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THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2023] IECA 288

Court of Appeal Record No 2019/29

Collins J.

Haughton J.

Pilkington J.

BETWEEN

JOHN BUCKLEY

Plaintiff/Appellant

AND

DECLAN O'NEILL (TAXING MASTER)

Defendant/Respondent

AND

DENIS DOYLE

Party Interested

JUDGMENT of Mr Justice Maurice Collins delivered on 24 November 2023

BACKGROUND

1. This is Mr Buckley's appeal from an Order of the High Court (Binchy J) made on 5 December 2018 (perfected on 8 January 2019) whereby, for the reasons set out in his judgment of 9 November 2018 ([2018] IEHC 717), the Judge refused Mr Buckley's application for a review of a taxation conducted by the Respondent ("*the Taxing Master*" or "*Taxing Master O' Neill*") relating to work undertaken by Mr Buckley as solicitor on behalf of Denis Doyle.

2. At the outset of his judgment, the Judge observed that it was "*something of an understatement*" to say that the background to the application for review was "*complex*", adding that it was "*difficult to conceive of a case with a more eventful background leading up to an application of this kind*" (Judgment, para 1). Fortunately, that background is so comprehensively and clearly set out by the Judge that, for present purposes, it can be recited relatively briefly.

3. Mr Buckley acted as Mr Doyle's solicitor over many years, going back as far as the late 1990s. He also acted for family members of Mr Doyle occasionally. The services provided by Mr Buckley related mainly to non-contentious business, principally a number of high-value property transactions. In late 2010/early 2011, a bitter dispute arose between Mr Doyle and Mr Buckley as to the level of fees that Mr Buckley had charged for those services. A significant proportion of those fees had already been paid directly from the property sales and other monies held by Mr Buckley on Mr Doyle's behalf. Mr Doyle was particularly concerned about a sum of €600,000 which had been

paid to Mr Buckley by a company called Sandystream Limited as a deposit for a property purchase from Mr Doyle. That deposit had been forfeited when the transaction failed to proceed after Sandystream went into liquidation but, rather than being paid over to Mr Doyle, it appeared to have been applied by Mr Buckley in discharge of fees said to be due to him.

4. These concerns led to Mr Doyle commencing proceedings against Mr Buckley in July 2011. In the course of those proceedings, Mr Buckley swore on affidavit that only €45,000 (approx.) remained to the credit of Mr Doyle in his client account. More than €500,000 had been applied by Mr Buckley towards, fees, outlay and VAT. Mr Buckley also repeatedly stated on affidavit that, in the event that any sums were payable to Mr Doyle, he undertook to make any appropriate repayment following the determination of the Taxing Master.

5. Mr Doyle also issued a summons to tax in July 2011. However, in March 2012 Taxing Master O' Neill expressed dissatisfaction with that procedure. That led Mr Doyle to apply to the High Court seeking an order for taxation pursuant to section 2 of the Solicitors (Ireland) Act 1849 (as amended) ("*the 1849 Act*") or alternatively pursuant to the inherent jurisdiction of the court. That application, which was brought within the proceedings issued in July 2011, came on for hearing before Charleton J in the High Court and on 25 March 2013 he gave judgment ([2013] IEHC 292).

6. Charleton J had been asked by Mr Doyle to refer for taxation bills of costs going back to 1998. While acknowledging that some of those bills might have been paid in error,

he declined to go back as far as 1998. He directed taxation of two specific bills of costs relating to the Sandystream transaction (D215 and D226). As regards the remaining disputed costs (going back to 2000), he took the view that the Taxing Master should assess whether (1) a proper bill of costs had been furnished by Mr Buckley and (2) whether there was evidence of voluntary payment of those costs by Mr Doyle (at page 4). Where a proper bill had been furnished which had been paid in a "*regular way*" by Mr Doyle (i.e. in a manner indicating his assent to payment of that bill), there was in his view no warrant for exercising the inherent jurisdiction to direct taxation. The judge summarised the outcome as follows:

> "*Bills D215 and D226 are referred to taxation. All of the charges made by the defendant of the plaintiff are to be proved before the Taxing Master. In respect of any matter where a proper bill of costs furnished by the defendant solicitor to the plaintiff as his client is proven, together with a voluntary payment of that bill by the plaintiff, taxation is to be rejected. In respect of any matter where a proper bill of costs is not furnished, or where voluntary payment by the plaintiff to his solicitor is not apparent, taxation in respect of that is hereby ordered.*" (at page 5)

The High Court gave liberty to apply should "*any intractable issue arise that is not capable of being dealt with in accordance with the principles set out herein*" (at page 5).

7. That judgment effectively delegated to the Taxing Master the task of ultimately deciding what bills/costs were to be taxed, albeit by reference to the principles set out in the judgment and with the facility of going back to the High Court for further guidance if required. That no doubt appeared to be a pragmatic solution. However, it left significant and undesirable uncertainty as to the scope of the taxation exercise to be undertaken by the Taxing Master and significant room for further dispute between the parties on that issue.

8. In any event, the parties clearly accepted the judgment and order of Charleton J as neither brought an appeal from it.[1] The taxation then proceeded before Taxing Master O' Neill. The course of the taxation, and the various rulings made by the Taxing Master between December 2013 and May 2015, culminating in a final ruling on the taxation on 22 May 2015, are set out in detail at paras 7 – 15 of the Judgment of Binchy J. As he explains, as a result of a ruling given on 30 April 2014, the Taxing Master ultimately decided to proceed to tax a significant number of bills of costs in addition to the two Sandystream bills of costs specifically directed to be taxed by Charleton J and his rulings on those bills resulted in very substantial reductions to the costs claimed by Mr Buckley, amounting in total to more than €750,000 (Judgment, para 15).

[1] For completeness, I note that in March 2016 this Court gave judgment in *Dorgan v Spillane* [2016] IECA 84. For the reasons set out in her judgment (with which Ryan P and Hogan J agreed) Irvine J considered that *Doyle v Buckley* had incorrectly interpreted section 2 of Solicitors (Ireland) Act 1849 as importing the formal requirements for a bill of costs set out in Order 99, Rule 29(5) RSC: para 70. In his judgment in the judicial review proceedings referred to below ([2016] IEHC 201), Twomey J considered whether the decision in *Dorgan v Spillane* affected the order made by Charleton J and concluded that it did not: paras 10-14. That conclusion is clearly correct and no doubt explains why no such issue was raised in this appeal.

9. It was only at that point that Mr Buckley sought to exercise the liberty to apply granted by Charleton J, maintaining that the Taxing Master ought not to have taxed any of the bills other than the two Sandystream bills. Charleton J had at that stage been appointed as a judge of the Supreme Court. Mr Buckley's motion came on before Kearns P on 1 July 2015. Kearns P took the view that the liberty to apply procedure was not apt to challenge the approach taken by the Taxing Master and that, if Mr Buckley wished to challenge the Taxing Master's rulings, there were other means of doing so such as judicial review and/or appeal (the reference to appeal obviously being a shorthand for a review of taxation under Order 99, Rule 38(3) RSC and Section 27(3) of the Courts and Court Officers Act 1995 ("*the 1995 Act*") (Judgment, para 15).

10. Later in the same month (July 2015) Mr Buckley brought judicial review proceedings. The primary reliefs sought in those proceedings were directed to challenging the Taxing Master's entitlement to tax eight specific bills of costs (in addition to the two Sandystream bills referred by Charleton J) and seeking to set aside the findings made by the Taxing Master in respect of those bills.[2] However, the proceedings also sought to challenge the Taxing Master's findings in relation to the two Sandystream bills (D215 and D226) on the basis (so it was said) that these bills had been incorrectly taxed on a

[2] Those bills being identified as D151, D151/A1, D151/A2/A3, D151/A4, D151/A5, D240(i) & (ii) , D254 and D151/A6. Confusingly, a different (but significantly overlapping) list of 11 bills (including the 2 bills directed to be taxed by Charleton J) is set out in the Schedule to the Notice of Appeal. In other words, that list has 9 rather than 8 additional bills. Nothing turns on that point.

party and party basis when they ought to have been taxed on a solicitor and own client basis.[3]

11. Those judicial review proceedings were duly heard by the High Court (Twomey J) and on 20 April 2016 Twomey J gave judgment refusing all the reliefs sought ([2016] IEHC 201). In his view, judicial review was not an appropriate procedure for challenging the decision of the Taxing Master to proceed to tax the additional bills of costs. In proceeding as he had, the Taxing Master had acted on foot of the order made by the High Court (Charleton J) in the 2011 proceedings and any dispute as the scope of the exercise undertaken by the Taxing Master on the foot of the order ought to have been ventilated and resolved in those proceedings (para 24). Noting that Kearns P had refused to permit Mr Buckley to re-enter the proceedings, Twomey J observed that that refusal could have been appealed to the Court of Appeal. Separately, Twomey J considered that Mr Buckley had an adequate alternative remedy available to him in relation to the rulings of the Taxing Master, namely his entitlement to carry in objections to those rulings (which he had in fact done) and, if necessary, seek review of taxation pursuant to Order 99 RSC (paras 29 and 30).

