THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

Neutral Citation Number {2021] IECA 203

Court of Appeal Record No. 2020/72

Faherty J.

Ní Raifeartaigh J.

Collins J.

IN THE MATTER OF A TAXATION OF SOLICITOR- CLIENT COSTS

BETWEEN

MONICA LEECH

PLAINTIFF/APPELLANT

AND

INDEPENDENT NEWSPAPERS IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 16th day of July, 2021

1. The issue raised on appeal

1. This appeal concerns the scope of the High Court's jurisdiction to review a ruling of the Taxing Master under the taxation regime which was in force prior to the

commencement of the Legal Services Regulation Act 2015 (Part 10). More specifically the case relates to the jurisdiction of the High Court on review in relation to an issue which was not raised during the taxation process and was complained of in the High Court for the first time. The appellant asserts that where the Taxing Master makes what is characterised by her as a "quantification error", that is to say, an error involving a simple arithmetical error as distinct from something of a more substantive nature, the High Court has power to correct that error even if it was one which could have been raised in the taxation process but was not. That argument – as well as that characterisation of the alleged error made by the Taxing Master - is in dispute. The defendant to the defamation proceedings is not a party to this appeal; the parties are the appellant Ms. Leech and the solicitors McCann Fitzgerald who previously acted for Ms. Leech in those proceedings. This arises in the circumstances described below.

2. The appellant sought to have her solicitor-client costs taxed by the Taxing Master in respect of defamation proceedings she brought against Independent Newspapers. She had dispensed with the services of the solicitor McCann Fitzgerald (hereinafter "the Solicitor") after her High Court defamation proceedings and prior to appeal. She maintains that the Taxing Master made an error in one of his rulings (referred to in this judgment as the *"Initial Ruling")*. She says this error is of the character described above. The appellant did not notice the point in question until after the taxation process had concluded, and then sought to include it as a ground for challenging the taxation ruling in her application to the High Court to review that ruling. The High Court found that the appellant was not entitled to raise this issue on review because she had not raised it as an objection before the Taxing Master. Lest he be wrong, and for completeness, the trial judge also dealt with the point on the merits at paragraph 62 of his judgment; he also ruled against her in that regard. The key

question on this appeal is whether the trial judge was correct in how he approached this issue of the alleged quantification error.

3. Other points were raised by the appellant in the High Court but they have not been pursued on this appeal. To that extent the issues on appeal are narrower than those in the High Court. However, the Solicitor complains that the appellant seeks to introduce new arguments on appeal which were not before the High Court. Thus there is, overall, a double complaint by the Solicitor in connection with 'new issues'; first, complaint is made that the appellant sought to argue before the High Court a point not raised before the Taxing Master, and secondly, complaint is made that the appellant now seeks to argue additional points on appeal which were not argued before the High Court.

2. Events prior to the commencement of the taxation process in the present case

4. The appellant consulted the Solicitor in relation to a series of articles that had been published in the Evening Herald newspaper between 30 November 2004 and 15 December 2004. She instituted defamation proceedings against Independent Newspapers Ireland Ltd. She also instituted similar proceedings in respect of articles in other newspapers published by the defendant.

5. The case came on for hearing in the Jury List in the High Court in June 2009 and the trial lasted for seven days. The Jury awarded the sum of €1,872,000 to the appellant. The

defendants then appealed to the Supreme Court, which awarded a lesser sum of €1,250,000.

6. The work done by the Solicitor took place over the course of approximately six years and eight months, between 15 December 2004 and August 2011. The plenary summons had issued on 21 December 2004 and the jury verdict was delivered on 24 June 2009.

7. The relationship between the Solicitor and the appellant broke down after the trial. By letter dated 8 August 2011, the Solicitor said that it could no longer act for her. The reasons for the breakdown are set out in the Objections Ruling of the Taxing Master and are not relevant to this judgment. The appellant requested that the file be transferred to another firm on 11 August 2011. An order allowing the Solicitor to come off record was granted on 7 February 2012. This was granted upon an undertaking by the appellant to discharge the fees of the Solicitor upon agreement or completion of taxation. It was also ordered that the Solicitor provide its file in the proceedings to a firm of solicitors nominated by the appellant; that it furnish a bill of costs to the appellant to be taxed in default of agreement; and that the appellant pay the fees due to the Solicitor when agreed or taxed and ascertained.

8. The taxation process was commenced by the issue of a summons on 13 February 2014 and took place over a number of years thereafter. Before setting out the events which occurred during the taxation process, I will give a brief overview of the legal regime which was in place at the time.

3. The legal regime in force at the relevant time

9. The ruling which is the subject-matter of the application for review of taxation was made prior to the commencement of Parts 10 and 11 of the Legal Services Regulation Act 2015 ("the LSRA 2015"). The taxation itself and the review of taxation conducted by the High Court were thus conducted under the "old" taxation regime as provided for under s.27(3) of the Courts and Court Officers Act 1995 ("the 1995 Act") and Order 99 of the Rules of the Superior Courts.

10. S.27 of the 1995 Act provides in relevant part as follows:

> "27.—(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.
>
> (3) The High Court may review a decision of a Taxing Master of the High Court … 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 or the County Registrar is **unjust."** (emphasis added)

11. As noted by the Supreme Court (judgment delivered by Laffoy J.) in *Sheehan v Corr*[1], there are two aspects to the test on review in subsection (3) as follows:-

> *"The first is that the High Court is satisfied that the Taxing Master has erred as to the amount of the allowance or disallowance. The second is that the error is such that the decision of the Taxing Master is unjust. That provision merely refers to the Taxing Master having erred, and it does not circumscribe in any way the nature of the error, so that it may be an error of fact, an error of law, or an error of principle. What brings the error within the scope of the review is that it results in the decision being unjust."*

[1] [2017] IESC 44

12. Order 99, r.37(22)(ii) R.S.C. sets out the criteria to be applied by the Taxing Master in exercising discretion with regard to any item:

