THE HIGH COURT

[2020] IEHC 599

[Record No. 2011/2196 P.]

BETWEEN

JACK LEANE (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND ANNETTE LEANE

PLAINTIFF

AND

BARBARA KERKHOFF AND THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr.Justice Barr delivered electronically on the 20th day of November, 2020

1. Introduction

1. The plaintiff settled his High Court medical negligence action against the defendants for €15m, and an apology and costs, in July 2017.

2. In the Bill of Costs, the plaintiff's solicitor sought an instructions fee of €445,000. That aspect went to taxation, where the defendants' legal costs accountant suggested that the appropriate fee was €200,000. In his ruling on taxation, the Taxing Master assessed the instruction fee at €295,000.

3. The plaintiff's solicitor brought in objections to the amount assessed by the Taxing Master in respect of the instructions fee. Following a hearing, the Taxing Master gave a written ruling on the objections wherein he assessed the solicitor's instructions fee at €340,000.

4. In this application the defendants have sought a review of the taxation by the High Court pursuant to s.27(3) of the Courts and Court Officers Act, 1995. The defendants maintain that having regard to the fact that while liability was an issue between the parties initially, it had been formally conceded by February 2016 and that, while the case was certainly one of considerable importance given the level of injury and disablement suffered by the plaintiff, it was not out of the ordinary for a catastrophic medical negligence action for assessment of damages. In these circumstances it was submitted that the instructions fee ultimately allowed by the Taxing Master was too high.

5. It was agreed between the parties that the taxation and the review of taxation in this matter are governed by the Courts and Court Officers Act, 1995 and by O.99 of the Rules of the Superior Courts in existence prior to 3rd December, 2019, when the current rules were introduced.

2. The Substantive High Court Proceedings

6. The background and history of the substantive medical negligence proceedings brought on behalf of the plaintiff, can be summarised in the following way: The plaintiff was born on 11th August, 2008. It was clear from the moment of his birth that he was very seriously injured. He was ultimately diagnosed as having severe hypoxic ischaemic encephalopathy in the neo-natal period, cerebral palsy, microcephaly, cortical visual impairment, feeding difficulties, seizure disorder, infantile spasms, gastro-oesophageal reflux and global developmental delay.

7. In January 2009, the plaintiff's next friend and her husband, consulted Messrs Niall Brosnan & Company, Solicitors of Killarney, Co. Kerry. Investigations were undertaken and reports were obtained from a number of specialists confirming that it was their view that the plaintiff's condition and resulting disablement had been caused by negligence on the part of the treating doctors in advance of and at the time of his birth. A personal injury summons was issued on behalf of the plaintiff on 8th March, 2011. Thereafter, a notice for particulars was raised on behalf of the defendants and replies were furnished thereto.

8. On 26th June, 2013, the plaintiff's next friend, swore an affidavit of discovery on a voluntary basis making discovery of the plaintiff's records from The Children's Hospital, in Crumlin, Dublin for the period August 2008 to June 2013 and of the records from Enable Ireland for the same period. That was done in response to a request for voluntary discovery made by the defendants' solicitor on 5th June, 2012.

9. A defence was filed on behalf of both defendants on 3rd December, 2013. It was made clear in the defence that it was being delivered prior to the completion by the first and second defendants of their investigations and prior to the receipt by the defendants of all necessary advice from medical experts. Thus, it was very much in the nature of a "*holding"* defence.

10. Further progress was made in relation to the proceedings by Messrs Niall Brosnan & Company, by obtaining further reports in relation to the quantum aspects of the case and by obtaining an advice of proofs from an experienced senior counsel. However, on 18th May, 2015, the plaintiff's next friend gave instructions that the file was to be transferred to Cantillons Solicitors in Cork. They opened their file in the matter on 18th May, 2015.