12. Mr Buckley appealed that decision. This Court was furnished with the extensive written submissions exchanged by the parties in that appeal. On 13 October 2017, the Court dismissed the appeal for the reasons set out *ex tempore* by Ryan P (Peart and Whelan JJ agreeing). This Court was also furnished with a note of the President's judgment.

[3] That relief does not appear to have been pursued – certainly the issue is not referred to in the judgments of the High Court or the Court of Appeal in the judicial review proceedings.

The President referred to the events of 29/30 April 2014 (recounted in detail at paras 11-14 of the Judgment of Binchy J in these proceedings), emphasising that, far from Mr Buckley maintaining any objection to the Taxing Master's decision to proceed to tax the additional bills (i.e. the bills other than the two Sandystream bills expressly referred for taxation by Charleton J), he had "*explained that he was happy to have all the bills to be taxed and that is in fact what proceeded*" (para 3). The consequences that followed – the reductions determined by the Taxing Master – "*followed from what [was] Mr Buckley's agreement, not in dispute in these proceedings, to have the bills in question all taxed and that is actually what happened*" (para 5). While there were other reasons why the appeal should not succeed, that appeared to the President to be a "*fundamental one*". The President also regarded as significant the fact that, since the commencement of the proceedings, the taxation process had proceeded and the Taxing Master had ruled on the objections and that determination was the subject of an appeal to the High Court. Accordingly, the decision under challenge had been overtaken by the further decision of the Taxing Master. Furthermore, the time for challenging the decision of the Taxing Master to broaden the taxation to include the eight additional bills of costs had long since passed (para 5). The appeal therefore did not "*get to first base*" and was unstateable (para 6).

13. As Ryan P noted, the taxation process had proceeded in parallel with the judicial review proceedings. The Taxing Master gave his final ruling on the taxation on 22 May 2015, a copy of which was provided to this Court. In July 2015, Mr Buckley carried in detailed objections to that ruling. Those objections were subsequently superseded by a further set of very detailed objections dated 28 September 2016, a copy of which was also

provided to the Court. We were also provided with a copy of Mr Doyle's replying submissions dated 4 October 2015. In due course there was a hearing on those objections and on 13 January 2017, Taxing Master O' Neill gave a detailed written ruling on the objections. For the reasons set out in that ruling (a copy of which was provided to us), the Taxing Master disallowed all of Mr Buckley's objections, with one immaterial exception relating to the fees of a third party.

14. On 2 February 2017, Mr Buckley issued a notice of motion seeking a review of the Taxing Master's allowances/disallowances. At that time, reviews of taxation were governed by Part V of Order 99 RSC[4] and section 27(3) of the 1995 Act. [5] The statutory framework has changed subsequently with the coming into operation of Part 10 of the Legal Services Regulation Act 2015 ("*the 2015 Act*") on 7 October 2019[6] and the consequential adoption of a recast Order 99 (also reflecting Part 11 of the 2015 Act, dealing with costs in civil proceedings, which came into effect at the same time as Part 10). Recast Order 99 came into operation on 3 December 2019.[7] However, the parties

[4] And in particular Order 99, Rule 38(3) RSC which in material part provided that "*Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may within twenty-one days from the date of the determination of the hearing of the objections or such other time as the Court or the Taxing Master may allow, apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just…*"

[5] Section 27(3) 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.*"

[6] Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (SI 502/2019).

[7] Rules of the Superior Courts (Costs) 2019 (SI 584 of 2019).

did not suggest that this appeal is affected in any way by these changes to the review procedure. Accordingly, references in this judgment to the review procedure are to the review procedure provided for by Order 99, Part V RSC prior to its amendment in 2019 and for which further provision was made by section 27(3) of the 1995 Act.[8]

15. In his notice of motion, Mr Buckley sought a stay on the review process pending the decision of this Court on his appeal in the judicial review proceedings. That relief obviously fell away in October 2017 when the Court gave its decision on the appeal. The only other relief sought by Mr Doyle is in the following terms:

> *"1. An Order pursuant to Order 99 Rule 38(3) of the Rules of the Superior Courts for review of the findings of the Respondent Taxing Master dated 13 January 2017 on the objections raised by the Applicant to the Respondent's Taxation of the Applicant's bills of costs in so far as those objections go to the quantum of the allowances/disallowances made by the Respondent in Review of Taxation."* (my emphasis)

16. It is evident from the Judgment of Binchy J that the review application was case managed and directions were given for the exchange of points of claim and defence and the preparation of an agreed *"schedule of issues*". The High Court also directed Mr Doyle to produce, in advance of the review hearing, a book of the documents that he intended to rely on at the hearing. All of these directions were complied with. At the hearing of the review Mr Buckley sought to introduce additional documentation but this

[8] And references to Order 99 are to the Order as it stood prior to its amendment in 2019, unless otherwise stated.

was not permitted by the Judge. The review then proceeded over three hearing days and, having reserved his decision, the Judge in due course gave the Judgment the subject of this appeal which it is now necessary to consider in detail.

THE DECISION OF THE HIGH COURT

17. At paragraph 22 of his Judgment, Binchy J sets out 9 grounds encapsulating Mr Buckley's "*principal grievances*" with the decisions of the Taxing Master. These may be further summarised as follows:

- Complaints as to the scope of the taxation exercise undertaken by the Taxing Master and in particular the Taxing Master's decision to proceed to tax the additional bills of costs which, Mr Buckley said, he had no jurisdiction to do. [Grounds 1 & 2]. Insofar as it was suggested that he had agreed to such taxation, Mr Buckley disputed any such agreement. Moreover, any agreement to taxation presumed that the Taxing Master would conduct the taxation on the basis of Order 99, Rule 11(3) RSC.[9] Further complaint was made about the Taxing Master's decision to tax two specific bills which, Mr Buckley said, had been accepted as agreed by Mr Doyle and his legal costs account [Ground 7] ("*the Jurisdiction Ground*")

[9] Order 99, Rule 11 provides:

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

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

(3) On a taxation as between solicitor and his own client, all costs incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount."

- Complaints as to the basis on which the Taxing Master taxed the bills. According to Mr Buckley, the Taxing Master had wrongly failed to apply the "*conclusive presumption*" which Order 99 Rule 11(3) RSC provided for in a taxation as between solicitor and own client, the effect of which (so Mr Buckley said) was that any bill paid under the written authority of the client was not amenable to taxation and/or should have been allowed in full [Grounds 2, 3, 8 and 9] ("*the Basis of Taxation Ground*")

- Various complaints as to the evidential basis for the Taxing Master's conclusions. Those conclusions lacked any supporting evidence [Ground 4]. Due to the passage of time (and without fault on his part) some of Mr Buckley's files were "*skeletal*" and did not fairly represent the work undertaken by him [Ground 5]. There was no obligation on him to keep detailed time records and, while he did keep records, he was not asked to produce them [Ground 10]. Mr Buckley also complained of being directed to prepare detailed bills of costs by Taxing Master Flynn in circumstances where, he said, the bills he had prepared at the conclusion of the relevant transactions were valid bills amenable to taxation [Ground 6] ("*the Residual Grounds*").

