STATE (CUSSEN)

1979 No. 249 S.S.

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FACULTY OF ... 20 FEB ... U.C.C.

THE STATE (AT THE PROSECUTION OF
GERALD H. CUSSEN)

-v-

JOSEPH BRENNAN & ORS. (No 2)

Judgment of Mr. Justice Barrington delivered the 1st day of December 1983.

This is a motion for review of taxation of costs brought pursuant to the provisions of Order 99 Rule 38 (4) of the Rules of the Superior Courts. In view of the difficulty of the issues arising I heard oral evidence on the motion.

The case giving rise to the review (which is now reported in 19 Irish Reports at page 181) concerned an appointment to the Office of Paediatrician to the Southern Health Board. By virtue of an agreement between the Southern Health Board and University College Cork the successful candidate for the post of Paediatrician to the Southern Health also became Professor of Paediatrics at University College Cork.

The applicant in the present case was the successful candidate for the post and was so informed by the Southern Health Board by letter dated the 1st of February 1979.

The applicant duly accepted the appointment and by letter

dated the 6th of April, 1979 resigned from his position as Consultant Paediatrician to the Mid Western Health Board which resignation was accepted by them on the 20th of April, 1979. He also put in hands the purchase of a new house in Cork and himself and his wife made arrangements and planned their future lives on the basis of the applicant taking up the joint posts of Paediatrician to the Southern Health Board and Professor of Paediatrics at University College Cork.

The prosecutor in the proceedings was an unsuccessful candidate for the post of Paediatrician to the Southern Health Board. On the 21st of May, 1979 he applied for and obtained a Conditional Order of Certiorari against the respondents who are the local Appointments Commissioners quashing their recommendations for the said post unless cause shown to the contrary on the grounds, inter alia, that they had, in excess of their powers, purported to impose, as a qualification for the post, a test in competence in oral Irish. The prosecutor also obtained a Conditional Order of Mandamus directing the Commissioners to issue a new recommendation based exclusively on a consideration of qualifications prescribed for the appointment by the Minister for Health and excluding any

credit whatever for a knowledge of Irish.

It was directed that the applicant should be served with notice of the making of the said conditional orders.

The respondents showed cause by Affidavit to the said Conditional Orders and the applicant also filed an Affidavit setting out the steps he had, in good faith, taken on the basis of the said appointment being valid.

On the 2nd of July 1979 the prosecutor moved to make absolute the Conditional Orders of Certiorari and Mandamus notwithstanding cause shown.

On the 13th of July 1979 the Chief State Solicitor, on behalf of the respondents, served notice of intention to cross-examine the prosecutor on his Affidavit.

On the 23rd of July, 1979 Mr. Justice Butler made absolute the Conditional Order of Certiorari but allowed the cause shown against, and discharged, the Conditional Order of Mandamus.

The said order recites that it was made after reading the various affidavits and after hearing what was offered by counsel for the prosecutor "and by counsel for the respondents and by counsel for the notice party".

The prosecutor, the respondents and the notice party all appealed against Mr. Justice Butler's order.

After the appeals and cross-appeal had been heard, but before the Supreme Court had delivered judgment, the prosecutor by notice of motion dated the 15th November, 1979 applied for leave to adduce further evidence in relation to the appeals and cross-appeal. The Court by order dated the 5th of December, 1979 refused this motion.

The Court delivered judgment on the 20th of December, 1979 and, by a majority, held that the Commissioners had no power to impose the oral Irish test complained of but that the prosecutor, by his delay in moving for Certiorari, had disentitled himself to relief.

Mr. Justice Henchy, delivering the majority opinion of the Court, said (at page 196, 197 of the reported judgment) -

> "On the 19th January, 1979, Dr. Kearney was informed that he had been recommended by the Commissioners for the appointment. At that time he held an office under the Mid Western Health Board. He notified that Board on the 6th April, 1979 of his new appointment and that it would commence on the 1st August, 1979. Thereupon, he instructed his solicitors in Cork to

"act for him in connection with the purchase of a house in Cork, and he and his wife made arrangements and planned their lives on the basis that they would be going to live in Cork.

