VAT), in addition to the damages of €175,000. It cannot be said that by allowing costs at this level the Taxing Master has reached a decision which is "unjust".

113. In conclusion, the application for review of taxation must be dismissed in circumstances where neither of the two criteria under section 27(3) of the Courts and Court Officers Act 1995 have been met.

114. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

115. Insofar as the costs of the review of taxation are concerned, the default position is that the paying party, i.e. the defendants in the personal injuries proceedings, would be entitled to their costs in accordance with the provisions of section 169(1) of the LSRA 2015 as they have been "entirely successful" in the proceedings. If the other side wishes to contend for a different form of costs order, then written submissions should be filed

by 3 February 2021. Any replying submissions on behalf of the defendants should be filed by 17 February 2021. These dates are peremptory, and no extension of time will be allowed. The submissions should not exceed 2,500 words.

Appearances

Tony McGillicuddy on behalf of the reviewing party instructed by Hayes Solicitors (Limerick)
Finbarr Fox, SC and Gráinne Berkery on behalf of the paying party instructed by Harrison O'Dowd Solicitors (Limerick)

Approved Garrett Simons