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

13. Order 99, r. 38 is entitled "*Review of Taxation*". Rule 38(1) provides:

> "Any party who is dissatisfied with the allowance or disallowance by the Taxing Master of the whole or part of any items (including any special

allowance) may, before the certificate is signed, but not later than fourteen days after the completion of the adjudication by the allowance or disallowance of the entire of the items in the bill of costs deliver to the other party interested therein, and **carry in before the Taxing Master his objections in writing to such allowance or disallowance**, specifying therein by a list in a short and concise form the items, or parts thereof, objected to, and **the grounds and reasons for such objections, and may thereupon apply to the Taxing Master to review the taxation in respect of the same.** The Taxing Master may, if he shall think fit, and upon the application of the party entitled to the costs issue pending the consideration of such objections an interim certificate of taxation for or on account on the remainder of the items in the bill to which no objection has been taken and also for that part of the bill of costs in dispute which the Taxing Master may in his discretion consider reasonable. Such further certificate as may be necessary shall be issued by the Taxing Master after his decision upon such objections." (emphasis added)

14. Order 99, r. 38(2) provides:

"Upon such application the Taxing Master shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if so required by any party, he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. The Taxing Master may, if he thinks fit, tax

> the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation."

15. Order 99, r. 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 within 21 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 to review the taxation in respect of the disputed items and the Court may thereupon make such order as may seem just. The precise wording may be noted insofar as it refers to a review of a decision of the Taxing Master as to any items which have been objected to.

16. Thus, the system in being at the time was as follows. In the first instance, the parties would make their case to the Taxing Master and he would issue a ruling (the "Initial Ruling"). Thereafter, a party dissatisfied with any aspect of that ruling could raise or make (or "carry in") objections, which the Taxing Master was obliged to consider and rule upon those objections (the "Objections Ruling"). A party could then seek a review from the High Court (the "Review Hearing").

17. It is useful at this point to observe what was said about the above-described system in two decisions of the Supreme Court. In *D.M.P.T. v. Moran*,[2] the applicant challenged the system, alleging among other things (1) that the Rules were *ultra vires* and void insofar as they mandated that an applicant go through the objections stage before the Taxing

[2] [2015] IESC 36

Master before being entitled to access the High Court; and (2) that the procedure was unconstitutional and in breach of Article 6(1) of the European Convention on Human Rights because the involvement of the Taxation Master at objections stage involved a breach of the principle *nemo iudex in causa sua* and constituted an invalid restriction of right of access to the courts. This root and branch challenge to the taxation regime was rejected, although the Supreme Court allowed the appeal on the single ground that the Taxing Master was required to give reasons for his Initial Ruling as well as in the Objections Ruling. Given the broad scope of the challenge mounted, the judgment of Laffoy J. (the judgment of the court) included some general comments about the nature of the taxation process which are helpful in the present context.

18. Laffoy J. at paragraph 42 of her judgment described the taxation process as *sui generis*, adding –

> *"Its specialist nature is reflected in the personnel involved in it and in the manner in which they operate. The adjudicators, the Taxing Masters, specialise in the taxation of costs and are not involved in any other form of adjudication*".

She gave examples of the manner in which the process should be carried out in order to demonstrate the highly specialised nature of the function. and continued:

> *"The role of the Taxing Master under r. 38 must be considered against that background.* ***His role is 'a second stage of the taxation but part and parcel of the taxation****', as Geoghegan J. stated in Gannon v. Flynn [2001] 3 I.R. 531 at p. 534. It is a second stage which only comes into play if the dissatisfied party brings in objections."* (emphasis added)

And

> *"If a taxation goes to the second stage, the Taxing Master is reconsidering and reviewing his decision at the first stage with the benefit of the specific grounds and reasons advanced by the dissatisfied party for his objections and, perhaps, with the benefit of further evidence. One way of looking at that stage is that the dissatisfied party is getting, as the saying goes, a second bite of the cherry."*

19. Commenting on the role of the objections process specifically, Laffoy J. said:

> *"It may be that it is regarded as being less costly from the perspective of the litigants than a review directly to the High Court after the first stage, or, as counsel for the respondents submitted, it may be regarded as a filtration system, which avoids unnecessary use of the High Court. Whatever the policy, it is a review process which has been in place for over a century, which, as was disclosed in Flynn and Halpin (* op. cit. *at page 668), was only challenged once up to 1999 as lacking basic fair procedures, which challenge was in proceedings which were disposed of in the High Court by Keane J. on 24th March, 1995 without the challenge being addressed. While counsel for the appellant was correct in stating that, even if the review procedure has been hallowed by tradition, that does not necessarily mean it is above reproach, nonetheless, the fact that it seems to have been operated to the satisfaction of litigants for over a century does suggest that it had not been perceived as giving rise to objective bias. Of course, if the outcome of the bringing in of objections and the review*

procedure before the Taxing Master does not satisfy the dissatisfied party, he has his right to seek a review by the High Court in accordance with Order 38(3)."

20. With regard to the arguments as to the Convention, Laffoy J. noted that the court had been referred to the decision of the European Court of Human Rights in *De Haan v. The Netherlands*.[3] She said that this case clearly suggested that if the pre-1877 practice in Ireland**,** which was decried by Kenny J. in *Corrigan v. Irish Land Commission,*[4] still operated, it would be found to be a violation of Article 6(1) of the Convention, unless the Court which sat *en banc* as an appeal Court was subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of Article 6. What Kenny J. had decried was that the Court of Common Pleas and of the Exchequer Division had sat *en banc* as an appeal court which included the judge who had heard the case originally. Kenny J. observed that "*the judge who gave the original decision would naturally be predisposed to support his original view*"**.** Laffoy J. considered that in contrast, the taxation procedures before her did not constitute a violation of Article 6(1) because of the availability of the review by the High Court under rule 38(3). It may be noted that it appears to have been assumed that Article 6(1) of the Convention applied to the taxation process in that case, but there was no discussion of this particular point.

21. It is also instructive to look at the basis on which the court reached the conclusion that, as a requirement of fair procedures and constitutional justice, reasons ought to be given in the original Taxation Ruling (and not merely in the later Objections Ruling).