In my view, a situation was allowed to develop to a point when it would be unfair and not in the public interest to set aside the Commissioners' recommendation of Dr. Kearney for this post. Dr. Kearney and his wife, the Mid Western Health Board and University College Cork, were all induced to make plans for the future and to enter into commitments from which they should not now be compelled to withdraw. They entered into those commitments because they were led to believe that Dr. Kearney's appointment was an accomplished fact. The prosecutor, because of his dilatoriness, cannot now be heard to say that that appointment was wrongly made".

The Court accordingly discharged that portion of Mr. Justice Butler's order which had granted an absolute Order of Certiorari and affirmed that portion which had refused to make absolute the Conditional Order of Mandamus.

The Court then went on to provide that the prosecutor should pay to the respondents one half of their costs of the proceedings in the High Court and in the Supreme Court when taxed and ascertained such costs to be taxed on the basis of proceedings in Certiorari only. It then went on to provide -

> "The prosecutor and the respondents do each pay to the notice party one half of his costs of the proceedings in the High Court and of this appeal when taxed and ascertained the Taxing Master in taxing such costs to have regard to the fact that the said notice party was in fact a notice party only and took no part in the substantial argument herein".

Much of the controversy in the hearing before me has turned on the correct interpretation of this portion of the Supreme Court Order.

In his report to the Court dated the 13th of March, 1981 the Taxing Master dealt with various items in dispute between the parties.

Counsels' fees in the High Court.

Mr. James O'Driscoll S.C. who appeared for the applicant in the High Court marked a fee of £420. Junior Counsel marked a

corresponding fee. These appear at items 24 and 28 of the Bill. The Taxing Master, in his report, deals with these two matters as follows -

"These two Items relate to Senior and Junior Counsels' Brief Fee on the hearing in the High Court. At the Taxation and again on the hearing of the Objections I made special enquiry as to these fees and I found as follows and so beg to report to this Honourable Court. I found that Counsel marked the fee and that this was done at the conclusion of the case. The Solicitor for the Costs appeared in person and he confirmed to me that he did not discuss these fees with Counsel but merely acquiesced in the figure as marked by Counsel. The said Solicitor for the Costs did not determine or fix these fees nor did the said Solicitor for the Costs act in a reasonable and prudent manner as a practising Solicitor who would consider the proper fee to offer suitable Counsel nor did the said Solicitor for the Costs have regard to the practice of barristers as to marking fees in so far as they are accepted by Solicitors in practice. Having heard submissions by the Solicitors for the Costs and the Chief

"State Solicitor in reply I came to the conclusion that I could not allow the Brief Fee as charged and in the exercise of my judicial discretion I could only allow the fees in part and not in whole and that the part which I would allow was the sum of £131.25p for Senior Counsel with the appropriate deduction for Junior Counsel and I Ruled accordingly. Nothing was put to me on the hearing of the Objections which induced me to alter the Ruling which I had made on the Taxation."

<u>Consultation</u>

Items 31, 32, 33 and 34 of the Bill related to the holding of a consultation and included counsels fees, attending on counsel, and the cost of the consultation room. On these items the Taxing Master reports -

"These Items refer to a consultation. As the matter was heard on affidavit there were no witnesses with whom Counsel could consult. I therefore disallowed these Items".

<u>Counsels' fees in Supreme Court.</u>

Mr. O'Driscoll marked a fee of £210 in the Supreme Court and his junior marked ⅔ of this. On these items the Taxing Master reports -

"These relate to Counsels' Brief Fees in the Supreme Court. My findings in regard to these Brief Fees are identical to the observations and findings which I have set out above in relation to Counsels' Brief Fees in the hearings in the High Court and having heard submissions from the Solicitor for the Costs and the Chief State Solicitor in reply I came to the conclusion that I could not allow the fee in whole but only in part and in the exercise of my judicial discretion the part to be allowed was the sum of £131.25p with appropriate deduction for Junior Counsel."

