

1983 No. 493 S.S.



THE HIGH COURT

(STATE SIDE)

THE STATE (AT THE PROSECUTION OF RICHARD
F. GALLAGHER, SHATTER AND COMPANY)

Prosecutors

-and-

TOIRLEACH DE VALERA, A TAXING MASTER

Respondent

Judgment of Mr. Justice Costello delivered the 9th day of
December 1983.

Costs - Solicitor and Client Bill paid by client - Application to Taxing Master to tax under 0.99 r. 15 (e) - Jurisdiction to tax in absence of court order.

Certiorari - Whether certiorari lies against a Taxing Master's order - Whether in the exercise of discretion certiorari should be refused.

INTRODUCTION

Messrs. Richard F. Gallagher, Shatter & Company acted for a wife in family law proceedings in the High Court in which claims for maintenance for herself and her children and claims in relation to the family home were made. Although they have long since ceased so to act, I will for convenience sake refer to them either as "the Plaintiff's Solicitors" or "the Prosecutors", as appropriate. The proceedings were successful and the Plaintiff's husband was ordered to pay her costs. As the action had proceeded the Plaintiff had paid her Solicitors sums amounting to £655-00 on account of costs. After judgment on 23rd October 1980 instead of drawing a party and party Bill or attempting to agree a figure with the Defendant's Solicitors the Plaintiff's Solicitors, sent the Plaintiff an "up to date bill of account" for £1,980-00 seven days after the action had concluded. The Plaintiff seems to have been surprised, not to say aggrieved, at being required to pay

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this sum and she requested her Solicitors to send the bill to her husband's Solicitors. Her Solicitors replied, explaining for reasons which I will later examine, that they would only do this after she had paid their Bill. As she failed to do so they sued her. The Plaintiff paid the claim in full and later issued a requisition to tax the Bill under Order 99, rule 15(e) of the 1962 Rules. Her Solicitors appeared before the Taxing Master but submitted that he had no jurisdiction to tax the Bill as after payment of a Solicitor and client bill an Order of the Court was necessary to give him jurisdiction. This objection was over-ruled and Master de Valera (the Respondent herein) proceeded to tax a more detailed bill which he had required the Plaintiff's Solicitors to submit. They fared badly, the Taxing Master being of the opinion that the amounts charged were "grossly excessive" and "completely unsubstantiated." The sum of £815-50 was taxed off their Bill and they were disallowed the costs of taxation (a sum of £299). The proceedings took a further

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unpleasant turn, as far as the Prosecutors were concerned. By a ruling of the 29th of July 1983 the Taxing Master directed the Plaintiff's Solicitors to take up the Certificate of Taxation and to pay fees on doing so (amounting, I am told, to a sum in excess of £300-00) and to lodge the Certificate for signature. Instead of doing so they applied for and obtained on the 13th August, 1983 a Conditional Order of Certiorari directed against the Respondent. They challenged:-

- (a) the whole taxation proceedings on the grounds that the Taxing Master had no jurisdiction to tax the Solicitor and client costs, and alternatively,
- (b) the July 1983 rulings on the grounds that the Taxing Master was functus officii when he made them.

I must now decide whether the Conditional Order should be made absolute, cause having been shown by an Affidavit sworn on the 29th of September 1983.

In the light of the Affidavits filed, the terms of

the Conditional Order and Counsel's submissions I can summarise the issues which have arisen for determination as follows:-

- (a) whether as submitted by the Respondent an Order for Certiorari can lie against a Taxing Master. It is urged on behalf of the Taxing Master that he should be regarded as a "delegate" of the High Court and just as the High Court cannot make an Order of Certiorari against itself it cannot make an Order against its "delegate".
- (b) whether as submitted by the Prosecutors the Taxing Master lacked jurisdiction to tax the solicitor and client Bill of Costs. The Conditional Order was granted on the ground set out in paragraph 16 (1) of Mr. Shatter's Affidavit of the 12th of August 1983 which stated as follows:-

"The Respondent has no jurisdiction to tax a Bill of Costs after payment thereof without an order of this Honourable Court referring such Bill of Costs to him pursuant to section 6 of the Attorneys and Solicitors (Ireland) Act, 1849."