11. By letter dated 28th August, 2015, Messrs Cantillons Solicitors (hereinafter referred to as "*the plaintiff's solicitor*") wrote to the defendants' solicitor inviting them to reconsider the issue of liability. On 2nd September, 2015, a formal notice of change of solicitor was filed in the High Court.

12. In January 2016, the defendants' solicitor confirmed to the plaintiff's solicitor by telephone, that having reconsidered the question of liability, that issue would no longer remain live in the proceedings. On 29th February, 2016, an amended defence was filed on behalf of the defendants wherein liability was conceded.

13. On 29th March, 2016, a notice of trial was served. In February 2017, the case was called on for hearing and it was specially fixed to commence in the first week in October 2017.

14. On 12th July, 2017, negotiations between the lawyers representing the plaintiff and the defendants were held at the Four Courts in Dublin. The case was settled for €15m, and an apology and costs, to include all reserved and discovery costs and to include the costs of an uncontested wardship application to the High Court. The terms of settlement were approved by the High Court on 18th July, 2017.

3. Taxation of the Plaintiff's Costs

15. In March 2018, the plaintiff's solicitor produced a Bill of Costs covering all of the costs which had been incurred by the plaintiff from the time that his next friend first consulted with Messrs Niall Brosnan & Company in January 2009, up to the time that the case had been settled and all necessary ancillary orders had been made. In the Bill of Costs, the plaintiff's solicitor sought an instruction fee of €445,000. The matter was referred to taxation wherein the defendants suggested that the appropriate instructions fee for the plaintiff's solicitor was €170,000, to which they were prepared to add an uplift of €30,000, in case any of the allowances that they had made proved to be insufficient; accordingly, the suggested fee was €200,000.

16. On 7th February, 2019, the Taxing Master gave an oral ruling on taxation, wherein he allowed an instructions fee of €295,000. That ruling was subsequently reduced to writing and was agreed between the parties on 16th April, 2019.

17. In his ruling on taxation, the Taxing Master divided the entire period during which work had been done by solicitors acting on behalf of the plaintiff into five distinct periods. The first was the period from January 2009 to the issue of proceedings in March 2011. He allowed an instructions fee of €25,000 for this period. The second period was from March 2011 to 18th May, 2015, for which he assessed an instructions fee of €20,000. Thus the total amount payable to Niall Brosnan & Company was €45,000.

18. The third period was from May 2015 to December 2015. This represented the first seven months during which Cantillons Solicitors began working for the plaintiff. In his ruling, he summarised the work done during this period in the following way:-

> *"Investigation of liability, writing to defendants regarding same, review of all documents and discovery material, preparing authorities and investigation of needs of plaintiff and formulating strategies and heads of daily routine, future needs, identifying, treating and past and current doctors and the fact that no investigation had been undertaken in any detail with regard to particulars of the claim as requested by the defendants. Past reports obtained were examined. Noting at that stage that annual care costs had been determined at circa. €45,000, which agents, and the next friend considered totally inadequate.*
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> *Work in earnest really commences in August 2015. The case was not set down for trial. The solicitors prepared an outline of the infant's position and assessed those areas of costs associated with the level of care required. A bulleted memo was prepared identifying thirty-five separate areas of his care that required analysis. A detailed consultation was had with the parents. A full overview of the daily weekday routine and the weekend routine was analysed. Thirteen separate areas were identified and the required experts were identified, spoken to and then briefed in detail by the solicitors. All of these areas had to be initially identified, tracked at the location of the source medical notes and material was assembled in manageable and interpretable form. All of this work took up until the end of December 2015."*

19. The Taxing Master assessed the instructions fee for this period in 2015 at €75,000.

20. Period four was represented by the calendar year January to December 2016. It is not necessary to set out in detail the work that was analysed during this period, as there is no dispute in relation to the amount assessed by the Taxing Master in respect of the instructions fee of €78,000 for this period.