Counsels' Refresher Fees in the Supreme Court

Mr. O'Driscoll marked a Refresher of £157.50 in the Supreme Court while his junior Mr. Haugh marked a fee of £105.00. These are items 59, and 61 in the Bill. In relation to these the Taxing Master reports as follows -

"These refer to Counsel's Refresher Fees. Having allowed the Brief Fee I then considered what would be a fair and proper Refresher Fee and in the exercise of my judicial discretion I allowed the sum of £66.15 with the appropriate deduction for Junior Counsel. In relation to these Brief Fees and Refresher Fees in the Supreme Court, I had special regard to the

"limitation placed on me by Order of the Supreme Court dated the 20th of December, 1979 wherein the said Order stated that the Notice Party was in fact a Notice Party only and took no part in the substantial argument herein".

Counsels' fees for taking judgment.

Mr. O'Driscoll marked a fee of 40 guineas for taking judgment in the Supreme Court and Mr. Haugh marked a fee of £28.35. These are Items 81 and 83 in the Bill. On these the Taxing Master reports as follows -

"I considered the fee marked by Counsel in respect of this Item namely to attend Court while judgment was delivered to be excessive and altogether disproportionate particularly in view of the limitation as set out in the Order of the Supreme Court herein and as already hereinbefore recited. In the exercise of my judicial discretion I could only allow this fee in part and that the part I allowed was the sum of £12.60 in respect of Senior Counsel and £12.60 in respect of Junior Counsel".

Dr. Kearney - costs of attending Court on date of hearing

This is Item 39 on the Bill and relates to Dr. Kearney's costs

of being in Court on the date of the hearing when it was contemplate that the prosecutor would be cross-examined. On this item the Taxing Master reports -

"I disallowed this Item entirely as the Notice Party was not a party to the proceedings and I could see no good reason why the Notice Party had to attend the High Court on the proceedings on the 23rd of July 1979".

Instructions fee for appeal to Supreme Court

This is Item number 46 on the Bill. On it the Taxing Master reports -

"This Item refers to the Instructions Fee to the Appeal. I carefully considered this Item and again had special regard to the limitation on costs as set out in the Order of the Supreme Court dated the 20th of December, 1979 and in the exercise of my judicial discretion I came to the conclusion that an Instructions Fee herein was the sum of £75 and I Ruled accordingly. Nothing was put to me on the hearing of the Objections which induced me to alter the sum which I had allowed at the Taxation".

Solicitors' costs of attending Supreme Court.

These are Items 56, 63, 74, 75 and 77 in the Bill. On them

the Taxing Master reports as follows -

"I beg to draw this Honourable Court's attention to the fact that Item 56 is not mentioned in the Notice of Motion to review the Taxation. As to Items 63, 74, 75 and 77 I beg to report as follows. These Items refer to travelling expenses and attending Court in connection with the hearing in the Supreme Court. I had special regard to the fact that these were Notice Party costs and again I had very specia regard to the limitation on costs placed by the Order of the Supreme Court dated the 20th December, 1979. I was not satisfied that these Items were properly chargeable against the paying party herein and I therefore disallowed them".

Instructions for hearing of motion to adduce further evidence in the Supreme Court.

The costs of this motion appear to be governed by a Special Order of the Supreme Court dated the 9th of July 1980 which awarde the applicant his costs of the Motion against the prosecutor. On this item the Taxing Master reports as follows -

"This relates to an Instructions Fee with reference to Notice of Motion of the prosecutors and having considered this Item

"came to the conclusion that a fair and proper Instructions Fee in all the circumstances was the sum of £21 and I Ruled accordingly."

Solicitors Sundry costs

This is Item 87 in the Bill. On it the Taxing Master reported.

"This Honourable Court will please note that this Item is not included in the Notice of Motion to review this Taxation".

Supplementary Report dated 12th March, 1982.

The Motion for review of Taxation first came before the learned President. The Taxing Master had correctly referred to the fact that Items 19, 56 and 87 were not referred to in the Notice of Motion seeking a review of taxation. The learned President allowed the applicant to include these items in his Motion to review and requested a supplementary report of the Taxing Master reported on the 12th March, 1982.