Alternatively, whether the Taxing Master lacked jurisdiction to make the rulings of the 29th of July 1983. The ground on which the Conditional Order was granted is set out in paragraph 17 of the grounding affidavit which stated:-

"The orders made by the Respondent on the 29th day of July 1983 are wrong in law and without jurisdiction and in excess of jurisdiction on the following ground, namely, that the Respondent was functus officii on the said date, the taxation of costs having been completed on the 19th day of November 1982 or at the latest on the 13th day of December 1982."

- (c) whether, as submitted by the Respondent, assuming the remedy of certiorari lies against the Taxing Master and assuming he lacked jurisdiction as alleged, the Court in the exercise of its discretion should refuse the relief claimed; (1) because of a lack of uberrimae fidei in Mr. Shatter's Affidavit of the 12th of August, and/or (2) because of the existence of an alternative remedy available to the Prosecutors.

The lack of uberrimae fidei alleged is that in the grounding Affidavit Mr. Shatter swore that at no stage prior to the service of the summons to tax did the Plaintiff request him to have the costs due by her to his firm taxed on a solicitor and client basis. It is said that this statement was not correct, and that it materially affected the Court in granting the Conditional Order.

As to the existence of an alternative remedy it is urged that if dissatisfied with the taxation the Plaintiff's Solicitor could have applied to the High Court to review it under Order 99, Rule 38 (3) of the 1962 Rules and in the light of all the circumstances of this case they should be left to this alternative remedy

Rather than turn immediately to these issues in the order I have just set out I think it would be preferable if I firstly indicated what occurred between the Plaintiff and her Solicitors after the termination of the family law proceedings and then turn to what happened before the Taxing Master.

The claim for solicitor and client costs.

The Plaintiff's Solicitors acted for the Plaintiff between January 1978 and March 1981 both in family law proceedings which included applications brought under The Guardianship of Infant's Act 1974, The Family Law (Maintenance

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of Spouses and Children) Act, 1976, The Family Home Protection Act, 1976 and in connection with a mortgage suit between her husband and an insurance company. On the 23rd of October 1982 the family law proceedings concluded, an order being made requiring her husband to pay maintenance to the Plaintiff and her children and for other outstanding matters in dispute, and the Court ordered the Plaintiff's husband to pay the Plaintiff's costs of the proceedings. On the 30th of October 1980 the Plaintiff's Solicitors wrote to their client confirming for her information the contents of the Court's Order but making no reference to the Order for costs. The letter ended:-

"Finally, I enclose for your information our up-to-date bill of account and I would be obliged if you could discharge same as soon as possible."

The account was for a sum of £1,980-00. The Plaintiff replied on the 14th of December noting that her husband wanted to have the costs taxed, and stating that she was in agreement with this, pointing out that as she had already paid

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the sum of £655-50 the total sum for costs was
£2,635-50. She added:-

"Please forward your bill for the total sum i.e.
£2,635-50 to Messrs. Downey, Leech & Vanston and
request that the total sum be taxed."

It is likely that the Plaintiff was then unaware of the
distinction between a party and party Bill of Costs and a
Solicitor and client Bill of Costs. It is, however, clear
that she was requesting that the Bill sent to her be sent to the
Defendant's Solicitor so that it could be taxed.

Her Solicitors did not comply with their client's
request. They replied instead on the 19th of December
pointing out that they had already informed her that she was
primarily liable for their costs, that because her husband
was in England there would be "considerable difficulty"
enforcing the order for costs but adding:-

"We will arrange to have our Bill of Costs taxed upon
this firm receiving from you the full sum due by you
for all work done to date."

For the next twelve months the Plaintiff's Solicitors

maintained this position, i.e., that they would take no steps to have a party and party Bill of Costs taxed until their Solicitor and Client's costs had been paid.

On the 4th of February, 1981 the account was re-presented.

The Plaintiff wrote on the 25th of February making no reference to this, but instructing her Solicitors of her husband's failure to comply with the 1980 order. A further account was sent on the 18th of March and on the 25th of March the Plaintiff's Solicitors wrote referring to their client's February letter and stating:-

"No further work can be undertaken by this firm on your behalf until our bill of account is discharged by you."