[3] (1998) 26 E.H.R.R. 417
[4] [1977] I.R. 317

Laffoy J. said that the decision any dissatisfied party has to make at the end of the initial stage of the taxation process has serious implications for that party. First, if the review process is not invoked, the determination is a binding judgment requiring a party to discharge the adjudicated amount without knowing why that decision was reached (such as the appellant in that case, who was required to pay €306,000, being in excess of €150,000 more than he submitted was appropriate). Secondly, in deciding whether to bring in objections and seek a review, any dissatisfied party to the taxation process would have to factor in against the likely outcome of the review the costs involved in the review, which must be borne by that party under s.27(6) of the Act of 1995, as well as other possible adverse consequences, such as inconvenience and delay. Thirdly, making further submissions at the review stage, in the vacuum created by the absence of reasons, could only be speculative. It would not be easy, or in most cases possible, to focus any submissions, or make fresh arguments, if the basis of the adverse decision sought to be challenged or the favourable decision sought to be supported, was not known.

22. In *Sheehan v. Corr*, the Supreme Court engaged in a comprehensive examination of the taxation which had been conducted following the settlement of a medical negligence action by the plaintiff. One of the issues in contention was the so-called "time" issue, namely to what extent, if any, the amount of time actually spent on a case should be elevated above the relevant criteria mandated by Order 99, r. 37(22) for the fixing of costs. The court held that the amount of time actually spent on a case was *only one element* of the relevant circumstances by reference to which the nature and extent of the work done is assessed and that this factor should not be elevated above the relevant criteria mandated by Order 99, r. 37(22), for fixing costs.

23. Laffoy J. approved the approach laid out in the judgment of Herbert J. in *C.D. v. The Minister for Health*.[5] That case concerned a review of the taxation of the 'General Instructions Fee' (for the Solicitor). Herbert J., at para. 32, stated:

> *"The learned Taxing Master should have objectively examined each of the separate items in the Bill of Costs which together make up the claim for a General Instructions Fee. He should have ascertained precisely what work was done by the Solicitor for the Costs, with particular reference to the documentation furnished in support, and by what level of fee-earner it was done. The learned Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The learned Taxing Master should have indicated what amount of time he considered should reasonably have been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The learned Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The learned Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a Party and Party taxation. In my judgment, this is the form of scrutinisation, measurement and evaluation which it is necessary for a Taxing Master to perform in the proper discharge of his or her statutory powers under the provisions of s. 27(2) of the Courts and Court Officers Act. Without such an analysis, his discretion to allow in whole or in part as fair and*

[5] [2008] IEHC 299

reasonable or, to disallow, any item in the General Instructions Fee would not be validly exercised."

24. At paragraph 120 of her judgment, Laffoy J. said that the obligation upon the Taxing Master to carry out a '*root and branch examination'* of the bill of costs pursuant to s.27 of the 1995 Act should not be understood as involving the Taxing Master "*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 aspects of the bill which the parties to the review had determined to be contentious. Where there are a limited number of items in dispute, the "*analysis should be confined to such items and should not extend further or beyond those in respect of which controversy has been raised*". At paragraph 121, she said that the taxation process should be cost effective and time efficient. A taxation process that continued for a number of days, rivalling the underlying proceedings, was incompatible with this requirement.

25. To summarise, the points which emerge from those two leading authorities are as follows:

- The taxation of costs is a specialist form of adjudication which is carried out by personnel who have specialised knowledge and experience in the area.
- The second stage of taxation (the 'Objections Stage') before the Taxing Master is part and parcel of the taxation process.
- The second stage of taxation is a review of the first stage with the benefit of the grounds and reasons advanced by the objecting party.

- The fact that there is an avenue to the courts from the taxation process is an important factor in ensuring compliance with Article 6 of the Convention.

- Reasons must be given not only at the second stage (the Objections Ruling) but also the first stage (the Initial Ruling) so that the parties know why the decision was reached and to assist them in deciding whether to bring in objections and/or seek a review.

- The factors to be examined by the Taxing Master include: (a) what items of work were done; (b) by whom it was done; (c) the level of skill required to do it; (d) the amount of time devoted to the work; (e) the level of responsibility; and (f) the extent to which the work was proper and necessary.

- The Taxing Master was not to conduct an inquisitorial review of every item in every bill but rather to conduct a review in respect of those aspects of the bill which the parties have deemed to be contentious.

- The taxation process should itself be cost-effective and time-efficient.

4. The taxation process in the present case

26. As noted earlier, the taxation summons issued in February 2014; it was made returnable for 19 June 2014. The taxation commenced on 14 November 2014 and was adjourned on a number of occasions, culminating in a hearing date of 30 July 2015. Meanwhile the Solicitor applied to the Supreme Court for various orders with a view to obtaining security in regard to the party and party costs. This resulted in a compromise between the Solicitor and the appellant dated 9 June 2015. The Solicitor believed it

appropriate that as a result of this compromise, the taxation of solicitor-client costs should be adjourned pending the outcome of the party and party costs process and wrote to the appellant inviting an adjournment. This invitation was declined by the appellant via a solicitor's letter dated the 29 July 2015.

27. On the resumed taxation date (30 July 2015), there was argument as to whether the taxation should proceed in advance of the party and party process having concluded. The Master pointed out that there were advantages to the taxation of the solicitor-client costs being postponed, and pointed out potential risks to the appellant on costs. However, as the Taxing Master noted in his ruling of 10 January 2018, the appellant was "*adamant*" that she was aware of the risks but would prefer the taxation of the solicitor-client costs to proceed. The Taxing Master accepted that she was entitled to exercise that right, commenting that "*otherwise the defendant would be at a disadvantage given that, in such a circumstance, there would be no certainty concerning the amount of costs to which the client, as the successful party, could legitimately claim entitlement by way of indemnity*" and that "[*a] party and party bill of costs… should only include items and amounts in respect of which the client is actually indebted to the claimant solicitor*". He said "*it could not be right*" that a party could put forward a claim to party and party costs by way of indemnity for a specified figure while claiming that the solicitor-client costs were in fact a lesser figure.