18. In addition, as the Judge noted at para 23 of his Judgment, Mr Buckley made submissions in relation to specific deductions made by the Taxing Master. However, as the Judgment records at para 43, Mr Buckley did not otherwise address the *quantum* of the fees allowed by the Taxing Master in his submissions to the High Court, although *quantum* issues were addressed in his points of claim. A further feature of

the High Court hearing, noted at para 21 of the Judgment, is that, even though he had his files with him in court and although they comprised the bulk of evidence that had been before the Taxing Master, Mr Buckley did not seek to refer to or rely on those files. Even so, the Judge gave detailed consideration to issues of *quantum* in his Judgment.

The Jurisdiction Ground

19. The Judge expressed surprise that Mr Buckley was advancing a jurisdiction argument in light of the fact that it was evident from his notice of motion that the application for review was concerned with *quantum* only (and that, the Judge noted, was accepted unambiguously by Mr Buckley in the course of the hearing before him) (Judgment, para 24). In any event, the jurisdiction arguments were, in his view, misconceived and had to be rejected for a number of reasons (Judgment, para 25). Mr Buckley was, in Binchy J's view, "*stuck with the decision*" of the Taxing Master to proceed to tax the additional bills in circumstances where he had failed to challenge that decision for more than a year and where judicial review proceedings challenging the decision had been unsuccessful in both the High Court and the Court of Appeal (para 25(1)). More than that, it was "*clear beyond any doubt*" that Mr Buckley had agreed to the taxation of those bills and that he had done so "*without qualification*" (para 25(2)). As for Mr Buckley's argument that he only agreed to taxation of the additional bills on the basis that Order 99, Rule 11(3) would apply, the Judge was of the view that he could not properly rely on that rule to exclude any of the bills from taxation. Mr Buckley had clearly agreed to an examination of the bills and submitted to the jurisdiction of the

Taxing Master and, if he intended that any of the bills should have been excluded by reason of Order 99, Rule 11(3) he should have said so and/or challenged the decision of the Taxing Master to proceed with the taxation of those bills in a timely manner (para 25(3)). As for Mr Buckley's argument that some or all of the additional bills were "*beyond the reach of taxation*" because the statutory time-limits for seeking taxation had expired, that argument foundered in the face of the order that had been made by Charleton J (which Mr Buckley had not appealed) and the view taken by the Taxing Master that the order authorised him to proceed as he had (which Mr Buckley had failed to challenge in a timely way) (para 25(5) & (9)).

20. As for the argument that the Taxing Master had wrongly proceeded to tax certain specific bills which Mr Doyle and his legal costs accountant had accepted were agreed and need not be taxed, the Judge said that the Taxing Master had come to the conclusion that there had been confusion on their part as to the files being referred and, on that basis, decided to subject those files to taxation. In the Judge's view, that was an issue about the Taxing Master was best placed to form a view and about which it was not possible for the court to form any view at all. It was therefore not appropriate to review the Taxing Master's decision in that respect (Judgment, para 37).

21. The Judge also addressed aspects of the Order 99, Rule 11(3) issue in this context and I will refer to his analysis below.

The Basis of Taxation Ground

22. The Judge rejected the contention that the effect of Order 99, Rule 11(3) RSC was to exclude examination of Mr Buckley's bills by the Taxing Master or preclude any reduction of the costs claimed by him. Such a contention was not consistent with the section 8 of the Solicitors Remuneration Act 1881 ("*the 1881 Act*") (which allows for the opening up of agreements between solicitor and client in relation to non-contentious business)[10] and section 10 of the Attorneys and Solicitors Act 1870 ("*the 1870 Act*") (allowing for agreements in relation to contentious matters to be re-opened even after payment of the costs (para 25(4) & (5)).[11] It was apparent from those provisions – which in the Judge's view reflected the fiduciary duty owed by solicitors

[10] Section 8(1) permits a solicitor to make an agreement with his or her client to fees. Such an agreement must be in writing and signed by the "*person to be bound*" (section 8(2)). Section 8(4) – the provision that the Judge had in mind – provides that "*The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the Court may inquire into the facts, and certify the same to the Court; and if, upon such certificate, it shall appear to the Court or judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the Court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the Court or judge may seem fit*."

[11] Section 4 of the 1870 Act permits an attorney or solicitor to make an agreement in writing with his or her client in relation to fees. Section 4 also imposes certain preconditions to receiving payment on foot of such an agreement. Section 10 of the Act provides that "*When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person chargeable with or entitled to pay the same, any court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such court or judge that the special circumstances of the case require the agreement to be re-opened, re-open the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the court or judge may seem just*."

to their clients – that agreements between solicitors and clients in relation to fees "*did not have the sacrosanct status attributed to them by [Mr Buckley]*" (para 25(6)). Furthermore, any conclusive presumption in Order 99, Rule 11(3) RSC had to yield to the jurisdiction conferred by section 27(3) of the 1995 Act which "*contains no presumptions, conclusive or otherwise, in favour of either solicitor or client*" (para 25(7)). The Judge also noted that section 151 of the 2015 Act makes it clear that agreements between solicitor and client regarding legal costs are amenable to adjudication (para 25(8)).

23. Accordingly, the Judge considered that it was clear that a fee agreement between solicitor and client was not beyond review by a court or, post the 2015 Act, review by a legal costs adjudicator. But, he added, where an agreement was freely entered into in relation to fees, both legal costs adjudicators and the courts should be very slow to intervene (Judgment, para 27).

24. Later in his judgment, the Judge addressed Mr Buckley's contention that the Taxing Master had wrongly applied the principles applicable to party and party taxation in taxing the bills of costs here. He reiterated his view that Order 99, Rule 11(3) RSC did not preclude the taxation of the bills of costs here. As to the more general proposition advanced by Mr Buckley that there was an onus on the client in a solicitor and client taxation to demonstrate that any particular item of cost was unreasonable, the Judge did not accept that was correct. All that Order 99 provided was that all costs were to be allowed except where they had been unreasonably incurred or were of an unreasonable amount. There was no presumption, one way or the other (Judgment,

para 38). As for Mr Buckley's contention that on a solicitor and own client taxation, the taxing master should not even take the files for inspection unless and until the client had demonstrated that the solicitor's charges were unreasonable, the Judge agreed with the ruling that had been given by Taxing Master O Neill to the effect that the provisions of section 27(1) and (2) of the 1995 Act imposed a clear obligation on him to ascertain the nature and extent of the work undertaken by the solicitor and to place a value on that work. It was, in the Judge's view, "*self-evident that in order to consider whether or not a particular fee is reasonable, a taxing master must have regard to the work done, and the evidence of that work will mainly be found on the file*" (Judgment, para 39).

The Residual Grounds

25. In the Judge's view, there was no substance to the argument that the Taxing Master did not have evidence on which to base his conclusions. He had the evidence of Mr Buckley and Mr Doyle and, more significantly, he had the evidence of the files. Apart from letters or agreements about fee, the files were the most important evidence to be considered on a taxation: almost everything else said about what is reasonable or not was more in the nature of a submission than a matter of evidence (Judgment, paras 31-34).

26. As to the suggestion that some of the files were "*skeletal*", the Judge noted that there was no suggestion in the rulings of the Taxing Master that he was unable, from the files provided, to identify the services provided by the solicitor or that he was impeded

in doing so (Judgment, para 34). He also noted that when Mr Buckley had been directed by Taxing Master Flynn to prepare detailed bills of costs, he was able to do so on the basis of the available files. That was as far as the matter could be put, in circumstances where the files were not brought into evidence before the High Court (Judgment, para 35).

27. As to Mr Buckley's objection to having been directed by Taxing Master Flynn to prepare more detailed bills, the Judge was unsure as to the significance of that argument but clearly saw nothing in it to warrant reviewing the allowances made by the Taxing Master (Judgment, para 36).

28. The final issue under this heading related to time records. Here, Mr Buckley had maintained that he was under no obligation to keep time records (though also maintaining that, in fact, he kept such records). The Judge noted, however, that where – as was the case here – a solicitor quoted an hourly rate of charge as the basis on which fees would be calculated, then it was incumbent on the solicitor to keep detailed time records. In the absence of such records, the Taxing Master had little choice but to undertake his own review of the files and to compare that with Mr Buckley's estimate of the time spent on those files and where the Taxing Master felt – as he clearly did in a number of items – that Mr Buckley could not reasonably have spent the time he claimed to have spent on any particular item, it was quite proper for him to adjust the time accordingly (Judgment, paras 40-42).