On the 9th of May the Plaintiff wrote expressing surprise at the "tone" of this letter and she again asked her Solicitors "to submit your Bill of Costs to Messrs. Downey, Leech and Vanston so that they may either (a) pay them or (b) ask that they be taxed." Here, once again, the Plaintiff was asking her Solicitors to present to her husband's Solicitors the Bill of Costs which her Solicitors had asked

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her to pay. In a reply of the 13th of May the Plaintiff's Solicitors maintained their earlier attitude: they requested payment in full of their fees and added "we will then duly arrange to have our costs taxed."

The Plaintiff wrote on the 14th of July stating that she was going to re-enter the proceedings because of the refusal to present the Bill of Costs to her husband's Solicitor; on the 9th of September the Plaintiff's Solicitors threatened proceedings; on the 22nd of September they issued a Civil Bill; on the 9th of October the Plaintiff paid their demand in full.

After payment the Plaintiff then wrote, on the 25th of October 1982, as follows:-

"I now request you to make available to me directly any documents which you hold in relation to the above matter.

May I further ask you to make available to me a more detailed itemised Bill of Costs than the one I presently hold for taxation purposes as I gather the one I hold is not adequate."

Whilst the Plaintiff and her solicitors may have earlier been at cross purposes this letter is a clear reference to the solicitor and client Bill of Costs which she had paid.

Instead of informing the Plaintiff that they could not prepare a Party and Party Bill without their documents they gave the Plaintiff all their files and papers and then wrote on the 2nd of November stating "We are not in a position to prepare any further detailed account in the matter and indeed we are not prepared to do so." So, having obtained payment of their solicitor and client costs they resiled from their previous position, put it out of their power to prepare a detailed Bill, and, indeed, indicated that they were not prepared to prepare a party and party Bill even though their solicitor and client Bill had by then been paid.

The Plaintiff was extremely aggrieved at what had happened. She reported her former Solicitors to the Law Society but obtained no satisfaction from this source. With assistance from the free Legal Aid Centre she then applied to this Court by Motion of the 17th of December 1981 for an order directing her former Solicitors to tax a Bill of Costs, i.e. the party and party costs so that she could be paid by her husband as the Court had ordered. I heard this Motion

on the 18th of December. Mr. Shatter appeared and explained that he could not prepare a Bill of Costs because he had given his papers to the Plaintiff but he did undertake to co-operate with the Plaintiff's new Solicitors and give them what information they needed to prepare a Bill of Costs. In these circumstances I made no order on the Motion and adjourned it generally. Regrettably, nothing seems to have been done since then to prepare a party and party Bill of Costs and enforce the order against the Plaintiff's husband so that the Plaintiff could be recouped the costs she had already discharged

On the 25th of July 1982 the Plaintiff wrote one further letter to her former Solicitors. She stated:

"I hereby requisition you to supply me with an itemised Bill covering all the moneys paid to you by me for the purpose of taxation.

If you fail or neglect to do so within fourteen days from this date I shall present the Bill as it stands to a Taxing Master of the High Court."

Again, the Plaintiff undoubtedly was referring to the solicitor and client Bill sent to her and not to a Party and Party Bill to be presented to her husband. There seems to have been no reply to this letter and on the 1st of October 1982 she signed a requisition to tax and a summons to tax was then issued.

As I have already pointed out Mr. Shatter, in paragraph

3 of his Affidavit of the 12th of August, swore that at no stage prior to the service of the summons to tax had the Plaintiff requested him to have the costs due by her to his firm taxed on a solicitor and client basis. As a strict statement of fact this is correct - the Plaintiff did not write and state "please tax your solicitor and client Bill of Costs." The statement is, however, misleading as it conveys the impression that the Plaintiff had never intimated any wish to have the solicitor and client Bill of Costs taxed. Clearly she had done so - and on more than one occasion. But I do not think that any attempt was made deliberately to mislead the Court, and in any event the matter is not very material to the central issue in the case. I do not think therefore that the Plaintiff's Solicitors should not get relief (if otherwise they are entitled to it) merely because of the averments in paragraph 3 of the grounding Affidavit.

Proceedings before the Taxing Master.