28. The taxation resumed on 1 October 2015 and was ultimately heard on 14 April 2016 and 15 April 2016.

The Initial Ruling

29. The Taxing Master issued his ruling on the 10 January 2018. It is clear from the ruling that he was keenly aware of the issue of "overlapping work". This arose from the fact that the appellant had brought a number of defamation actions and that there was some degree of overlap between the work undertaken by the Solicitor in respect of the different sets of proceedings. He noted that the 30% reduction applied by the Solicitor was probably intended to reflect this position (paragraph 41 of his ruling). However, he proceeded to reduce the fee further. Importantly, at paragraph 45 of his ruling, he calculated the totality of the solicitor's professional fees at **€238,813** and not the figure of €253,755 which had been put forward by the Solicitor. This is at the root of the appellant's appeal.

30. The Taxing Master then went on to consider various matters, including Senior Counsel's Advice on Proofs. The key paragraphs upon which the appellant rely are paragraphs 66 and 67 of his Ruling, as follows. The first figure (set out below in bold type) should be noted:-

> "*66. Having regard to the matters referred to at paras. 37 to 45 hereof it seems to be the position that the reckonable time, before the application of the solicitors' voluntary 30% reduction is as follows-:*
>
> | | |
> |---|---|
> | *Total time charges* | ***€253,755*** |
> | *Less fees at p. 8 Mediation Summary* | *€2,911* |
> | *Reckonable time* | *€250,844* |

Less 30% voluntary reduction	*€75,253*
Balance	*€175,591*
Less scheduled items €2413	*€2,413*
Net Claimable instructions Fee	*€173,178*

67. Based on the records produced, together with the 30% reduction, this sum would seem to represent the maximum which could be charged by way of instructions fee."

31. It will be noted that his starting figure was €253,755. At the heart of the appellant's case is that that this figure was used when the Taxing Master had earlier said that this figure should be discounted to €238,813. Thus, she argues, the Taxing Master having taken the wrong figure as a starting-point, the ensuing figures were all erroneous. This was an error which resulted quite simply from calculations which took the wrong figure as their starting point.

32. The Taxing Master in his ruling went on to refer to s.27(1) of the Courts and Courts Officers Act 1994. At paragraph 71 he said that while he was obliged to take into account the *time* recorded by the Solicitor, he must also have regard to all of the factors set out in Order 99 r. 37(22)(ii) of the Rules. Time was only one of the factors to be considered and

other factors included: the magnitude of the case and its very great importance to the client; the manner in which it was defended; the heavy responsibility attaching to the solicitors at all times; and the quantum involved (paragraph 72). He then at paragraph 73 set out his calculation of the overall instructions fee, before going on to deal with counsels' fees for the remainder of his ruling:

"*I assess the instructions fee as follow:*

1. For allowable work from date of receipt of instructions up to November 2008	*€45,000*
2. For all further work by way of perfection of Proofs for the hearing of the Action, including briefing of Counsel and marshalling Witnesses, attendances at High Court and subsequent attendances at Supreme Court on Defendant's Applications to Vary and Stay; agreeing books of Appeal, all attendances on Client by way of providing extensive advices; dealing with mediation and providing final advices.	*€120,000*
[Total]	*€165,000"*

The objections raised

33. The appellant made a number of objections by way of three letters. The first (undated) letter concerned the costs of mediation and postage. Thereafter, the appellant furnished a letter dated 1 March 2018 raising four grounds of objection and a further letter

dated 8 March 2018 raising one further ground of objection. There were five grounds in total. The grounds were:- (i) Absence of the file; (ii) The Bill of Costs, overlapping work and overcharging; (iii) Costs of mediation; (iv) Postage; and (v) Payments on account. The Solicitor also raised objections in writing on 9 April 2018. The objections were heard before the Taxing Master on dates in June, July and November 2018.

34. For present purposes, what is important to note is that the appellant did not include within her objections the ground which she now describes as the quantification ground. There was no impediment to her doing so and the issue was clearly one which could properly have been raised, and adjudicated on by the Taxing Master, at the objections stage. The appellant alleges that her failure to do so was connected with the fact that she represented herself in those proceedings, although she has acknowledged that while she attended the taxation hearings in person and without lawyers, she had access to, and used the services of, a solicitor and costs accountant before, during and after the taxation.

The Objections Ruling.

35. The Taxing Master delivered his ruling on the objections on 25 January 2019. He disallowed each of the appellant's five grounds of objection. It is not necessary to consider those further as none of them are in issue in this appeal.

36. The written submissions of the appellant state that the appellant went back to the Taxing Master in relation to the quantification error after the Motion to Review had been issued in the High Court, but that he declined jurisdiction as he had completed his task at

that stage. The Solicitor's submissions state that it was not aware of this and that if it happened, it was never put on notice. In oral argument, the appellant referred to some correspondence concerning the matter but as nothing in the appeal appears to turn on this matter in any event, I do not propose to consider it further.

5. The Motion to Review in the High Court

37. By notice of review of motion dated 15 February 2019 the appellant sought a review of the taxation on the grounds set out in the schedule to the notice. It may be noted that this document explicitly seeks a review of the Objections Ruling, yet the alleged quantification error which is the focus of this appeal was not contained in the Objections Ruling but in the Initial Ruling.

38. At the hearing of the review of taxation in the High Court, the appellant sought to challenge the Taxing Master's ruling on the objections on five grounds, the first of which was the quantification ground. The five grounds were: (1) that the Taxing Master made an error in the quantification of the instructions fee in his initial ruling, such that the ultimate instructions fee which was allowed by him in that ruling was €10,500 greater than it should have been; (2) that the hearings in respect of the taxation were tainted by the fact that the Solicitor's original file was absent from those hearings, so that the appellant did not obtain a fair hearing; (3) that the Taxing Master had incorrectly assessed a fee as being due to the Solicitor in respect of a mediation, despite the fact that the appellant had an agreement that her liability for fees in respect of the mediation would be capped at €10,000; (4) that the Taxing Master had not taken adequate account of the fact that the appellant had been furnished with a fee estimate in advance of the hearing of the action,

wherein the instructions fee was estimated at a figure which was approximately 20% of the fee ultimately charged by the Solicitor, and (5) the Taxing Master had acted unreasonably in allowing the sum of €2,000, together with an additional €4,230.15 for outlay on postage and photocopying.