Quantum

29. As already noted, Mr Buckley did not make submissions on the *quantum* of the fees allowed by Taxing Master O' Neill. Mr Doyle did not make submissions on *quantum* either. Against that "*somewhat unusual background*", the Judge nonetheless carried out a very detailed assessment of what he characterised as "*the most significant deductions made by [the Taxing Master] to the accounts under consideration.*"

30. Before undertaking that exercise, the Judge addressed the applicable scope of review. There is a very substantial body of caselaw on the proper scope of the review procedure, the standard of review to be applied and the considerations relevant to the exercise. The principal authorities are discussed by Binchy J in his Judgment, at paras 44 - 47. As he noted, the courts have consistently emphasised the significant threshold that has to be surmounted if a review application is to succeed. Since the enactment of section 27(3) of the 2015 Act, the applicant must establish that the taxation was, in some material respect, "*unjust*". Absent such an injustice, it is not sufficient to establish some error on the part of the Taxing Master - see e.g. *Smyth v Tunney* [1999] ILRM 211 and *Superquinn Ltd v Bray UDC (No 2)* [2001] 1 IR 459 – and the reviewing court should operate "*on the basis of curial deference and judicial restraint*"*: Lowe Taverns (Tallaght) Limited v South Dublin County Council* [2006] IEHC 383. Having cited these authorities, the Judge expressed the threshold for review as follows:

"*46. So therefore it may be said that the scope of review undertaken by this court in an application to review a decision of the respondent is constrained by the curial deference which the court owes to decisions of the respondent in light of his expertise, as well as by the statutory framework and in particular s. 27 (3) of the Act of 1995 which, before the court may intervene, requires the court to form the conclusion that the Taxing Master has erred as to the amount of an allowance or disallowance so that his decision is unjust, and the courts have held that this imposes a significant burden on any party seeking to displace a decision of the Taxing Master…*"

31. These principles informed the Judge's detailed assessment of the disputed bills of costs, running over more than 30 pages of his judgment. With one qualified exception (the fees payable to an agricultural consultant in Files D151 A5(I) and (II)), the Judge was not persuaded that any of the allowances made by the Taxing Master should be reviewed. The Judge's detailed analysis of the bills was not challenged on appeal and accordingly it is not necessary to engage with that analysis in any detail.

32. Accordingly, the Judge refused the application for review. Mr Buckley was directed to pay the costs of the review, with a requirement to pay €25,000 on account.

THE APPEAL

33. Mr Buckley appealed to this Court from the judgment and order of the High Court. Numerous grounds of appeal are set out in his Notice of Appeal but in his written and oral submissions, Mr Buckley focused on (1) the jurisdiction of the Taxing Master to tax the additional bills and what he contended was the failure of the Judge to address that issue properly (again, I shall refer this ground as the "*Jurisdiction Ground*"); (2) the consequences which he said followed from the fact that the disputed bills were solicitor and own client bills which been agreed by Mr Doyle, in terms of excluding those bills from taxation and/or triggering the provisions of Order 99, Rule 11(1) and (3) RSC. A central plank of Mr Buckley's argument related to what he said was the failure of Mr Doyle to adduce any evidence that any of the disputed bills contained charges of an unreasonable amount or charges that were unreasonably incurred such as might rebut the presumption in Order 99, Rule 11(1) RSC (again, I shall refer to this ground as "*the Basis of Taxation Ground*") and (3) Mr Buckley complained about the exclusion of evidence on which he wished to rely in the High Court and which, he said, ought to have been before the Court to enable it properly to carry out its review function. Again, I will refer to the grounds as "*the Residual Grounds*".

34. Mr Buckley did not advance any challenge the Taxing Master's allowances on the basis those allowances were, as to *quantum*, erroneous or unjust. Mr Buckley did bring the Court in detail through one bill (Bill D240/i/ii) relating to the sale in two lots of lands at Delgany, Co Wicklow, where he had charged a professional fee of €344,733 plus VAT. On taxation, the Taxing Master concluded that the appropriate fee was €70,000.

That reduced fee was confirmed following the carrying in of objections by Mr Buckley. On review, the Judge agreed with the Taxing Master that the fee charged – calculated as 3% of the sale price – was well in excess of any marketplace norms (Judgment, para 100). But Mr Buckley's purpose in referring to this bill was not to challenge the *quantum* of the fee assessed as fair and reasonable by the Taxing Master but rather to demonstrate that the fee charged by him had been agreed by Mr Doyle and accordingly (so Mr Buckley said) either bill D240/i/ii ought not have been taxed at all or his fee ought to have been presumed to have been reasonably incurred and to have been reasonable in amount, having regard to Order 99, Rule 11(1) and/or (3) RSC.

35. Mr Buckley has now retired from practice. While he had been represented by solicitor and counsel in the High Court, he appeared on his behalf at the hearing of the appeal. He made his submissions skilfully and courteously and the Court is grateful to him, and also to counsel for Mr Doyle, for their assistance.

Analysis

The Jurisdiction Ground

36. Mr Buckley's essential point here is that the Taxing Master was not entitled to proceed to tax the additional bills. That argument rests on the provisions of the Solicitors (Ireland) Act 1849 and in particular the time limits set out in that Act for the referral to taxation of a solicitor and client bill: see *State (Gallagher Shatter & Co) v De Valera* [1986] ILRM 3.

37. However, it is clear that in certain circumstances the High Court may direct the taxation of a solicitor and client bill outside the time limits in the 1849 Act. Section 6 of the Act provides such a power but, apart from and in parallel with that statutory jurisdiction, the High Court has an inherent jurisdiction to direct taxation: *State (Gallagher Shatter & Co) v De Valera*.

38. Such an order was made here by Charleton J. He referred two specific bills for taxation (and no issue arises as to the entitlement of the Taxing Master to tax those bills). But he also *ordered* the Taxing Master to tax any other bills (dating from 2000 or later) where a proper bill of costs had not been furnished *or* where voluntary payment by Mr Doyle to Mr Buckley was not apparent (judgment of Charleton J at page 5).

39. That order may have been unusual but, in the absence of any appeal, it bound the parties and it also bound the Taxing Master. In accordance with it, the Taxing Master considered the issue of what further bills (if any) should be taxed and ultimately made the decision that he did on that issue. That decision (made on 30 April 2014) was explained by the Taxing Master in his Ruling on the Objections:

> "*... having duly examined the relevant bills of costs as originally issued to the clients, I came to the conclusion that although paid, I was not satisfied that there had been informed voluntary payment. I had doubts about Mr Buckley's credibility and I was not prepared to accept that the bills and invoices were properly served on the client or that a full and considered evaluation of bills*

took place so that the client understood them sufficiently, or at all, such that he had made no properly informed voluntary payment thereof." (Ruling on Objections, para 9)

40. On the basis of that finding of fact – one which appears to fall squarely within the scope of the exercise mandated by the order of Charleton J – the Taxing Master was not simply *permitted* but *required* to tax the additional bills. If Mr Buckley considered otherwise – whether on the basis that the Taxing Master was not entitled to reverse his previous position on this issue, that he had misunderstood or misapplied the criteria set down by Charleton J, that his finding was factually unsustainable and/or unreasonable or on any other basis whatever – it was incumbent on him to challenge the decision of the Taxing Master. Far from challenging that decision, all the available evidence indicates that Mr Buckley accepted it and expressly agreed to the taxation of the additional bills. Such agreement is referred to in the Taxing Master's Ruling of 22 May 2015 and he also makes reference to a document signed on 30 April 2014 acknowledging what files were to be taxed (at page 27). Reference is also made to such a document in the Ruling on the Objections (at para 11).

41. Mr Buckley subsequently did seek to challenge the decision to tax the additional bills but that challenge was unsuccessful. In this Court at least, the fundamental reason his challenge failed was the fact that Mr Buckley had agreed to the Taxing Master proceeding as he had – a fact which the Court observed was "*not in dispute in the proceedings*".

42. In these circumstances, I share the Judge's view that Mr Buckley cannot now maintain any challenge to the Taxing Master's decision to proceed to tax the additional bills of costs and that, as the Judge pithily observes, "*[Mr Buckley] is stuck with the decision of the [Taxing Master] to tax the relevant accounts.*" I reach that view for a number of distinct and independent reasons.