On the 1st October 1982 a requisition to tax was signed by the Plaintiff. It was headed "Requisition to Tax -

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Order 99, rule 15(e)". It was on a printed form available in the High Court and it contained an undertaking by the plaintiff to pay any balance which the Taxing Master might certify as being due by her on foot of the Bill of Costs. It was a requisition to tax "the solicitor and client costs incurred on my behalf and set out in the Bills of Costs annexed to this requisition." On the same day a summons to tax was issued addressed to the Plaintiff's former Solicitors. They instructed an experienced legal costs accountant to appear on their behalf. On the 15th of October the matter came before Master de Valera. He was informed that the Plaintiff's Solicitors were appearing out of courtesy to him; that they regarded the Taxing Master as having no jurisdiction to tax the Bill; and that objection was being taken to the taxation proceedings because of this. Having considered the matter the Taxing Master ruled on the 28th of October that he had jurisdiction, that the Plaintiff was entitled to a proper and detailed Bill of Costs, that the Plaintiff's Solicitors should prepare a proper and

itemised Bill of Costs and furnish a copy to the Plaintiff and that the taxation should be peremptorily fixed for the 19th of November. In his Affidavit Mr. Shatter explained his then attitude to the taxation as follows:-

"Before the taxation hearing on the 19th of November 1982 my firm considered whether it would bring a state side application at that stage to prevent the respondent proceeding with carrying out the taxation but after taking Counsel's advices we decided to allow the taxation to proceed, having stated our objection to the respondent, in the hope that the taxation would be carried out in a proper manner and that the costs would be properly taxed."

The taxation proceeded on the 19th of November. The Taxing Master has stated in his Affidavit that he found "substantial moneys to be due and owing to the Plaintiff" and that he was "satisfied that the amounts charged by her former Solicitors were grossly excessive and completely unsubstantiated". As a result of the taxation a balance on the account in the Plaintiff's favour amounting to £815.50 was found. The Plaintiff's Solicitors, being dissatisfied with this taxation, delivered objections in writing under Order 99, rule 38 and carried them in before the Taxing Master for re-consideration and review. The application, apart from some trival amount, was unsuccessful. Because more than one sixth of the Bill was taxed off, the Taxing

Master considered that Order 99, rule 30(13) applied and as there were no special circumstances he disallowed the Plaintiff's Solicitors their costs of the taxation (amounting to £299.00).

Order 99, Rule 30 (11) provides that:-

"Certificates of the amount of costs allowed shall be prepared without interlineation, or alteration so such as the Taxing Master may think it right to mark with his initials, and no erasure whatsoever shall be allowed."

The Plaintiff's Solicitors took the view that it was for the Plaintiff to draft, engross, stamp and lodge the certificate for signature by the Taxing Master. This was not the view of her advisers and they re-entered the matter before the Taxing Master who on the 29th of July 1983 made a number of rulings. In paragraph 16 of his Affidavit he stated:-

"I carefully considered the matter. I heard representations from both sides, and was of the opinion that there was no good reason for the inordinate delay in taking up the certificate of taxation and that the deliberate failure was causing loss to Mrs. Delaney a fortiori in light of the substantial balance which I had found in her favour at the taxation and the fact that the Prosecutors were withholding substantial funds paid to them under duress" (by the Plaintiff) "as far back as 21 months ago. I made a formal ruling in which I directed, inter alia, that the Prosecutors take up the certificate of taxation paying all necessary stamp duties and outlay within 14 days from the 29th day of July 1983."

He made certain consequential orders and stated in his Affidavit that he believed that he had jurisdiction to make the rulings in accordance with the provisions of Order 99,

rules 20 and 26 and Order 99, rule 37 (17), "and all other powers vested in me as Taxing Master."

Jurisdiction of the Taxing Master.