The alleged quantification error

39. The conclusions of the High Court under appeal are confined to matters related to the alleged quantification error and I will therefore not deal with the other issues canvassed in the High Court. A recapitulation of the appellant's argument about the quantification error is as follows.

40. The appellant alleges that there was an error in the quantification of the instructions fee in the Taxing Master's initial ruling, such that the ultimate instructions fee which was allowed by him in that ruling was €10,500 greater than it should have been. This argument is based upon the following steps: (i) "*The Taxing Master had calculated at paragraph 45 that the overall professional fees owing to the Solicitor were €238,813 and not €253,755 as put forward by the Respondents as being due on the time assessment basis*"; (ii) the Taxing Master then deducted 30% to account for overlapping work and (iii) "*At paragraphs 66 and 67 of the ruling of the Taxing Master the overall reductions to be applied to the instructions fee were applies inclusive of the 30% deduction. The starting figure used in relation to these reductions was €253,755 rather than the figure earlier determined by the Taxing Master to be correct at paragraph 45 of the Ruling*".

41. The appellant's criticism is that, in the course of a purely arithmetical process aimed at identifying the '*net claimable instructions fee*', the Taxing Master at paragraph 66 of his ruling wrongly commenced the process with the sum of €253,755, when he had already concluded earlier (at paragraph 44) that this figure should have been €238,813. This, according to the appellant, led to a net claimable instructions fee of €173,178, instead of a lower figure of €162,719. During the Review Hearing, the appellant argued that, as the ultimate allowance (€165,000) reflected a 5% deduction from the erroneous '*ceiling*' of €173,178, the true allowance should reflect a 5% deduction from the correct '*ceiling*' (€162,719). According to the appellant, this would result in a lower allowance of €154,484, rather than the actual allowance of €165,000, a difference of €10,416.

42. In the High Court, it was conceded that the appellant had not raised the quantification point as such at the objection stage of the taxation process, due to the fact that she had not noticed the Taxing Master's error until after he had ruled on the objections in his ruling dated 25 January, 2019. Counsel submitted that the Court should have regard to the fact that the appellant represented herself in the taxation process and that the Court should allow considerable leniency to a person who was acting in legal or quasi legal proceedings as a lay litigant. It was also submitted that the appellant had made an objection concerning the instructions fee and that it might be conceived as falling with that objection. Counsel submitted in the alternative that the Court was given considerable discretion pursuant to the provisions of Order 99, r. 38(4), especially the final portion thereof, which (so it was argued) enabled it to hear argument on a new ground.

43. Counsel on behalf of the Solicitor submitted that there was a well-established legal principle that a party was not entitled to raise a point in the High Court which had not been raised with the Taxing Master. Further, it was submitted that while some leeway is given to litigants in person, they are not entitled to operate under an entirely different set of rules to litigants who are represented. It was also submitted that the points actually raised before the Taxing Master bore no relation at all to the quantification point. Without prejudice to the submission that this objection should therefore fail *in limine*, counsel submitted that the submission concerning the quantification error should also fail on the merits.

6. The High Court Judgment

44. I will deal with the High Court judgment only insofar as it deals with the quantification point because the remaining conclusions of the trial judge are not the subject of this appeal.

45. The trial judge (Barr J.) was satisfied that it was well settled in Irish law that the High Court when carrying out a review of taxation could not entertain a review on grounds which were not brought in by way of objections during the taxation process. In this regard he cited *Re Walshe*,[6] and *O'Sullivan v Hughes*.[7] He noted the argument that some leeway should be afforded to the appellant because she had represented herself before the Taxing Master but said that while he accepted some leeway should be afforded, there were limits to that, citing in this regard *Burke v Halloran*,[8] and *Duffy v Clare County Council*.[9] He

[6] (1962) 96 ILTR 173
[7] [1986] ILRM 555
[8] [2009] IEHC 343
[9] [2013] IEHC 51

noted the argument that the quantification error might be conceived as falling within the objection concerning the instructions, and also an argument that the provisions of Order 99 concerning the High Court review permitted a new ground to be argued, but he rejected both submissions. His conclusions are succinctly set out in the following paragraphs:

> "*58. The Court is satisfied that the law is clear that a party cannot raise new grounds of objection in a review of taxation before the High Court. The objections must have been brought in in writing before the Taxing Master at the Objection stage and must have been ruled on by him before this Court can review them. The Court is further satisfied that it is settled at Irish law that the Court cannot enable a party to ignore the rules, or act in contravention of the rules, merely because he or she chooses not to have any legal representation at the time of the process under review. As it is accepted that the quantification point was not raised before the Taxing Master at the objections hearing and therefore was not ruled upon by him in his Objections ruling, it cannot be raised by the plaintiff in this review of taxation.*
>
> *59. Insofar as there was a vague suggestion that because the Taxing Master had referred to certain aspects of the instructions fee in his Objections ruling, that this enabled the plaintiff raise the quantification point; the Court is satisfied that that is not correct. While there was some reference to the instructions fee and the methodology which had been adopted by the Taxing Master in his assessment of same at paragraph 8 of the Objections ruling, this was not sufficient to encompass the point now being sought to be made on behalf of the plaintiff in relation to the quantification issue. As already noted, it was accepted that the plaintiff had not raised that issue at the Objections hearing and could not have done so, because it*

was accepted that she only spotted the alleged error after the Taxing Master had delivered his ruling on the objections.

60. In relation to the submission that Order 99, rule 38(4) permits the Court to admit new grounds of objection, the Court is of the view that that provision in the rules does not support that contention. It is quite clear that Order 99, rule 38(4) merely allows the Court to permit further evidence to be brought in on grounds of objection that were previously raised before the Taxing Master. That sub-rule only relates to evidence, it does not encompass the bringing of new grounds of objection at the review of taxation by this Court.

61. For the reasons stated herein, the Court rules that the plaintiff cannot raise the quantification issue in this review of taxation, same not having been part of the objections brought in by her in relation to the original ruling made by the Taxing Master."