Instructions fee in the High Court

This was Item 19 in the Bill. On it the Taxing Master reported as follows -

"This refers to Solicitors' Instructions Fee. In allowing an Instructions Fee I examined carefully the nature and content

"of the work done and required to be done by the Solicitor for the Costs, the nature of the case and in particular the limitation placed on the costs by Order of the Supreme Court herein dated the 20th of December, 1979. Having heard the submissions of the Solicitor for the Costs in support of the fee claimed and the Chief State Solicitor and the Solicitor for the prosecutor in reply I, in the exercise of my discretion came to the conclusion that a fair, just and proper fee by way of Instructions Fee herein was the sum of £315 and I Ruled accordingly. On the hearing of the Objections nothing was put to me which induced me to alter the Ruling I had made on the Taxation and I therefore disallowed the Objection. I beg to report to this Honourable Court that I regard the fee which I allowed to be just, fair and reasonable for the work done and required to be done bearing in mind the value of money at the time the work was carried out (1979) and in particular having regard to the limitation placed on the costs by order of the Supreme Court aforesaid in relation to the Notice Party (the Solicitor for Costs herein)."

Item 56 (travelling expenses).

On this the Taxing Master reported -

"This Item is a claim for travelling expenses for the Solicitor attending the Appeal. I disallowed this Item at the Taxation and again on the hearing of the Objections and I beg this Honourable Court to refer to my principal report herein dated the 13th March, 1981 wherein I dealt with similar Items at page 9 under the headings of Items 63, 74, 75 and 77. I say and report to this Honourable Court that I disallowed Item number 56 for similar reasons to those which I have set out in the said report at page 9 aforesaid".

Sundries (Item 87).

On this the Taxing Master reports as follows -

"This Item relates to a claim for postages and sundries. At the Taxation and again on the hearing of the Objections I considered that the claim i.e. £40 to be excessive in relation to the amount of postage required in this case, the fact that the State was also involved whereby the Solicitor for the Costs could have availed of free postages by the use of "official mail", when dealing with the Chief State Solicitor, generally the costs of postage during the currency of the case i.e. during the year 1979. I consider

"and still consider that the sum of £20 was a fair and reasonable sum to allow in the circumstances considering the nature of the costs herein and again the limitation placed on the said costs by Order of the Supreme Court aforesaid".

The Motion for Review first came before me in July, 1982 when Counsel for the applicant indicated that he would be making the submission that the notice party, through his counsel Mr. O'Driscoll, had in fact taken part in the substantial argument on the case in the High Court and that the Taxing Master had misinterpreted the Order of the Supreme Court of the 20th of December, 1979. I requested a further report from the Taxing Master as to how he had applied this order in the taxation.

The Taxing Master made a further supplementary report dated the 5th of July 1982 wherein he stated -

"I have now been requested to furnish a further supplemantary report by the learned Review Judge, the Honourable Mr. Justice Barrington stating what factors I took into consideration and what weight I applied to the directions given me in the Order of the Supreme Court herein and dated the 20th of December, 1979 wherein the learned Supreme Court directed "the Taxing

"Master in taxing such costs to have regard to the fact that the said Notice Party was in fact a Notice Party only and took no part in the substantial argument herein".

"At the taxation and again on the hearing of the Objections I interpreted these aforementioned words as placing a direct limitation on the amount, size and nature of the costs which I should allow. I took these words as a positive direction to me that the Supreme Court intended that I should not allow the same costs as if the Notice Party had been a full party to the matter and as far as the legal argument was concerned the Notice Party was placed in much the same position as merely holding a watching brief and could not, and in fact did not, take part in the legal argument but simply abided the decision of the Honourable Court.

I could see no other interpretation of the aforementioned wording and Order other than to limit or restrict the amount and size of the cost to be allowed to the Notice Party and therefore I considered acted and ruled upon this principle in allowing the fees and charges as taxed by me herein".

The matter finally came before me for review in July 1983.

Oral evidence of motion to review

Mr. James O'Driscoll Senior Counsel gave evidence that he had been instructed in the case on behalf of Doctor Kearney. He considered the case to have been one of vital importance for Doctor Kearney. Doctor Kearney on his appointment as Paediatrician to the Southern Health Board and Professor of Paediatrics in University College, Cork, had resigned from his post with the Mid-Western Health Board and had purchased a house in Cork. The case was of crucial and vital importance to Doctor Kearney as his livelihood and his status in the medical world were both at stake. Mr. O'Driscoll said that he had argued all aspects of the case in the High Court on the motion to make the Conditional Orders absolute and had taken part in the substantial argument. He considered the case to be of extreme importance to his client and to have been a complex and difficult case to prepare. For that reason he had marked a brief fee of four hundred guineas which he considered to be appropriate.