The Prosecutors have submitted that the Taxing Master had no jurisdiction to issue the summons to tax on the 1st of October 1982 and had no jurisdiction to proceed with the taxation of costs or to make the orders which were made thereafter and to which I have already referred. The basis for this submission (and the basis on which the conditional order was obtained) was that after payment by the Plaintiff of the Bill sent to her the Taxing Master had no jurisdiction to tax a Bill "without an order of this honourable Court referring such Bill of Costs to him pursuant to section 6 of the Attorneys and Solicitors (Ireland) Act, 1849." This submission is, I think, based firstly on a misinterpretation of the 1849 Act and secondly on a misunderstanding of the effect of Order 99, rule 15(e)

Before turning to Section 6 of the 1849 Act on which the Prosecutors rely I should refer to the earlier sections of the Act and in particular to section 2. This section is

of immense length and is convoluted and prolix. It makes provision for a number of different matters dealing with the taxation and payment of costs. Referring to those relevant to the issues I must decide it is to be noted that having provided that no Solicitor can commence an action for his costs until after the expiration of one month from the delivery to his client of a Bill of Costs it makes provision for applications to the Court and confers jurisdiction on the Court to refer bills for taxation. It deals with applications for a reference order by the party chargeable by the Bill when made within one month of its delivery. Then it deals with applications for reference orders brought after the expiration of one month by the Solicitor or by the party chargeable. It goes on to cover two different eventualities. It provides that if a Solicitor has sued and obtained a "verdict" for his costs then no reference to taxation can then be made by the Court except "special circumstances" are proved. And if twelve months have elapsed after the delivery of the Bill before an application for a reference to taxation has been made, again, no reference

order can be made in the absence of "special circumstances"

The sections which follow give further powers to the Court to make reference orders; section 3 deals with the taxation of Bills upon the application of third parties; section 4 with taxation of bills charged to executors and trustees; and section 5 deals with the power of the Court to order a copy of a Bill of Costs to be delivered on a third party application. That brings me to section 6 on which the Plaintiff's Solicitors rely. This provides as follows:-

"The payment of any such Bill as aforesaid shall in no case preclude the Court or Judge to whom application shall be made from referring such Bill for taxation, if the special circumstances of the case shall in the opinion of such Court or Judge appear to require the same upon such terms and conditions and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

It is important to note that this section confers no jurisdiction on the Court to refer a Bill for taxation. It is a section dealing with yet another eventuality, namely a situation in which payment on foot of a Bill of Costs has been made. It restricts the rights conferred by the earlier sections in two important ways. Firstly, the application for a reference must be made within twelve calendar months after payment. Secondly "special circumstances" must be shown

before the Court can make a reference. The suggestion, therefore, that the Taxing Master lacked jurisdiction because no order pursuant to section 6 of the 1849 Act was made is obviously erroneous - the Court had no jurisdiction under section 6 to order that a Bill be referred for taxation - its jurisdiction to do so is to be found in an earlier section.

Although applications for orders for certiorari should proceed on the basis on which the conditional order was granted I do not think I should decide the point of jurisdiction on the narrow ground I have just mentioned. I will therefore approach the matter on the basis that the Prosecutor's contention is that the combined effect of section 2 and section 6 of the 1849 Act is that once a payment has been made no jurisdiction to tax exists without an application under section 2 of the Act having been made followed by an order of the Court referring the Bill for taxation.

This leads me to a consideration of Order 99, of the 1962 Rules. Order 99, rule 15 (e) provides that the Taxing Master shall have power to tax ...

(e) Without any order for the purpose, costs as between

"solicitor and client, upon the application of the client and upon his written undertaking to be lodged in the Taxing Master's office, to pay any balance which the Taxing Master may certify."

This rule deals with solicitor and client costs and confers on the Taxing Master a power to tax "without any order". The Prosecutors say that this power must be reconciled with the provisions of the 1849 Act. I think there is no difficulty in doing so. The power to tax without any Court order costs as between solicitor and client conferred on the Taxing Master by Order 99, rule 15 (e) is additional to the jurisdiction which he has to tax Bills referred to him under the provisions of the 1849 Act. That this is so is confirmed by the next rule, rule 16 which makes specific reference for applications under section 2 of the 1849 Act. The jurisdiction of the Rules Committee to confer this power cannot be challenged - nor has it been. It had been provided by statute (see paragraph 19(a) of the Eighth Schedule to the Courts (Supplemental Provisions) Act, 1961) that each of the Taxing Masters is to have such powers and duties as are conferred on them by statute or by rules of Court. The

Rules Committee had jurisdiction, therefore, to confer on the Taxing Master a power to tax solicitor and client costs without the necessity of an order of reference under the 1849 Act. There is therefore no problem in reconciling the 1962 rules with the 1849 Act - a separate and distinct power to tax is given by rule 15(e) of Order 99 to that contained in the 1849 Act.