46. The trial judge also went on to reject the quantification point on its merits, lest he be wrong with regard on the question of whether the appellant was entitled to raise the quantification error before the court.

7. The Notice of Appeal

47. The appellant in her Notice of Appeal sought to both limit and expand the scope of her case. She limited the appeal insofar as she no longer pursued the other grounds raised before the High Court and confines herself to the "quantification error". She sought to expand the scope of her case in a number of other respects; (1) insofar as she now seeks to

rely on the European Convention on Human Rights as a basis for her arguments; and (2) insofar as she suggests that s.27(2) is a stand-alone basis for reviewing the Taxing Master's decision which is independent from Order 99 and not subject to the constraints of the prohibition as interpreted before the introduction of s.27(2).

48. Concerning the quantification ground, the notice of appeal is in the following terms:

> **"**The appellant appeals only against the following parts of the said judgment and Order:
>
> I. The finding by the learned High Court Judge that the review ground of miscalculation of the instructions fee by the Plaintiff/Appellant was a new ground of objection was wrong in law and in fact;
>
> II. The finding by the learned High Court Judge that the Taxing Master's miscalculation could not be considered on a review was wrong in law and in fact;
>
> III. The finding by the learned High Court Judge that the Taxing Master had correctly found the appropriate instruction fee figure was wrong in law and in fact having regard to using the incorrect starting figure for the instruction fees;
>
> IV. The finding by the learned High Court Judge that the Taxing Master had correctly assessed the other factors attributable to the amount of the instruction fee was wrong in law and in fact;

V. The determination of the learned High Court Judge that the Taxing Master's decision should remain undisturbed was wrong in law and in fact in that the overall reductions applied were all incorrect having regard to the use of a mistaken instruction figure."

49. The grounds of appeal (slightly edited for the purpose of this judgment) are that the trial judge erred:

1. In determining that the appellant contesting the amount of the instruction fee was a new objection to the fees charged, as this had previously been contested with less specificity at a time when she represented herself;

2. In determining that a miscalculation by the Taxing Master could not be determined in a review of the Taxing Master in that it is an example of the Taxing Master being wrong in principle.

3. In determining that the usage of incorrect starting figures by the Taxing Master could not be determined in a review of the Taxing Master was wrong in law in that it is an example of the Taxing Master being wrong in principle.

4. In determining that a miscalculation by the Taxing Master could not be determined in a review of the Taxing Master in that it would be unjust to allow for the matter to then be taxed with those amounts and therefore in opposition to Section 27(3) of the Courts and Court Officers Act, 1995;

5. In determining that the use of an incorrect starting figure for the instruction fee by the Taxing Master could not be determined in a review of the Taxing Master in that it would be unjust to allow for the matter to then be taxed with those amounts and therefore in opposition to Section 27(3) of the Courts and Court Officers Act, 1995;

6. In refusing to review the miscalculation and incorrect starting figure applied by the Taxing Master in that this did not provide fair procedures to the appellant herein under the Constitution.

7. In refusing to review the miscalculation and incorrect starting figure in that this did not provide for a means of resolution of those issues in a fair manner as is required by Article 8 of the European Convention on Human Rights, the Article therefore failing to be considered in the application of the law to the proceedings in breach of Section 2 and 3 of the European Court of Human Rights Act 2003 (As amended).

8.Analysis

Application/scope of principle which prohibits a person from raising new objections on the High Court review

50. The basic principle is that a party may not raise on a review to the High Court a point which was not raised with the Taxing Master ("the prohibition"). The principle and its rationale were clearly set out in the High Court judgment, in *Re Walshe*, where Budd J. said (in relation to the equivalent rules in the 1905 version):

"*It has however been contended that the Court is not confined in its review of the taxation to considering the grounds and reasons for the objections stated or the objections carried in before the Taxing Master but can consider other and fresh grounds not argued before the Taxing Master.*

It seems to me that on a consideration of the three sub-rules in question that the latter contention of the respondent cannot be correct. The proper person to tax a Bill of Costs is the Taxing Master, an official with very specialised knowledge in such matters. Save as to the matters objected to, his certificate is final and conclusive. The power of the Court is to 'review' the taxation as to any item that may have been objected to. If the Court were to consider other new and fresh grounds not taken on the objections before the Taxing Master, the Court would be acting as a tribunal of first instance and such a course is not in my view contemplated by the sub-rules in question and one that would seem to be tantamount to usurping the functions assigned to the Taxing Master.

Furthermore another strange result would ensue. The application provided for in sub-rule 66(3) is one for a review. If the Court were on the hearing of such an application to consider new and fresh grounds of objection and uphold them, the Court would in fact be overruling the Taxing Master on grounds and reasons that were never before him and never considered by him.

It is moreover conceded by both parties that the Court can only review the Taxing Master's findings where he has gone wrong in principle. I cannot see that it would be possible for the Court to say that the Taxing Master had gone wrong in principle in matters not before him and on which he could therefore not have made a finding. On a fair reading of sub-rule 66(3) read in conjunction with sub-rule

66(1) and 66(2) it seems to me that the application to review provided for in that sub-rule is confined to a review of the objections and the grounds and reasons therefor as stated in the objections and grounds as carried in before the Taxing Master."

51. In *O'Sullivan v Hughes*, Blayney J. cited the *Walshe* case and said that "a party seeking a review of Taxation is confined to the grounds of objection made before the Taxing Master". The principle was also referred to in *Minister for Finance -v- Goodman (No. 2)*[10] by Laffoy J., saying that *"that the arguments sought to be advanced, which were grounds and reasons which had not been advanced before the Taxing Master could not be entertained on the hearing of the review*". She noted the decisions in *Walshe* and *O'Sullivan v Hughes*, observing that there was "*no discernible material difference*" between the sub-rules considered by Budd J. in the *Walshe* case and the corresponding provisions of the Rules in force in the case before her. It may be noted that in *Goodman*, the Minister was permitted to adduce new *evidence* before the High Court but Laffoy J. firmly rejected the attempt to raise new *arguments/grounds*.