21. The last period, period five, represented the period from January 2017 to the settlement and ruling of the matter in July 2017. As the fee assessed for this period is in dispute, it is necessary to set out the work that was described by the Taxing Master as having been done during this period:-

> *"Whilst this is just about a seven-month period, this was a period with great intensity and skilled work was undertaken. The assembly of the heads of claim, service and finalisation. The letters had intensive interaction with all of the experts including Chakraborty, Glynn, Ormond, Dutton, O'Loughlin, the Housing Team, there was also obtaining up-to-date medical records from seven outside hospitals. The matter was set down and called on for hearing on 4th October, 2017.*
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> *In March 2017 the final heads of damages were formulated and given to the parents and a huge amount of work was invested with them.*
>
> *Liaison with the defendants regarding negotiations, regarding independent inspection arrangements with defendant's experts. Exchange of SI 391. Consideration and revision on defendant's experts' views, particularly on life expectancy and on costings and on instructing the Consultant Actuary.*
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> *Significant consulting with parents about payments out. The issue of an apology. The negotiations and the alteration in dates and then all that goes with that and then arranging to brief and instruct counsel. Preparation for ruling and ruling and follow-up."*

22. In respect of this seven-month period, the Taxing Master assessed the instructions fee at €97,000. This gave an overall instructions fee of €295,000.

23. The plaintiff's solicitor was not happy with the overall instructions fee that had been allowed by the Taxing Master. On 20th February, 2019, the plaintiff's solicitor carried in written objections to the Taxing Master's assessment of the instructions fee. It was submitted that the instructions fee that had been assessed was unreasonable remuneration having regard to the nature and extent of the work carried out by the plaintiff's solicitors. In particular, it was submitted that the Taxing Master had failed to have sufficient regard to the responsibility borne by the plaintiff's solicitors in preparing for the settlement negotiations in light of the fact that the terms of settlement provided for a final lump sum payment, which had to cater for all of the plaintiff's extensive needs for the rest of his life. It was submitted that this had to be seen in contrast to interim settlements, which provided for compensation to cater for the plaintiff's needs for a

limited number of years, with an agreement that the matter would then come back into court, either for assessment of a lump sum by way of damages, or for the provision of a periodic payment order to cater for his future needs. It was submitted that the level of responsibility on a solicitor advising in relation to such an interim settlement was far less than that which applied where a solicitor was advising in relation to a final lump sum settlement.

24. It was submitted that the instructions fee allowed failed to have adequate regard to the degree of specialisation and skill possessed by the plaintiff's solicitor and exercised by her and the firm in selecting and briefing all the appropriate experts who had provided reports in relation to the plaintiff's condition and in relation to his future care needs. In this regard, it was emphasised that the plaintiff had been profoundly physically and mentally injured and would be permanently severely disabled both physically and cognitively.

25. It was submitted that the Taxing Master had failed to take fully into account the very large size of the settlement that had been obtained in the case. It was further submitted that regard had not been had to the very important issue of life expectancy, which was an area of conflict between the experts engaged on behalf of the plaintiff and the defendants. In particular, the defendants' expert was of the view that the plaintiff had a life expectancy of approximately 23 years, whereas the plaintiff's experts were of the view that he would live until approximately 34 years of age. Given his overall life expectancy, this discrepancy was very significant and had a very large impact on the overall quantum of damages. Accordingly, it was an issue that required detailed specialist attention on the part of the plaintiff's solicitors.

26. It was submitted that the Taxing Master had failed to take into account, or had failed to take sufficiently into account, the matters set out in O.99, r.37(22)(ii) and in particular the responsibility borne by the solicitor, the importance of the matter and the skill and specialised knowledge of the plaintiff's solicitors.

27. It was further submitted that the Taxing Master had failed to have sufficient regard to the comparator cases, which had been referred to on behalf of the plaintiff's solicitor by the legal costs accountant. It was pointed out that the instructions fee allowed by the Taxing Master in his ruling in the present case, had been significantly lower than the instructions fees recovered in all of the comparators referred to on behalf of the plaintiff. Furthermore, while the defendant had submitted five comparator cases, it was notable that in four of those cases the instructions fee had been in relation to negotiation of an interim settlement, which it was submitted was not at all the same as the negotiation of a final lump sum award for an infant plaintiff, who had been profoundly disabled. It was pointed out that both parties had relied on the case of *MC v. HSE and LM*, which had settled on a 50/50 basis for the sum of €5m, where an instructions fee had been allowed of €340,000.