Mr. O'Driscoll had himself directed the holding of a consultation with Doctor Kearney. The immediate occasion for holding the consultation was that the Chief State Solicitor had

served notice of intention to cross-examine the prosecutor in the proceedings and that Mr. O'Driscoll thought that oral evidence might therefore be given at the hearing. Mr. O'Driscoll said, however, that he probably would have directed the consultation in any event because of the importance of the case to his client.

In the High Court the prosecutor obtained an absolute Order of Certiorari so that the appeal to the Supreme Court was of the utmost importance to his client and required the same careful preparation. In the Supreme Court, however, the Local Appointments Commissioners had retained two Senior Counsel both of whom addressed the Court. The second Senior Counsel concluded his submissions at 4 o'clock in the afternoon and, before the Court rose, the Chief Justice spoke to Mr. O'Driscoll and said that the Court had heard two Senior Counsel on behalf of the Local Appointments Commissioners and that, in these circumstances Mr. O'Driscoll might like to consider, overnight, whether there was anything further he could usefully offer. Mr. O'Driscoll carefully checked his notes overnight to ensure that all points which could be advanced in favour of his clients had been put before the Court and, having done so, considered it safe to act on what he took to be an indication from the Chief

Justice as to the way the case was going. Accordingly, on the following morning, he informed the Court that there was nothing he wished to add.

Mr. O'Driscoll subsequently attended in Court to take judgment. His recollection was that he had to do this at short notice. He marked his brief at the conclusion of the case. He cannot now recollect precisely why he marked two hundred guineas on the brief in the Supreme Court when he had marked four hundred guineas in the High Court. His normal practice would be to mark the same fee in each Court. He presumes that the reason why he marked two hundred guineas was because of the nature of the Court's order as to costs.

In cross-examination Mr. O'Driscoll said that the case was a crucial one for both the prosecutor and the notice party. But it was more immediately important to the notice party than to any other party to the proceedings. Doctor Cussen, the prosecutor, had not resigned from his post but Doctor Kearney had resigned from his. Having regard to the importance of the case to his client he considered the fee of four hundred guineas which he marked in the High Court to be a modest one.

Mr. Moloney said he was a partner in the firm of Jermyn and Moloney Solicitors who acted for the applicant in the case. He had instructed Mr. Cooke to draw up the Bill of Costs.

He did not normally act for Doctor Kearney. He considered the case an extremely important and complex one and his firm had to start from scratch in dealing with it. He had not discussed Mr. O'Driscoll's brief fee in the High Court with him prior to the hearing. But, at the time, he considered the fee of four hundred guineas marked by Mr. O'Driscoll to be very modest having regard to the nature of the case. The fee was less than he expected and he would have paid more. If he had considered it appropriate to do so he would have challenged the fee marked by Counsel and refused to pay it. He had done this in other cases.

In relation to the instructions fee claimed in the High Court Mr. Moloney said the case was an exceedingly complex and important one and the cost to his office was substantial. In relation to the appeals to the Supreme Court Mr. Moloney said there were in effect three appeals - the prosecutors', the Commissioners', and the applicant's. The three solicitors came to an arrangement concerning the work to be done each solicitor supplying some of

the documents.

With regard to Item 87 (i.e. Sundries) Mr. Moloney said that it appeared from a check of his file that the actual expenses which he was in a position to vouch came to £32.45. This sum of £32.45 included £11.70 for trunk calls; £12 for postage; £6 for telexes plus £2.75 for the Fastrack Delivery Service. It did not include local telephone calls, photocopying or notepaper. In the circumstances he considered the claim for £40 to be modest.

In relation to Item 67 which was his instructions fee for the prosecutors' motion to adduce new evidence in the Supreme Court Mr. Moloney said that this matter had to be dealt with as a matter of urgency. He had to travel from Cork to Dublin and to Limerick to give and take instructions. He had to go over the prosecutors' affidavit with his client. Mr. O'Driscoll had considered it prudent to obtain a replying affidavit from Doctor Kearney in case the Supreme Court admitted the prosecutors' new evidence and this draft affidavit was in fact prepared and sworn.