52. In essence, the appellant makes three arguments about the prohibition on raising new grounds before the High Court. With the first argument, she seeks to describe and bring herself within an exception to the prohibition based on the nature of the error which she says exists in the present case. Secondly, she seeks to rely upon the wording of s.27(3) and maintains that the provision is a stand-alone basis of review which is spearate and less constrained than that in Order 99, r. 38. Thirdly, she argues that if she is indeed prohibited

[10] [1999] 3 IR 333

from raising the new argument she wishes to raise, there is a breach of Article 6(1) of the European Convention on Human Rights.

53. I will deal with the first two arguments in the next section, and the Article 6 argument in a spearate section.

The alleged quantification error and the s.27(3) self-standing review argument

54. As to the first argument, the appellant maintains that the basic principle of prohibition on new arguments does not apply in the case of a simple arithmetical or quantification error, akin to the misplacing of a decimal point.

55. Secondly, the appellant submits that the terms of s.27(3) of the 1995 Act confers the necessary discretion upon the court. She points out that s.27(3) confers upon the High Court the power to allow or disallow any costs, charges, fees or expenses in circumstances where the court is satisfied that there is an error resulting in the allowance or disallowance being *unjust* and that the subsection does not add any further qualification. She submits that s.27(3) does not in any way confine the High Court on a review of taxation to matters which were raised in objection before the Taxing Master. Thus, she argues, a literal interpretation of the subsection confers the necessary discretion on the court to enable a rectification of the error in the present case. It may be noted that this argument was not made in the High Court.

56. The Solicitor strongly disputes the appellant's characterisation of the alleged error in quantification in this case as a simple error in of arithmetic, having equivalence with an error such as the misplacing of a decimal point. The misplacement of a decimal point could be resolved by the Taxing Master prior to signing the certificate of taxation. In contrast, the calculation of the allowance for the instructions fee is not clear and simple but is a far more complicated point than the status of the town agent's fee as outlay in *O'Sullivan* or the issue of whether an agreement, as in *Re Walsh,* not to charge the client disbursements was displaced by subsequent agreements.

57. The Solicitor further submits that the appellant's attempt to apply a literal interpetation of s.27(3) seeks, in effect, to drive a wedge between Order 99, r. 38(3) and s.27(3) of the 1995 Act, whereas they should be read together. It submits that regard should be had to the fact that it was intended that the specialist expertise of the Taxing Master would be respected by giving him full opportunity to rule on all matters at first instance, before the matter goes on review to the courts. Thus viewed, the prohibition on raising new grounds before the High Court is not a mere technical rule but is rather designed to ensure fairness and efficiency in the taxation process.

58. The Solicitor argues, further, that if the appellant's own interpretation is applied, she faces the additional difficulty that her Notice of Review was brought in respect of the Objections Ruling only and did not purport to challenge the original Initial Ruling, which is the one in which the alleged quantification error was made.

59. In the present case, the appellant conceded in the High Court that the prohibition *did* apply. As Murray C.J. said at paragraph 20 of *Keating v. Crowley*[11], "*it is difficult to contemplate circumstances in which a party would be permitted, in an appeal or otherwise, to impugn a determination by the High Court of an issue, such as liability, which had been expressly conceded by the party concerned*." Of course, the U-turn on the liability issue which the State wished to make in the *Keating* case was particularly dramatic, but the principle also applies to smaller, more mundane concessions made at trial. The ban on raising points on appeal which were conceded at trial was reiterated in *Koger v. O'Donnell.*[12] Further, it may be noted that the Notice of Appeal does not state as a ground of appeal that the Trial Judge's findings were erroneous on the basis that the prohibition does not apply to a taxation under s.27(3) of the 1995 Act.

60. But even if one were to overlook the fact that the s.27(3) argument was not raised in the High Court, the appellant cannot in my view succeed. In the first instance, it is correct to say that her Notice of Review was confined to the Objections Ruling whereas the alleged error was contained in the Initial Ruling. Strictly speaking, therefore, her argument as to the error in the initial ruling was not properly before the court at all. However, secondly, and more importantly, I am not persuaded that s.27(3) can be read in such as manner as to give the court a power to remedy an injustice it perceives on review irrespective of whether the point was raised before the Taxing Master or not. The sub-section uses the language of "…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*

[11] [2010] IESC 29
[12] [2013] IESC 28

unjust". I do not think that one can meaningfully speak of a "decision" of the Taxing Master-or review of his decision by the High Court- if he has not been alerted to the point either prior to his initial ruling or by way of objection prior to his Objections Ruling; he has in those circumstances not made a decision on the point.

61. Further, the whole tenor of the discussion of s.27 of the 1995 Act and Order 99 of the Rules in the *D.M.P.T.* and *Corr* cases suggests that the Supreme Court considered the two sets of provisions as part of an interlocking whole, involving three distinct stages; the Initial Ruling, the Objections Ruling, and the court's review. The parameters of what the Taxing Master was to analyse were set by what the parties had determined to be contentious (*Sheehan v Corr);* the two-stage process was to act as a filtration system before matters are reviewed by the High Court (*D.M.P.T.)*; and reasons were to be given by the Master at each of the process (*D.M.P.T.)* precisely in order to enable each party to inform itself, make decisions about next steps, and for the court to understand the basis upon which the Master had arrived at his decision. It would make no sense within that context if the court could then alter the decision of the Taxing Master on the basis of a point never identified during the taxation process itself. When introducing s.27(3), the Oireachtas must be taken to have been aware of the taxation regime under Order 99 and not to have intended to have implicitly swept the objections procedure to one side and to create a self-standing, parallel system of review. The presumption against implicit alteration of the law, as described by Henchy J. in *Minister for Industry and Commerce v Hales*[13] is of some relevance in this regard. There is nothing in the judgment of Laffoy J. to support the view that s.27(3) entitles a party to seek review of the initial decision without going through the objections procedure.