28. Finally, the plaintiff's solicitor disagreed with the breakdown of the overall figure assessed for the instructions fee into the periods which had been done by the Taxing Master and

submitted that this had led to an underestimation of the fee that was properly due to the plaintiff's solicitor for the work done in connection with the case.

29. In their replying submissions, the defendants submitted that the Taxing Master's analysis of the nature and extent of the work done by the plaintiff's solicitor had been correct and the allowance made had been reasonable. It was submitted that the Taxing Master's approach had been in accordance with established principles applicable to the taxation of costs on a party and party basis.

30. It was accepted that there was an obligation on the Taxing Master to carry out a root and branch examination of the nature and extent of the work done by the solicitor for the costs. When he had examined the nature and extent of the work done, he must then exercise his discretion in making appropriate allowances in respect of the items claimed. He must have regard to the provisions of O.99, r.37(22) (ii) when coming to his assessment of an appropriate instructions fee for the solicitor. It was further submitted that the Taxing Master was required to give an analysis of the reasoning that had led him to his decision. He was obliged to outline the factors that he took into account in arriving at the decision and the weight that he had attached to them when making an allowance. However, it was pointed out that in *Walsh v. HSE* Birmingham J. cautioned against *"imposing any unreal or oppressive burden on hard pressed Taxing Masters" or "demanding a level of detail and analysis from Taxing Masters which would sometimes be absent from judgments of the Superior Courts".*

31. It was submitted that the instructions fee allowed of €295,000 was reasonable on a party and party basis having regard to the nature and extent of the work carried out by the solicitor. It was submitted that the Taxing Master in his ruling had carried out a full root and branch examination of the nature and extent of the work that had been carried out by the plaintiff's solicitor and in so doing had complied with the requirements of s.27 of the 1995 Act and the established jurisprudence of the High Court.

32. It was submitted that one of the factors which the Taxing Master had to take into account was the "*time and labour*" expended by the solicitor when assessing the appropriate instructions fee. In this regard it was submitted that time records had been submitted by Messrs Cantillons Solicitors, but they had submitted that those records were "*haphazard"* and "*incomplete*". This was denied by the defendants, who submitted that the records were in fact comprehensive in nature.

33. It was pointed out that the time records suggested that the solicitors had expended a total of 296 hours on the case, with a monetary value of €96,806. However, it was submitted by the defendants that approximately 45 hours, or just over €15,000 in monetary terms, was in respect of "*reading in*" time when they took over the file from Messrs Niall Brosnan & Company and on other activities which post-dated the making of the High Court order, neither of which were recoverable on a party and party basis. It was submitted that a more accurate assessment of the time expended on the case was 250 – 260 hours. It was submitted that two matters flowed from this: firstly, by the standards of a medical negligence action, the actual time expended on the case was not

that unusual and secondly, the fact that the Taxing Master had allowed an instructions fee of €295,000 notwithstanding the relatively modest amount of time expended on the case, demonstrated beyond question that the Taxing Master had given very considerable weight to the intangible factors referred to under the rules, when making his assessment of the appropriate instructions fee.

34. In relation to liability, it was pointed out that the majority of the work on liability was done prior to service of the proceedings. Three expert reports, two reports on breach of duty and one on causation, had been received, all of which were very positive from the plaintiff's point of view. Liability had been withdrawn by the defendant in January 2016, approximately 18 months before the settlement talks and ultimate trial date.