Mr. Brian Cooke said he was a Cost Drawer and drew the bill in the present case. In preparing the bill he proceeded on the basis that the reference in the Order of the Supreme Court of the 20th

December, 1979 to the applicant having taken "no part in the substantial argument herein" referred only to the argument in the Supreme Court and he did not regard this phrase as imposing a limitation on the costs in the High Court. In exercising his discretion on taxation the Taxing Master should have regard to the matters set out at Order 99 rule 37 paragraph 22. These included the complexity of the case and the importance of the case to the client. In the circumstances witness considered the instructions fee of £550-00 to be reasonable. He also considred the brief fee of four hundred guineas marked by Mr. O'Driscoll to be reasonable having regard to the fees paid to Senior Counsel in similar cases in 1979.

With regard to Item 46 (being the Solicitor's Instructions Fee on the Appeal to the Supreme Court) he considered the sum of £210 to be reasonable and that the sum of £75.00 allowed by the Taxing Master had no bearing to the work carried out by the Solicitor.

With regard to Item 67 (being the Solcitor's Instructions Fee on the Motion to adduce new evidence) he considered the sum of £42.00 to be reasonable and appropriate and that the sum of £21.00 allowed was a very low fee for a motion in 1979.

With regard to Items 31, 32, 33, 34 (which relate to the pre-Trial Consulatation) Mr. Cooke said that it seemed reasonable to hold the pre-trial consultation having regard to the fact that notice of cross-examination had been served on the prosecutor and that Mr. O'Driscoll had directed the consultation.

With regard to Items 56, 63, 74, 75, 77 (all of which related to travelling expenses of Mr. Moloney incurred in attending Counsel in the Supreme Court in Dublin), Mr. Cooke said that the Taxing Master had disallowed these fees in their entirety on the basis tha it was not necessary for Mr. Moloney personally to attend. Mr. Cooke was of the opinion that it was appropriate that Mr. Moloney should attend having regard to the importance of the appeal and he said that such costs had been allowed on umpteen occasions in other cases. Mr. Cooke said the costs appeared to hi to have been reasonably incurred and that they are specifically covered by Appendix W Item 24 in the Rules of the Superior Courts.

With regard to Item 87 (being the claim for £40.00 in respect of Sundries) witness said he had read the file and checked that thi was a reasonable sum.

With regard to Item 39 (being Doctor Kearney's expenses in

attending at the High Court, Dublin) this had been disallowed in toto by the Taxing Master on the basis that the case, having been heard on affidavit, it was not necessary for Doctor Kearney to attend. But whether this item was allowable depended, in witness's view, on whether it was proper for Mr. O'Driscoll to direct the consultation and have Doctor Kearney present.

With regard to Items 24 and 28 (being Counsels' fees on the hearing in the High Court) the Taxing Master attached considerable significance to the fact that no prior consultation concerning fees had taken place between solicitor and Counsel. Nevertheless the Solicitor had regarded the fee as a reasonable fee and, in witness's opinion, it was a reasonable fee having regard to the fees then being charged by Senior Counsel in similar cases.

So far as Mr. O'Driscoll's fee of two hundred guineas in the Supreme Court was concerned he was surprised that Mr. O'Driscoll had marked a reduced fee but he could not see why the marked fee should be interfered with. He felt that the Taxing Master had taken an unrealistic view of the case.

Finally it was established in evidence, or admitted, that Mr. Dermot Gleeson, who had appeared for the prosecutor in the High

and Supreme Courts, had, for private reasons, marked no fee at all, but that the Attorney General had marked a fee of four hundred guineas for his Senior Counsel in the High Court and a fee of four hundred guineas for each of his two Senior Counsel in the Supreme Court with corresponding appropriate fees for Junior.

Legal Submission

The legal submissions before me raised certain issues of principle which I consider it expedient to deal with first. On behalf of the respondents it was contended that the Taxing Master had correctly interpreted the Order of the Supreme Court of the 20th December, 1979 and in particular words which appear in the last paragraph of that Order and which read:-

> "The Taxing Master in taxing such costs to have regard to the fact that the said notice party was in fact a notice party only and took no part in the substantial argument herein".