[13] [1967] IR 50, at 76

62. Further, I am not convinced that there is a clearly identifiable error of an arithmetical or mechanical nature in the Taxing Master's ruling. It is true that there is an apparent discrepancy as between paragraphs 45 and 66 of his ruling, but when one has regard to paragraphs 70- 73, the position is less clear. To my mind, it is an issue of the kind that would have required the parties to go back to the Taxing Master at the Objections Stage and ask him what he meant. It is not clear beyond doubt that the Taxing Master in fact engaged in the equivalent of a slip of the pen or that the figure he ultimately arrived at was not what he intended, having taken into account various factors in addition to the time factor, as he was required to do. I would be less categorical in this respect than the High Court judge, who definitively reached the conclusion that the Taxing Master had not made any error (see paragraph 62 of his judgment); I would content myself with the conclusion that it is not clear that there was a manifest error of an arithmetical nature.

63. I would leave to another day the question of what the court might be entitled to do if something in the nature of an obvious error did present itself, such as an arithmetical error or the misplacing of a decimal point, to use the appellant's example. It is difficult to imagine that, if the matter were so obvious, the other side would not consent to an amendment of the figure without the need to resort to the court at all. However, wherever there is room for doubt as to whether the error was of that kind, I do not think it can be described as a mere arithmetical error nor a matter which the court can alter on review in circumstances where it was not raised before the decision-maker himself. It might be observed that if the appellant were correct about s.27(3) containing an unqualified discretion on the part of the court, there would seem to be no reason in principle to confine

it to arithmetical errors or slips of the pen and not to include, for example, other errors such as errors of fact.

64. I would therefore dismiss the appeal insofar as the appellant relies upon the submission that the prohibition on raising new grounds before the High Court does not extend to the alleged error in this case because it was a 'mere quantification error' and/or the submission that s.27(3) confers discretion on a court to vary a figure arrived at by the Taxing Master on the basis that it might perceive a situation to be "unjust" in circumstances where the issue was not raised before the Taxing Master himself.

65. For the avoidance of doubt, I would also reject the argument that the appellant should have been granted more leeway because she had represented herself in the taxation process. This did not feature strongly in the appeal but for completeness I would simply state that I agree with the manner in which the High Court judge dealt with the issue. The appellant has acknowledged that while she represented herself at the taxation hearing, she had access to, and used the services of, a solicitor and costs accountant before, during and after the taxation. Furthermore, on the appellant's own case, the error made by the Taxing Master was a clear and obvious error which was evident on the face of the Initial Ruling; it therefore did not require particular expertise, such as the expertise of a legal costs account, to identify.

66. I would also agree with the trial judge's analysis and rejection of the submission that the specific argument concerning what is now characterised as the "quantification

error" fell within a more general objection related to the instruction fee which had been raised with the Taxing Master.

The argument based on Article 6(1) of the Convention

67. The appellant submits that errors in quantification are to be expected in complex numerical exercises such as a taxation of legal costs and that if the Court on a review of taxation is precluded from examining such errors where they become apparent, that could create a situation where the necessary judicial oversight of the process which is required for it to be Article 6-compliant (as stated in *D.M.P.T.)* would be lacking. The submissions discuss some of the Strasbourg jurisprudence in some detail with a view to establishing that the existence of the prohibition on raising new grounds in the High Court review, if unqualified, would deprive the High Court review of its capacity to render the entire process Article 6-compliant because the court's involvement in the process would have insufficient scope.

68. The Solicitor submits that this ground was never raised in the High Court and that it cannot be introduced at this late stage in the process. The individual authorities relied upon by the appellant are also discussed with a view to establishing that the appellant's reliance upon them is any event misconceived.

69. Insofar as the appellant seeks to mount a more far-reaching challenge to the scope of the prohibition on the basis of Article 6(1) of the Convention, I agree with the submission of the Solicitor that this cannot be raised at this late stage of the process for the

first time. This new argument falls at the wrong end of the "spectrum" described by O'Donnell J. in *Lough Swilly Shellfish Growers Co-operative Society Limited v. Bradley*[14], described by O'Donnell J. in the following terms:

> "*At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in* K.D. *for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in* Movie News*); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be grated to argue a new point of appeal*".

70. In my view, the claim that the legal regime should be interpreted in a particular manner lest it be in breach of the European Convention on Human Rights is a claim which falls well outside the parameters of the case as it was advanced by the appellant in the High Court, even if one assumes *arguendo* that such a claim could be made within an application for review of taxation pursuant to s.27(3) and Order 99 rule 38 RSC. It is not necessary to express any view upon the latter point. At the very least, it seems to me that there is an important difference for the purposes of Article 6 of the Convention, between (a) a judicial review of an adjudicative process by another body which is limited *in general* from carrying out certain exercises; and (b) a judicial review of an adjudicative process by another body which is limited to what the *parties themselves have raised* before that body, which is the situation which presents here. Any Article 6 analysis would have to take this distinction into account and would require a careful and nuanced approach. It is certainly

[14] [2013] IESC 16

not an exercise which should be conducted on appeal in circumstances where the appellant failed to articulate it at first instance.

Conclusion

71. My main conclusions in summary are:

- It is not clear that the Taxing Master in fact committed a mere arithmetical error and/or that his ultimate conclusion on the solicitor's instruction fee was manifestly the product of an error of this type;
- S.27(3) should not be read as a stand-alone method or test of review but should be interpreted within the context of the taxation-and-review procedure set out in Order 99 rule 38;
- The general prohibition on raising new objections/arguments in the High Court described in *Re Walshe* and subsequent cases does apply to the appellant in the circumstances of this case and the trial judge was correct so to conclude;
- The appellant is not now entitled to challenge the prohibition by means of an argument constructed in relation to Article 6 of the European Convention on Human Rights, in circumstances where this was not put pleaded or put forward in the High Court and was raised for the first time on appeal.

72. In all of the circumstances, I would dismiss the appeal.

73. As the Solicitor has been successful in this appeal, my provisional view is that the it is entitled to the costs of the appeal. If the appellant wishes to contend for a different order, she has liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, she may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the terms proposed will be made.

74. As this judgment is being delivered electronically, I should say that Faherty and Collins JJ. have read this judgment in draft and have authorised me to say that they agree with it and with the provisional ruling on costs.