43. In the first place, that challenge involves a fundamental challenge to the jurisdiction of the Taxing Master and, in my view, a jurisdictional challenge of that kind cannot be advanced in an application for a review of taxation.

44. Mr Buckley relies on a statement made by Geoghegan J in the High Court in *Bloomer v Incorporated Law Society of Ireland* (No 2) [1999] IEHC 260, [2000] 1 IR 383 where (at 387) he indicated that in a review of taxation the court must consider "*whether the Taxing Master has fallen into error in either law or jurisdiction*". On that basis, Mr Buckley says that jurisdictional errors may be raised in a review of taxation. However, no jurisdictional error appears to have been at issue in *Bloomer* and it is not at all clear precisely what type of error Geoghegan J had in mind.

45. In *Chubb European Group SE v Health Insurance Authority* [2020] IECA 91, Murray J (Whelan and Power JJ agreeing) observed that "*statutory appeals will not usually extend to claims that a body lacked jurisdiction to determine a matter*" (at para 136). While the authority cited for that proposition – the decision of this Court in *Sheehan v. Solicitors Disciplinary Tribunal* [2020] IECA 77 – was subsequently reversed on appeal to the Supreme Court, the decision of the Supreme Court turned very

significantly on the nature and scope of the particular statutory appeal at issue in *Sheehan* (an appeal to the High Court from the Solicitors Disciplinary Tribunal pursuant to section 7 of the Solicitors (Amendment) Act 1960, involving a *de novo* appeal).

46. The appeal here is not a *de novo* appeal. Order 99, Rule 38(3) provides that any party who is "*dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof*" may apply for an order "*to review the taxation as to the same items*". In other words, Rule 38(3) contemplates a challenge to (i) the decision of the taxing master to allow or disallow an "*item*" and/or (ii) the quantum of the allowance made in respect of that "*item*". That language does not appear apt to encompass a fundamental jurisdictional objection such as that advanced by Mr Buckley here. Section 27 of the 1995 Act must also be considered in this context. That section and Order 99 constitute "*an interlocking whole*"*: Leech v Independent Newspapers Ireland Ltd* [2021] IECA 203, per Ní Raifeartaigh J (Faherty and Collins JJ agreeing) at para 61. Section 27(3) provides that the High Court may review a decision of the Taxing Master "*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… has erred as to the amount of the allowance or disallowance so that the decision of the Taxing Master… is unjust.*" Again, that language, with its focus on the allowances and disallowances made by the Taxing Master and whether there was any error as to the *amount* of such allowances or disallowances, appears wholly inapt to confer on the High Court undertaking such a review competence to consider a jurisdictional objection(s) such as that advanced by Mr Buckley here.

47. That the Taxing Master is amenable to judicial review, and that the availability of the review of taxation procedure does not preclude the bringing of judicial review proceedings where appropriate is, of course, well-established on the authorities: see for example the decision of the Supreme Court in *DMPT v Taxing Master Moran* [2015] IESC 36, [2015] 3 IR 224 (failure of taxing master to give reasons for his initial ruling on a taxation amenable to challenge by way of judicial review) and this Court's decision in *Fitzpatrick v Behan* [2020] IECA 324 (complaints of lack of fair procedures relating to a failure to grant an adjournment and alleged objective bias amenable to challenge by way of judicial review).

48. The jurisdictional objection taken by Mr Buckley here is fundamental in nature. His complaint is not that the Taxing Master strayed outside the proper parameters of his jurisdiction in the course of carrying out a taxation otherwise properly within his jurisdiction, such as by making a procedural ruling outside his powers or mistakenly taxing an item that was not disputed (which may be the sort of jurisdictional error that Geoghegan J had in mind in *Bloomer*). Rather, on Mr Buckley's case, the Taxing Master had no entitlement to tax the additional bills at all and it was *ultra vires ab initio* for him to do so (or purport to do so).

49. In my view, such a fundamental challenge to the jurisdiction of the Taxing Master must be made by way of judicial review. It is not an issue that properly comes within the review taxation of the taxing master under Order 99, Rule 38(1) or the review

jurisdiction of the High Court under Order 99, Rule 38(3) and/or section 27(3) of the 1995 Act.

50. The second reason arises from the fact that Mr Buckley did in fact bring judicial proceedings challenging the decision of the Taxing Master to proceed to tax the additional bills. Insofar as those proceedings failed in the High Court on the basis that the issues raised by them could and should be pursued in an Order 99, Rule 38(3) review of taxation (and that was not the primary basis for the High Court's decision – the failure of Mr Buckley to effectively pursue his liberty to apply in the 2011 proceedings was clearly the more significant consideration in that court's view), the High Court was, with respect, mistaken. But, in any event, that was not the basis on which this Court decided Mr Buckley's appeal. It addressed the substance of Mr Buckley's complaint and dismissed it as unstateable on the basis of the undisputed evidence that Mr Buckley had agreed to the taxation of all of the additional bills taxed by the Taxing Master.

51. Even if it were the case that, as a matter of principle, the Jurisdiction Ground could properly be advanced in these review of taxation proceedings, the decision of this Court in the judicial review proceedings closes the door to any attempt to reopen or reargue that ground now. The issue of whether Mr Buckley consented to the taxation of the additional bills is *res judicata.* The additional complaints made by Mr Buckley – that the Taxing Master changed his mind, that he allowed Mr Doyle and his costs accountant to resile from concessions made by them as to whether particular bills came with the order made by Charleton J and that he failed to give advance notice of his intention to tax certain of the bills – were all matters that ought to have been raised in the judicial

review proceedings. Some of those complaints appear to have been raised in those proceedings, at least by way of submission. But even if it be the case that those complaints are new, and were not advanced in the judicial review proceedings, it does not follow that they can be relied on in these proceedings. Mr Buckley ought to have brought forward his entire case when he challenged the Taxing Master's decision to proceed to tax the additional bills: see *AA v Medical Council* [2003] IESC 70, [2003] 4 IR 302. The principle applied in *AA* – commonly referred to as the "*rule*" in *Henderson v Henderson* – admits of an exception where there are special circumstances but there are no such circumstances here.

52. Thirdly, the jurisdictional issues now relied on by Mr Buckley are not within the scope of this review of taxation in any event. The originating document – the notice of motion issued by Mr Buckley on 2 February 2015 - seeks review of the Taxing Master's findings on the objections – not any prior ruling made by him – and only "*in so far as those objections go to the* quantum *of the allowances/disallowances*" (my emphasis) made by the Taxing Master in his Ruling on the Objections. That relief is limited to issues of *quantum* and does not encompass issues of jurisdiction.

53. Fourth, in light of Mr Buckley's agreement to taxation, any jurisdiction issue fell away in any event. Nothing in either the 1849 Act or Order 99 limits the power of a taxing master to tax a solicitor's bill outside the time limits set out in that Act where the solicitor consents to taxation.

54. Fifthly, and finally, as already observed the Taxing Master determined to tax the additional bills based on the finding made by him that the payments made by Mr Doyle were not properly informed voluntary payments. On the basis of that finding, the Taxing Master was clearly entitled (indeed obliged) to tax the additional bills, having regard to the terms of the order of Charleton J. There is simply no evidence in these proceedings that would permit the High Court, or this Court on appeal, to conclude that the Taxing Master's finding was in error, still less that he was guilty of any "*manifest error*" (see in that regard ***HM v SM*** [2018] IECA 396, per Baker J (Birmingham P and Costello J agreeing) at para 26).

55. As regards the 1870 and 1881 Acts, I am not entirely certain that Mr Buckley ultimately contended that those Acts excluded the jurisdiction of the Taxing Master to tax some or all of the disputed additional bills of costs – that such bills were, as a matter of law, not "*amenable*" to taxation - in the absence of an order made under section 10 of the 1870 Act (contentious business) or section 8(4) of the 1881 Act (non-contentious business). To the extent that he did, precisely the same considerations apply as with the objection based on the 1849 Act. Such a contention cannot, in my view, properly be advanced in a review of taxation that is concerned only with the allowances and disallowances made by the Taxing Master. It involves a further and far-reaching jurisdictional objection that is properly a matter for judicial review.