It was submitted on behalf of the respondents that the word "herein" in this Order must mean, in the context, "in this case". On behalf of the applicant it was submitted that the word "herein" when read in the light of the known facts can only mean "in this Court".

I must say that I regard the applicant's submission on this point as persuasive. The evidence of Mr. O'Driscoll and Mr. Molc..e which I accept, and which was not challenged in the hearing before m establishes that Mr. O'Driscoll argued all issues in the case in the High Court. Moreover the Order of Mr. Justice Butler of the 23rd July, 1979 recites that the Court heard what was offered by Counsel for the prosecutor and by Counsel for the respondents "and by Counsel for the notice party".

It therefore appears to me that the Taxing Master misinterpreted the Order of the Supreme Court so far as the taxation of the notice parties costs in the High Court were concerned. It appears to me that the word "herein" must, in context, and when read in the light of what actually happened, mean "in this Court" as opposed to "in these proceedings".

Secondly it was submitted that the Taxing Master failed to appreciate the true significance of the reference in the Supreme Court Order to the applicant being "a notice party only".

On this matter the Taxing Master says in his supplementary report of the 5th July, 1982:-

"I took these words as a positive direction to me that the

"Supreme Court intended that I should not allow the same costs as if the notice party had been a full party to the matter and as far as the legal argument was concerned the notice party was placed in much of the same position as merely holding a watching brief and could not, and in fact did not, take part in the legal argument but simply abided the decision of the Honourable Court".

Again it appears to me that the Taxing Master erred in point of principle in his interpretation of the Supreme Court Order. There is no proper comparison between a notice party and a person holding a watching brief. Justice is administered in public in our Courts and any person, subject to very few exceptions, is entitled to watch the proceedings. But a notice party is given notice of the proceedings because the Court considers that he has or may have some legitimate interest which he may wish to defend, and, because the order of the Court may not be valid, or at any rate may not be binding on him, unless he is given notice of the proceedings and, if appropriate, an opportunity to defend his legitimate interests. He is not merely a person watching the proceedings, he is a party to them. In the present case the

primary responsibility for upholding the recommendation of the Appointments Commissioners rested on those Commissioners and not on the applicant. In that sense he was "a notice party only" but he clearly had an interest to defend which was vitally important to him. His right to defend it was, as I understand the matter, accepted both in the High Court and in the Supreme Court. In the High Court the applicant was allowed to address the Court on all aspects of the case. In the Supreme Court the Chief Justice after two Senior Counsel had made submissions to the Court on behalf of the Commissioners, intimated to Mr. O'Driscoll that he might not consider it necessary to make further submissions. But by making this intimation the Court acknowledged Mr. O'Driscoll's right to make further submissions should he consider it in the interest of his client to do so. It therefore appears to me that the reference in the Supreme Court Order to the applicant being "a notice party only" must, in the context, mean, that the applicant was by virtue of the presence in the litigation of the Local Appointments Commissioners relieved of the main burden of upholding the recommendation of the Commissioners. At the same time the applicant retained his status as a party to the proceedings and his right to take such steps as he considered necessary or prudent to defend his interests in those proceedings.

I now turn to discuss the specific items:-

Counsels' fees in the High Court - Items 24 and 28

I fully accept that Mr. Moloney ought, prudently, to have discussed and agreed Counsels' fees prior to the hearing. I am also quite satisfied however, that - in the actual circumstances of this case - had such discussion taken palce the fees marked by Counsel, and agreed by Mr. Moloney, would have been no less. I accept Mr. Moloney's evidence that he expected Counsel to mark a somewhat higher fee and that had he considered the fee marked by Counsel to have been excessive that he would have questioned it. I note also that the Attorney General marked a fee of 400 guineas for the Counsel acting for the Commissioners. I am satisfied that Mr. O'Driscoll did in fact take part in the substantial argument in the High Court and that a heavy onus of responsibility rested on him. This onus must, however, have been lightened in some measure by the fact that the Commissioners had also retained Senior Counsel on whom rested the primary responsibility of upholding their recommendation. The reference in the Supreme Court Order to the applicant being "a notice party only" is relevant not only in the Supreme Court but also in the High Court.

Had Mr. Moloney been conscious of this fact when agreeing a fee with Mr. O'Driscoll he might have insisted on a smaller fee. In these difficult circumstances it appears to me that the appropriate fee for Senior Counsel in the High Court was 300 guineas with a corresponding fee for Junior.