35. In relation to quantum, it was accepted that the case was a catastrophic injury case and that the plaintiff's solicitors had specialist skill and experience in that area; however, it was submitted that while the figures were large, the case itself was standard in relation to the heads of damages that would flow from such catastrophic injuries. In essence, it was submitted that while it was a catastrophic injury claim, it was nothing out of the ordinary for that type of claim.

36. It was submitted that the Taxing Master had given due regard to the skill and specialist knowledge of the plaintiff's solicitors. It was stated that such regard was evident from the content of the Taxing Master's ruling.

37. It was submitted that while the plaintiff had placed heavy reliance on intangible factors to justify the fees claimed and in particular factors such as the importance of the matter to the client and the responsibility resting on the solicitors, it was submitted that such factors had been taken into account by the Taxing Master in his ruling and in the fee that he had assessed. In relation to the assertion that the settlement was a final lump sum award for the plaintiff, rather than an interim settlement, it was submitted that in the absence of any legislation providing for periodic payment orders, all such settlements had to be on the basis of a final lump sum award, unless specifically agreed to the contrary by the parties. Accordingly, it was not unusual to prepare for negotiations and ultimately settle the claim on such a basis.

38. In relation to the value of the settlement, while it was accepted that it was a high value claim, it was submitted that all of the work carried out was the usual type of work that one would expect to see in a catastrophic medical negligence case. The only unusual or distinguishing factor in the case, was perhaps the high value of the ultimate settlement. It was submitted that the value of the claim achieved through the solicitor's efforts had been recognised by the Taxing Master and was comfortably accommodated in the instructions fee that had been allowed.

39. It was submitted on behalf of the defendants that the comparator cases that had been referred to by them at the taxation hearing, represented fair comparators in all the circumstances. It was noted that both parties had relied on the *MC* case.

40. Finally, it was submitted that the objections raised by the plaintiff were without merit and should be rejected by the Taxing Master. It was submitted that the Taxing Master had correctly applied the legal principles relevant to the taxation of costs on a party and party basis and that the instructions fee allowed by him had been eminently reasonable having regard to the nature and extent of the work and its importance and complexity.

41. Having furnished written submissions in relation to the hearing of the objections, oral submissions were made by the parties on 22nd October, 2019. The Taxing Master issued a written ruling on the objections on 29th January, 2020. In that ruling, he stated that having considered the respective parties' submissions, having reconsidered the documentation and analysed his notes, he had concluded that there was merit in the plaintiff's objections to the allowances that he had made in respect of the instructions fee and that the overall allowance in that regard was insufficient. The Taxing Master increased the instructions fee allowed for periods three and five. In respect of period three, being the period from May to December 2015, he stated as follows at para. 59:-

> *"In period three, I have concluded that when the plaintiff changed solicitors, there was a large body of work to be undertaken in formulating the claim for special damages. I remind myself that the schedule of special damages which was in draft and formulated at that stage, showed a claim for annual ongoing care of about €45,000 per annum. This is to be contrasted with the annual costs as finally determined in the sum of multiples of this amount. These were addressed on the taxation and on the hearing of the objections and are to be located at p.102 of the Bill of Costs. On the grounds of brevity, they are not repeated here, the parties are well aware of them. The investigation of the claim as to liability and thirty-five specific areas of care needs were identified, all of the medical reports and medical records were considered and the care needs of the infant were identified from these sources. I have concluded that I have underestimated this work and I would increase the allowance for the work undertaken in this period by €19,000 to €94,000."*

42. The Taxing Master also increased the instructions fee for period five, which covered the seven-month period from January 2017 to the settlement negotiations held on 12th July, 2017. He concluded as follows at para. 61:-

> *"In period five, although only for a seven-month period, it was intensive and detailed work. I am satisfied that on reflection, I have undervalued the work undertaken, not in the context of not being aware of the amount of work but I feel on reflection that I have underappreciated the significance of the money involved, the pressure borne in drawing all of the strands together, and completing the matter. I would increase the allowance made for the work undertaken in this period by €26,000 to give an allowance of €123,000."*