56. The rule in *Henderson v Henderson* is also relevant here. Judicial review proceedings were brought by Mr Buckley in the immediate aftermath of the Taxing Master's final ruling on the initial stage of taxation. If Mr Buckley considered that the Taxing Master

had taxed bills which he lacked the power to tax having regard to the provisions of the 1870 and/or 1881 Acts, that objection ought to have been raised in those proceedings. No reference is made to the 1870 Act in the Statement of Grounds. Reference is made to section 8 of the 1881 Act but as regards only one bill (D240) (para (e)17). The section 8 point was not expressly addressed by this Court in the judicial review proceedings, perhaps because the Court took the view that the point could not be maintained in the face of Mr Buckley's agreement to have the additional bills taxed. In any event, it appears to me that *Henderson v Henderson* presents a significant barrier to these issues being raised in these proceedings, even if it was the case that, contrary to the view I have expressed, such issues could in principle be raised in a review of taxation.

57. Furthermore, even on the assumption that, as a matter of principle, such issues can properly be raised in a review of taxation, they are not within the scope of this review in any event, given the very specific terms of the relief sought by Mr Buckley in his notice of motion. That relief is limited to issues of *quantum* and does not encompass issues of jurisdiction.

58. That is not the last of the difficulties that Mr Buckley faces in this context. In making his objections to the initial Ruling of the Taxing Master, Mr Buckley relied on section 8 of the 1881 Act but, once again, only in respect of Bill D240 (objection 45). The Taxing Master rejected all of the objections relating to that bill, *inter alia* because he could not be satisfied that the fees in question (which the Taxing Master clearly considered to be grossly excessive) had been the subject of an informed and voluntary payment decision by Mr Doyle (Ruling on the Objections, page 50). That was

particularly so in the absence of any agreement executed by the client (Ruling, page 51). It is difficult to see any basis on which such a finding of that kind could be reviewed by the High Court or this Court, at least in the absence of compelling evidence that the Taxing Master had erred in his assessment and there is no such evidence here. That finding was and is fatal to Mr Buckley's reliance on section 8 of the 1881 Act as regards Bill 240 (as indeed it would have been fatal to any wider reliance on section 8 or any reliance on the 1870 Act).

59. The 1881 Act does not appear to have been relied on by Mr Buckley before the Taxing Master in respect of any bill other than D240 and he does not appear to have relied on the 1870 Act at all (and when the Court raised the issue of whether the Acts had been relied on before the Taxing Master, objection 45 was the only objection identified by Mr Buckley). Therefore, with the single exception of bill D240, the arguments made by Mr Buckley in reliance on the 1870 and 1881 Acts – and at one point in his submissions he appeared to contend that *all* of the bills (other than the two Sandystream bills referred to taxation by Charleton J) were governed by one or other Act – were advanced for the first time in these review proceedings. It is not permissible to raise new arguments in a review of taxation: see *Minister for Finance v Goodman (No 2)* [1999] 3 IR 333, per Laffoy J at 346-347, as well as *Leech v Independent Newspapers Ireland Ltd* [2021] IECA 203, at para 50 and following.

60. All of Mr Buckley's jurisdictional objections must therefore be rejected and the Jurisdiction Ground fails. That does not, of course, preclude Mr Buckley from objecting to the *manner* in which the bills were taxed insofar as that relates to the *quantum* of the

allowances/disallowances actually made by the Taxing Master but Mr Buckley cannot maintain an objection to the *fact* that the bills were taxed and in particular he cannot maintain that the provisions of the 1849 Act, the 1870 Act and/or the 1881 Act excluded such taxation or deprived the Taxing Master of jurisdiction to tax the bills that he did.

The Basis of Taxation Ground

61. Mr Buckley says that the Taxing Master erred significantly in his approach to the taxation of the disputed bills here. He makes a two-part argument. First, he relies on Order 99, Rule 11(1), which provides that "*[o]n a taxation as between solicitor and client, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred*." The taxation here was a taxation between solicitor and client and Mr Buckley submits that the effect of Order 99 Rule 11(1) was to create a presumption in favour of him as solicitor and to impose on Mr Doyle as client the onus of adducing evidence that any of the costs claimed were "*of an unreasonable amount*" and/or were "*unreasonably incurred.*" *Heffernan v Heffernan* (Unreported, High Court, Gannon J, 2 December 1974) *McGrory v Express Newspapers Plc* (Unreported, High Court, Murphy J, 21 July 1995), *Dunne v Fox* [1999] 1 IR 283 and *Lowe Taverns (Tallaght) Limited v South Dublin County Council* [2006] IEHC 383 were cited as authority for that proposition.

62. Second, Mr Buckley relies on Order 99, Rule 11(3) RSC, which provides as follows:

"*(3) On a taxation as between solicitor and own client, all costs incurred with the express or implied approval of the client evidenced in writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount.*"

On Mr Buckley's case, virtually all of the costs at issue between here were "*incurred with the express or implied approval*" of Mr Doyle, not just as the nature of the costs being incurred but also as to their amount, such as to trigger the conclusive presumption provided for in Order 99, Rule 11(3).

63. Rule 11(3) has its origins in the 1962 Rules, where it took the form of Order 99, Rule 12(3).[12] There is surprisingly little authority on it. It did not fall for consideration in *Heffernan*, *McGrory* or *Dunne* (none of which involved a taxation between solicitor and client)[13] and arose only in a very limited way in *Lowe Taverns* (where, in the absence of any suggestion that the fees paid to counsel had been paid voluntarily by the

[12] Rules of the Superior Courts 1962 (SI72/1962).

[13] *Heffernan v Heffernan* was a probate action and the relevant order for costs provided for the payment of the costs of the parties from the deceased's estate, to be taxed on a solicitor client basis. The effect of that order was to allow for the recovery of a higher level of costs than would be recoverable on a normal party and party taxation. *McGrory* involved an agreement for costs made *inter partes* providing for the plaintiff to recover his costs on an "*indemnity basis*". Effect was given to that agreement by the making of an order on consent that the plaintiff should have his costs on a "*solicitor and own client basis*". Even so, the judgment of Murphy J makes no reference to Rule 11(3), presumably because the relevant costs did not actually arise as between a solicitor and his and her client and so no issue of what costs may have been approved by the client in the context of such a relationship arose. Finally, *Dunne* involved the costs payable by a party to a non-party in respect of an application for and the making of non-party discovery under Order 31, Rule 29 RSC. Again, Rule 11(3) was not engaged in those circumstances.

client, McGovern J considered that it was to be conclusively presumed that his fees were reasonably incurred and reasonable in amount). In *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] 1 Ch 59, Sir Robert Megarry VC said of the equivalent rule in England and Wales (Order 62, Rule 29(2) that it seemed "*entirely just and proper as between a solicitor and his own client. The client ought not to be allowed to complain about what he has authorised his solicitor to do*…" (at 72F).

64. Section 27(1) & (2) of the 1995 Act must also be considered. So far as material, these sub-sections provide:

> "*(1) On a taxation of costs as between party and party by a Taxing Master of the High Court, … or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master … shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs.*
>
> *(2) On a taxation of costs as between party and party by a Taxing Master of the High Court …. or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master … shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses*

included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master … considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part." (my emphasis)

65. As is clear from the highlighted text, these provisions apply to solicitor and client taxations as they do to party and party taxations and draw no distinction between those two categories of taxation in terms of the powers conferred on the taxing master. They are not, on their face, limited to litigation costs (contentious business) and no argument to that effect appears to have been made to the Taxing Master and certainly none was made to the High Court or to this Court on appeal. Accordingly, those provisions must be taken to be applicable to the taxation of costs at issue here.[14] That was not in dispute.