Consultation - Items 31, 32, 33, 34

I accept that the immediate occasion of Mr. O'Driscoll directing the consultation was the fact that the Chief State Solicitor had served notice of intention to cross-examine the prosecutor and that the possibility existed that the case would be opened up to oral evidence. I also accept that Mr. O'Driscoll would probably have directed the consultation even if notice to cross-examine had not been served. When a case is over it is easy to suggest that steps which seemed prudent at the time were not necessary. But in my view if Senior Counsel of experience, like Mr. O'Driscoll, directs a consultation Counsel's judgment in the matter should be respected. I would accordingly allow items 31, 32, 33 and 34 in full.

Item 39 - Expenses of application attending at Dublin

It appears to me that the same reasoning applies to this item and that it too should be allowed in full.

Counsels' fees on Supreme Court appeals - Items 59 and 61

I accept Mr. O'Driscoll's evidence that in the normal course he would, most probably, have marked the same fee in the Supreme Court as he had marked in the High Court. I accept therefore that the most probable reason why he marked a reduced fee in the Supreme Court is that it was intended to reflect the terms of the Supreme Court Order as to costs. In the light therefore of the evidence of Mr. O'Driscoll and Mr. Moloney, which I accept, I can see no justification for reducing the fees further. I would therefore allow the fees of Senior and Junior Counsel as marked. For the same reasons I would allow Counsels' refreshers in the Supreme Court as marked.

Counsels' fees for taking judgment - Items 81 and 83 in the Bill

I cannot see that the burden placed on Counsel in taking judgment was any greater or any less because Counsel was appearing for a notice party only. However, and despite the factors mentioned by Mr. O'Driscoll, I think that the proper fee to allow to Counsel for taking judgment is the standard fee on the Bar Council Scale which, I understand from the affidavit of Mr. Kevin White sworn herein, was at the relevant time, £19.95p.

I would accordingly allow a fee of £19.95p to each Counsel for taking judgment.

Solicitor's instructions fee in High Court - Item 19

It is clear from the Taxing Master's Report that he taxed this bill on the basis that the notice party was not in fact a party to the proceedings at any rate so far as the legal argument was concerned and that he merely abided the Order of the Court. This, as previously indicated, appears to me to be a wrong interpretation of the Supreme Court Order. I accept the evidence of Mr. Moloney as to the burden which this case placed on him and on his office and I do not think that this burden was any the less because the applicant was a notice party. Moreover, I think that the work which Mr. Moloney undertook to protect his client's interests was the work of a prudent and conscientious solicitor. Applying to the case therefore the principles set out by Mr. Justice Hamilton in Kelly -v- Breen (unreported, judgment delivered the 4th April 1978), I would allow this item in the bill in full.

Instructions fee for appeal to Supreme Court - Item 46

I think the same principles apply here and again I would

allow the fee in the bill in full.

Solicitor's costs of attending Supreme Court - Items 56, 63, 74, 75, 7

Having regard to the nature and importance of the case it appears to me that it was prudent and proper of Mr. Moloney to attend the Supreme Court hearings. I think the Taxing Master totall underestimated the burden of responsibility cast on Mr. Moloney in this case and misinterpreted the Supreme Court Order. I would allow all of these items in full.

Instructions for hearing of motion to adduce further evidence in the Supreme Court - Item 67

These costs appear to be governed by the special order of the Supreme Court dated the 9th July 1980. As previously indicated some of the work done under this heading became unnecessary. But nevertheless it was done on Senior Counsel's direction and appears to me to have been work prudently undertaken to protect the applicant's interests in the litigation. Under these circumstances I would allow the sum of £42.00 claimed in full.

Solicitor's sundry costs - Item 87

I accept the evidence of Mr. Moloney that he can from his file vouch a sum of £11.70 for trunk calls, £12.00 for postage, £6.00 for telexes, and £2.75 for the Fastrack Delivery Service

showing vouchable items spent on this case of £32.45p. In the circumstances the sum of £40.00 claimed for sundry costs appears to me to be entirely reasonable and it should be allowed in full.

Approved.

[signature]

21/12/'83