The Rules Committee in 1962 was not making any startling innovation by adopting Order 99, rule 15 (e); in fact it was only updating similar provisions in the 1905 rules. Order 65, rule 54 (a) of the earlier Rules made provisions for applications under section 2 of the 1849 Act if made within twelve months after the Bill had been delivered. Then Rule 54 (b) made a separate provision entitling a Taxing Master to tax costs between solicitor and client "without any order for the purpose" upon the application of the client and upon an undertaking to pay any balance which the Taxing Master might certify. As pointed out by Gill "Notes on Solicitors Costs" (1937 edition, p. 181) the practice

of taxing solicitor and client costs under a requisition instead of under an order of reference is peculiar to Ireland, and the author drew attention to the fact (p. 182) that when a client is furnished with a Bill of Costs he can either state that he requires the Bill to be taxed or apply for an order referring the Bill for taxation. So, for at least the past seventy-eight years Taxing Masters have been empowered to tax solicitor and client costs on a requisition signed by the client without the necessity of a Court Order under the 1849 Act.

I conclude, therefore, that the Master had jurisdiction to tax the Bill pursuant to the provisions of Order 99, rule 15 (e) in this case. That disposes of the principal challenge to the orders made by the Taxing Master. The alternative suggestion is that even if he enjoyed the jurisdiction he exercised in this case he was functus officio on the 29th July, 1983 and at least the rulings made on that day should be quashed as having been made in excess of jurisdiction. But,

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again, I must disagree with the prosecutors' contentions. The Taxing Master is required to sign every Certificate of Taxation. Until that has been done there may be points (as this case amply illustrates) arising on the Certificate on which he may be required to adjudicate. Even though he has completed his main task when he has taxed the costs it cannot be said that he is then functus officio and lacks jurisdiction to make further rulings. The rulings which he made on the 29th July were, in my view, not made in excess of his powers. Accordingly, all the prosecutors' contentions fail, and I will refuse to make absolute the conditional order of certiorari.

I have been told by the Prosecutors' counsel that his clients are not primarily concerned with the fact that they have been required to repay £815 to their client and in addition are liable for court fees in excess of £300. They are mainly concerned, I was told, with establishing a principal viz., that

solicitor and client Bills of costs should not be subject to a taxation after the lapse of a year from payment. As they may wish to have the point determined by the Supreme Court it would be as well if I expressed my conclusions on the remaining two issues before me. I can do so briefly.

The Court's discretion.

It has been urged by the Respondent that even if the Taxing Master has acted in excess of jurisdiction in this case the court has a discretion to refuse to quash his orders and should, in the exercise of that discretion, refuse the present application.

On the question of the discretionary nature of the order of certiorari I was referred to The State (Abenglen Properties) Ltd. -v- The Dublin Corporation (1982) I.L.R.M. 590, a case in which the Dublin Corporation had refused planning permission to the prosecutors who then challenged the refusal by an application to quash the Corporation's decision. The discretionary nature of relief by way of certiorari was

discussed in the Supreme Court. Counsel for the prosecutors in the instant case referred me to certain passages of the judgment of the Chief Justice but the opinion of the majority on this point was delivered by Henchy, J., and it is this judgment which binds me. (I may add however, parenthetically, that the difference between the two judgments is not, in my view, as extreme as may be inferred from "Remoulding Certiorari", "The Irish Jurist" (N.S.) 1982 p. 32). Mr. Justice Henchy pointed out (p. 604) that he could not accede to the point which had been "strenuously argued" on behalf of the applicants that if the Corporation's decision had been made in excess of jurisdiction then certiorari should issue ex debito justitiae and not as a matter of discretion. He observed (p. 606) that aggrieved persons are entitled to certiorari only on a discretionary basis but indicated that if "the requirements of justice and fairness" justified the making of the order then it should be made.