66. The relevant provisions of Order 99 must now be construed and applied having regard to section 27(1) & (2): *Sheehan (an infant) v Corr* [2017] IESC 44, [2017] 3 IR 252, per Laffoy J (Denham CJ, O' Donnell, McKechnie and Charleton JJ agreeing) at para 75. There Laffoy J was addressing Order 99, Rule 37(18) and 37(22)(ii) RSC in the context of a party and party taxation. However, the same approach requires to be taken

[14] And that is clearly the view taken in Flynn & Halpin, *Taxation of Costs* (1999), at page 186, fn 100 and supporting text. As the authors explain, quite apart from the provisions of Section 27(1) & (2), Order 99, Rule 25 RSC gave the taxing master a broad power to direct the production of "*books, papers and documents*" and it was, it seems, common practice for taxing masters to request the production of the solicitor's file and working papers.

to those provisions of Order 99 governing solicitor and client taxations, including Order 99, Rule 11. That clearly follows from the fact that section 27(1) and (2) unambiguously apply to solicitor and client taxations. At the level of principle, that was accepted by Mr Buckley though, as I shall explain, he did not accept that section 27(1) and (2) justified the Taxing Master's approach to the taxation of the bills here.

67. The effect of section 27(1) & (2) has been considered in a number of decisions. In *Minister for Finance v Goodman (No 2)*, Laffoy J expressed the view that they had introduced "*a fundamental change*" in relation to the functions of the taxing master in the taxation of solicitor's disbursement, including counsel's fees, in that the Taxing Master could henceforth examine the nature and extent of the work to which the disbursements related and assess the value of that work and what was a fair and reasonable allowance for it: pages 474-476. That passage was referred to by the High Court (Kearns P) in *Superquinn Ltd v Bray UDC (No 2)* [2001] 1 IR 459. In the former President's view, it followed from the powers conferred on the taxing master by the Oireachtas, "*that the Taxing Master also has a duty to examine the nature and extent of work in any particular case and make his own fair and reasonable assessment on the merits accordingly*." That meant that some "*supposed 'no go' areas*", such as counsel's fees, no longer existed: at page 475. Later in his judgment, Kearns P suggested that the powers and responsibilities imposed on the taxing master by section 27(1) & (2) mandated a "*root and branch examination*" of the bill being taxed: page 480.

68. The language of a "*root and branch review*" has been repeated in subsequent cases: see for example *Cafolla v Kilkenny* [2010] IEHC 24, [2010] 2 ILRM 207 and *HM v SM*

[2018] IECA 396. In *Sheehan (an infant) v Corr* [2017] IESC 44, [2017] 3 IR 252, Laffoy J (Denham CJ and O' Donnell, McKechnie and Clarke J agreeing) referred to this line of authority and cautioned that statements such as that made by Kearns P in *Superquinn* should not be misunderstood. It was, she explained, never intended that:

> " *... such would involve the Taxing Master in conducting some sort of inquisitorial review of every item in every bill, calling for his or her adjudication. Rather, the phrase was intended to apply only to those contentious aspects of the bill, as determined by the parties to the review. Where, therefore, there are only a limited number of items in dispute, the requirement of such an analysis should be confined to such items and should not extend further or beyond those in respect of which controversy has been raised.*" (para 124)

Subject to that clarification that the taxing master is only obliged to examine items that are actually in dispute, *Sheehan (an infant) v Corr* does not suggest that the analysis that the taxing master is obliged to undertake is other than, or something less than, the "*root and branch examination*" identified in *Superquinn*.

69. The powers given to the taxing master under section 27(1) and (2) are not stated to be qualified by or subject to Order 99, Rule 11 RSC and, in my view, the statutory provisions do not allow any scope for any continuing presumption – less still any conclusive presumption – in favour of the solicitor in a solicitor and client taxation. Any conclusive presumption in favour of the costs would clearly conflict with the statutory provisions. The purpose of the legislature in enacting those provisions was to

ensure that the taxing master was empowered to assess the reasonableness of the costs claimed, regardless of whether those costs arose on a party and party or solicitor and client basis. That approach represented a significant departure from the *status quo*. If solicitors could continue to rely on Rule 11(3) so as to exclude solicitor and client bills from assessment by the taxing master, the purpose of the legislature in enacting those provisions would be frustrated and the rights and interests of the client would not be protected in the manner intended by the legislature.

70. It is clear from *Sheehan v Corr* that the provisions of Order 99 must be construed and applied having regard to section 27 of the 1995 Act. Where there is conflict – as clearly there is between the provisions of section 27(1) and (2) on the one hand and Order 99, Rule 11(3) on the other – then the statutory provisions must prevail and Rule 11(3) must yield.

71. I would add that the findings of fact made by the Taxing Master to the effect that Mr Doyle did not agree to Mr Buckley's fees on a voluntary or informed basis would have excluded any reliance on Rule 11(3) in any event. Therefore, quite apart from section 27 of the 1995 Act, Rule 11(3) would not avail Mr Buckley in the circumstances here.

72. Ultimately, I did not understand Mr Buckley to assert that Rule 11(3) applied so as to preclude the assessment of the disputed bills. He expressly accepted that, as a matter of principle, section 27 entitled the Taxing Master to examine his files and assess the nature and value of the work done by him. Indeed, he accepted that the Taxing Master was entitled to look at the files on his own motion. Even so, Mr Buckley also submitted

that the Rule 11(1) presumption continued to apply (reinforced in some way by Rule 11(3)) and the onus was on Mr Doyle to adduce evidence to rebut that presumption. Only if the presumption was rebutted, he said, was the Taxing Master entitled to proceed to examine the files and exercise the powers conferred by section 27 (and in such circumstances the Taxing Master would "*most assuredly*" be entitled to examine the files). Here, Mr Buckley contended, there was no evidence capable of rebutting the presumption in favour of the solicitor (the Rule 11(1) presumption) and so the Taxing Master erred in examining the files and assessing the value of the work done. It seems to me that Mr Buckley's position on section 27 was characterised by significant inconsistency and contradiction. In any event, his argument that the Taxing Master erred in examining the files here is not persuasive.

73. In the first place, having regard to the provisions of section 27 of the 1995 Act, Order 99, Rule 11(1) cannot be read as imposing any restriction on the taxing master's entitlement to assess the nature and value of the work done by a solicitor. Section 27(2) expressly provides that on a solicitor and client taxation the taxing master may allow "*... allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs ... as the Taxing Master considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part.*" That statutory power is not constrained by Rule 11(1).

74. Where a solicitor's bill is disputed by the client, section 27(1) and (2) of the 1995 Act entitle (and, the authorities suggest, oblige) the taxing master to examine the bill and

assess the work done and the value of it. That entitlement is not conditional upon any prior demonstration by the client that the costs claimed by the solicitor are (in the language of Rule 11(1)) "*of an unreasonable amount or have been unreasonably incurred.*" Where a client disputes a solicitor's bill, then the taxing master must examine the bill and assess the value of the work done. Even if any form of presumption remains in favour of the costs – and I agree with the Judge that section 27(1) & (2) do not appear to be consistent with any presumption either for or against the costs – the issue of whether such a presumption has been rebutted is one which properly arises only at the conclusion of that examination and assessment, not as a preliminary condition to such an examination and assessment taking place.

75. The Taxing Master here was entitled to examine Mr Buckley's files relevant to the disputed bills. That did not involve, as Mr Buckley suggested in argument, the introduction of evidence by the "*trier of fact*" (i.e. the Taxing Master). Rather, it involved the Taxing Master undertaking an inquiry and assessment mandated by the legislature. In light of his assessment of the files, and the evidence that he heard and the submissions made to him, he was entitled to determine what level of fees were fair and reasonable. That is precisely what he did and I can discern no error in his approach. It is manifest that, across virtually all of the bills that he examined and assessed, the Taxing Master found that the costs charged by Mr Buckley were excessive or (in the language of Rule 11(1)) were "*of an unreasonable amount*" and/or had been "*unreasonably incurred*." Apart from maintaining that the bills should not have been taxed at all and/or that the Taxing Master should not have looked behind the fees charged by Mr Buckley, the Taxing Master's detailed assessment of the individual bills

was not the subject of any challenge in this review. Mr Buckley accepted that, in seeking review of the allowances/disallowances made by the Taxing Master he had the onus of establishing that the Taxing Master had "*erred as to the amount of the allowance or disallowance*" such that his decision was "*unjust*". The Judge characterised the burden placed on Mr Buckley in seeking to displace the decision(s) of the Taxing Master as a "*significant burden.*" Mr Buckley has come nowhere close to discharging that burden here.

76. As to Mr Buckley's contention that there was no evidence before the Taxing Master on which he could have reached the conclusions that he did, it is clear that the Taxing Master had access to, and reviewed in detail, the relevant files of the solicitor. On that basis alone, any complaint that the Taxing Master acted without evidence is untenable. As the Judge observed, such files are the most important evidence to be considered on a taxation. Further, the Taxing Master had evidence from the parties and also had submissions from the legal costs accountant acting for Mr Doyle, as well as the submissions of Mr Buckley. In argument, Mr Buckley emphasised that submissions are not evidence. That no doubt is true as a matter of principle and the distinction between the two may be very significant in many contexts. In the context of taxation of costs, however, there is unlikely to be such a hard and fast distinction in practice. There may of course be factual conflicts that can only be determined on evidence but issues as to what is a fair and reasonable fee in any given circumstance is not, in essence, a matter of evidence. It is a matter for the expert judgment of the taxing master and, in exercising such judgment, the taxing master is clearly entitled to be informed by the submissions made to him of legal costs accountants or solicitors with expertise in the area. I agree

entirely with Binchy J that, apart from consideration of the files, almost everything else said about what is reasonable or not was more in the nature of a submission than a matter of evidence.

77. At paragraph 27 of his Judgment, Binchy J expressed the view that a fee agreement between solicitor and client was not beyond review. It was, in his view, clear from the terms of the 1870 and 1881 Acts that such agreements may be reviewed by a court. In light of the provisions of section 27(1) & (2), it would also appear that such agreements are subject to review by the taxing master. That does not mean that, where a fee agreement has been freely entered into, the taxing master should not give significant weight to that fact and I agree with the Judge's observations to that effect (also at para 27). Here, of course, the Taxing Master effectively found that the agreements that Mr Buckley was relying on had *not* been freely entered into. As I have already noted, that excluded any reliance by Mr Buckley on the 1870 and 1881 Acts in any event.

78. Brief reference should be made in this context to the 2015 Act and Order 99 (Recast) insofar as they relate to solicitor and client taxation (now, in the language of the 2015 Act, "*a legal practitioner and client adjudication*"). Order 99, Rule 11 now provides that such an adjudication shall be conducted in accordance with section 155 and Schedule 1 to the 2015 Act and such of the Rules in Order 99 as are applicable to legal practitioner and client costs. Those provisions give the legal costs adjudicator broad powers to assess the nature, extent and value of the work done by the legal practitioner. Section 151 of the 2015 Act permits a legal practitioner and his or her client to make an agreement in writing in relation to fees. Where such an agreement has been made,

section 155(6) obliges the legal costs adjudicator to "*have regard*" to it. That would not appear to oblige the legal costs adjudicator to allow recovery of the fees provided for in such an agreement or give rise to any presumption that such fees should be allowed in full. That construction appears to be reinforced by section 151(4) which provides that an agreement under section 151 shall be amenable to adjudication.

79. The position under the 2015 Act and Order 99 (Recast) regarding legal practitioner and client adjudication seems to replicate the essential features of the pre-2015 Act regime in light of the enactment of section 27 of the 1995 Act. Agreements between client and solicitor/legal practitioner are relevant but not necessarily decisive and the fundamental obligation of the taxing master/legal costs adjudicator is to determine what charges are fair and reasonable (section 27(2) of the 1995 Act; section 157(3) of the 2015 Act). However, this appeal is concerned only with the pre-2015 Act position and the precise parameters of legal practitioner and client adjudication under Part 10 of the 2015 Act are not at issue here.

80. As will be evident from the discussion above, I agree with the Judge that Mr Buckley has failed to establish any error of approach on the part of Taxing Master O' Neill or demonstrate that he taxed the bills on the wrong basis. The Taxing Master was empowered to carry out the assessment he did by the provisions of section 27(1) & (2) of the 1995 Act. Those provisions excluded the application of any conclusive presumption in favour of the costs claimed by Mr Buckley and, even if that was not the case, the Taxing Master's findings of fact would have excluded the application of Order 99, Rule 11(3) in any event, in the same way as they excluded the application of the

1870 and 1881 Acts. Even if there was some implied presumption in favour of the costs, that presumption did not operate to preclude the Taxing Master from undertaking an examination of the files. Having done so, the Taxing Master concluded that the fees charged by Mr Buckley were unreasonable and excessive to a very significant degree and proceeded to assess what he considered to be fair and reasonable fees for the work undertaken. The Taxing Master was entitled to proceed as he did and it is notable that Mr Buckley has made no attempt to demonstrate that the Taxing Master erred as to the amount of the allowances and/or disallowances made by him, such that his decision could be said to be "*unjust*", which he accepted was the standard he had to meet in order to succeed in his review.

81. Accordingly, the Basis of Taxation Ground must also be dismissed.

The Residual Grounds

82. The residual grounds can be dealt with quickly. Issues were raised by Mr Buckley in the High Court regarding the skeletal nature of certain of his files, the issue of time recording and the direction given to him by Taxing Master O' Neill to prepare more detailed bills of costs. The Judge considered those issues and concluded that they had no substance. Insofar as any or all of those issues were pursued on appeal, no error on the part of the Judge has been identified and accordingly there is no basis for interfering with his conclusions.

83. As regards Mr Buckley's complaint that his files were wrongly excluded from the material available to the Judge, that complaint is, in my view, founded on a number of misconceptions. Mr Buckley says that Order 99, Rule 38(4)[15] requires that all of the evidence that was before the taxing master must be before the High Court on a review. I do not read the rule in that way. The essential purpose of Rule 38(4) is to make it clear that a review is not a rehearing *de novo*. No *additional* evidence is permitted without permission. It does not follow that in every review the entirety of the evidence that was before the taxing master must be produced, regardless of whether it has any relevance to the items in dispute. Secondly, and separately, it is evident from the Judge's Judgment, that, so far from *excluding* Mr Buckley from relying on his files at the hearing in the High Court, the Judge was clearly surprised by the fact that Mr Buckley did not seek to refer to or rely on those files. It is clear, therefore, that the Judge's ruling that no further documentation could be relied on by Mr Buckley (because he had been directed to identify all of the documents on which he intended to rely in advance of the hearing) was *not* intended to exclude reliance on Mr Buckley's files. Thirdly, it is not at all clear how Mr Buckley is said to have been prejudiced by the supposed exclusion of his files. I have already observed that neither in the High Court nor in this Court did Mr Buckley challenge the detailed assessment carried out by the Taxing Master of the work which he had undertaken and the value of that work. The Judge nonetheless carefully reviewed the Taxing Master's assessment. It may be questionable whether he

[15] "*The application to the Court shall be made by motion on notice to the other party concerned, such notice of motion to be filed in the Central Office and a copy thereof filed in the Office of the Taxing Masters and the motion shall be heard and determined by the Court upon the evidence which shall have been brought in before the Taxing Master, and no further evidence shall be received upon the hearing thereof, unless the Court shall otherwise direct.*"

should have done so but, in any event, he clearly undertook the exercise in ease of Mr Buckley. As a former solicitor and President of the Law Society, the Judge was particularly qualified to carry out such an exercise. He was unable to identify any error on the part of Taxing Master O' Neill such as might warrant a review of the allowances/disallowances made by him. On appeal, there was no suggestion advanced that the Judge's analysis was wrong or would have been different in the event that the files had been available to him. The only relevance of the files, therefore, would appear to be as evidence of the fact that the fees payable to Mr Buckley were agreed by Mr Doyle. But, as I explained, that issue does not properly arise in this review.

84. The Residual Grounds therefore must be dismissed.

CONCLUSION AND ORDERS

85. Mr Buckley has not established any error in the Judge's analysis or in the conclusions that he reached and the Order made by him. Accordingly, I would dismiss the appeal and affirm the Order of the High Court (including the order as to costs).

86. Given that Mr Buckley has been entirely unsuccessful in his appeal, it seems to follow that he ought to pay Mr Doyle's costs of the appeal. That is a provisional view only, however. Should Mr Buckley wish to argue for a different costs order, he should notify the Court of Appeal Office within 14 days. In that event, the Court will convene a short hearing at a date and time to be notified. Mr Buckley should note that he will be at risk of the costs of such a hearing in the event that the order ultimately made is as per the provisional indication above.

Haughton and Pilkington JJ agree with this judgment and with the orders proposed.