In the present case I would have refused certiorari

even if I had thought the Master had acted in excess of jurisdiction for two reasons. Firstly, Mr. Shatter candidly admitted that he had decided to waive the objection to the Master's jurisdiction and allow the taxation to take place. He said (paragraph 10 of his first affidavit) that before the hearing of the 19th November 1982 he took counsel's opinion and then decided to allow the Taxation to proceed. Later after taxation had been completed at what he considered was an incorrect figure he again decided to submit to jurisdiction and to carry in objections and if not successful to appeal to the Court to have the taxation reviewed. So the prosecutors had clearly waived their objection to the Master's jurisdiction. But they withdrew their waiver after the ruling of the 29th July ordering them to pay stamp duty on the Certificate. As I have held that the Master had jurisdiction to make this ruling I do not consider that the prosecutors were justified in so acting. Therefore having submitted to jurisdiction I think they should not

now be permitted to challenge it.

There is a second reason why I would refuse relief in this case. It is relevant to bear in mind that in default of agreement the prosecutors are only legally entitled to a sum for costs from their client on the amount as fixed by the Taxing Master, subject to review by the Court. An experienced Master has held that they have been over-paid by £815. Whilst on review by the Court it may be shown that his rulings were wrong, prima facie it would seem that if this taxation is quashed and another does not take place the Plaintiff would suffer a not inconsiderable injustice. This will happen because, if the prosecutors are right, no taxation could now take place (assuming certiorari were granted) because if section 6 of the 1849 Act applies the Plaintiff had only one year from the payment (i.e. from 9th October 1980) to apply to this Court and she is now barred from seeking a reference under the Act. On the other hand, if certiorari is refused the prosecutors can, if they so wish, have the

Master's rulings reviewed by the High Court under the appeal machinery in Order 99 rule 38. By refusing certiorari the lawful amount payable by their client to the Prosecutors can be established. By granting it, there is at least a prima facie case that they will have been paid considerably more than is their due.

In justice and fairness, then, certiorari should be refused.

Whether certiorari lies against the Taxing Master.

The final point for consideration is this. The Respondent has argued that this court cannot ever make an order of certiorari directed against a decision of the Taxing Master because the Master is to be regarded as a "delegate" of the High Court and the effect of an order would be the same as if the High Court made an order against itself, which obviously, it could not do.

In support of this view, the Respondent relies on an unreported judgment of Woolf, J., in the High Court in England dated the 5th February, 1982 a transcript of

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which was supplied to me. (Ex Parte Bee-Line Roadways International Ltd.) That was a case involving an "application to review" under the new procedures now applicable in England, the orders sought being in the nature of an order of mandamus directing the Taxing Master to extend time for lodging objections to the taxation, and to restore a taxation appointment and hear representations. The application was refused. The learned trial judge did not find the authorities quoted persuasive on the power of the court under its earlier procedures to issue a prerogative writ against a Taxing Master. He pointed out, however, that there might be a ground for extending the court's jurisdiction to avoid injustice. As he found there was an alternative form of relief open to the applicant he held there was no need to extend the remedy of judicial review to cover the situation before him. Thus, it is by no means clear that an order of judicial review would have been refused if no other remedy was open to the

Prosecutor in that case.

It seems to me, therefore, that Ex Parte Bee-Lines is not an authority for the far-reaching proposition advanced on the Respondent's behalf. In any event, our legislation puts the matter beyond doubt. By the 8th Schedule of the Courts (Supplemental Provisions) Act, 1961 the office of the "Taxing Master's Office" is "attached to" the High Court, the Supreme Court and the President of the High Court respectively, and a number of officers "are attached " to the High Court, the Supreme Court and the President of the High Court, amongst them "two Taxing Masters". If the Court, therefore, makes an order of certiorari or mandamus it cannot in my view be said to be making an order against itself - it is making an order against an "officer" who is the holder of an office "attached" to the High Court. As pointed out by Gannon J., in Magauran -v- Dargan and Others (1981) I.M.L.R. p. 7) the "Taxing Master's functions may be described as ancillary to the judicial process only in the sense of being supplementary to it but not

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forming an essential part of it (p. 9)." It is wrong to suggest, in my view, that because of the nature of his office certiorari (and for that matter all other forms of relief formerly granted by means of prerogative writs) can never lie against a Taxing Master.

The result is that I will allow the cause shown by the Respondent and discharge the conditional order herein.

Approved

DZ

12th Dec. '83