43. This meant that the overall instructions fee had been increased from €295,000 to €340,000.

4. Review of Taxation by the High Court

44. By notice dated 14th February, 2020 the solicitor for the defendant has sought a review by the High Court of the allowances made by the Taxing Master in his ruling on the objections. It has been agreed between the parties that the review to be conducted by this court, is to be done pursuant to the provisions of s.27(3) of the 1995 Act. It is in the following terms:-

> *"(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."*

45. Written submissions were prepared on behalf of the defendants on 22nd May, 2020. They ran to some twenty-four pages. It is not proposed to recite them in *extenso* in this judgment. Having repeated the submissions made in relation to the objections hearing, the defendants made the following points in relation to the additional allowances that had been made by the Taxing Master in respect of periods three and five: firstly, it was submitted that no new evidence had been furnished to the Taxing Master to justify the substantial increase in the instructions fee in the sum of €45,000, or a 15% increase in the original fee allowed. Nor had the plaintiff's solicitor pointed to any matters to which regard had not been had by the Taxing Master at the time of his original ruling, so as to justify these increases. It was submitted that at the time of his initial ruling, the Taxing Master had had access to the solicitor's file and had also had the benefit of comprehensive computerised time records maintained by Cantillons solicitors in respect of their work carried out in periods three and five. It was submitted that in these circumstances there was no objective basis on which it could be argued that the Taxing Master had underestimated or undervalued the work done by the solicitor during these periods.

46. It was submitted that there was a requirement on the Taxing Master to set out reasons why he had made a particular allowance or a particular disallowance. In this case, there were no reasons given for the increases other than that he had underestimated the work actually done during period three i.e. between May and December 2015 and had undervalued the work done in the final seven months of the case i.e. between January and July 2017.

47. It was submitted that it was unrealistic for the plaintiff's solicitor to maintain that their computerised time records were either "*haphazard*" or "*incomplete",* when they appeared comprehensive on their face and when the plaintiff's solicitor had referred to them on twenty-seven separate occasions in the Bill of Costs: see for example items 126, 128, 129, 147, 150, 165, 167, 168, 201, 203, 212, 240 and 243, as representative samples.

48. It was submitted that it was clear from the original taxation ruling, that the Taxing Master had done a detailed root and branch examination of the work carried out by the solicitor during the various periods as required by the case law: see *CD v. Minister for Health and Children* [2008] IEHC 299 and *Sheehan v. Corr* [2017] 3 I.R. 252.

49. It was submitted that in the light of such an exhaustive review at the taxation stage, there was a duty on the Taxing Master to give clear reasons as to why he was making a substantial increase in the overall instructions fee of €45,000. It was submitted that it was not sufficient merely to say that he had underestimated the work done during period three. Furthermore, it was not sufficient for him to say that he had undervalued the work done in period five, when it was clear from his ruling that he was very much aware that the case was a high value case. It was submitted that in these circumstances the Taxing Master had been in error in making the allowances that he had done as a result of the objections hearing and had failed to give adequate reasons why he had made these increases in the instructions fee.

50. In relation to the work on quantum which had been done by the plaintiff's solicitor, it was accepted that that work had been done with skill and diligence; however, it was submitted that the file and the time records revealed that the work done was standard work that one would expect in a catastrophic medical negligence claim. In this regard the defendant relied on a memorandum dated 21st February, 2017 between the plaintiff's solicitor and the defendants' solicitor, wherein the plaintiff's solicitor had confirmed that there was "*nothing out of the ordinary*" in relation to the work on quantum.

51. It was submitted that the only unusual or distinguishing factor in the case was the fact that it had a high value arising from the plaintiff's extensive care requirements. Reference was made to the dicta of Hardiman J. in *BD v. JD* [2004] IESC 101 wherein the learned judge had stated that those charging instructions fees or brief fees must bear in mind that they are to be related to the work done and not directly to the asset value in the case. However, he went on to state that obviously such value would affect the complexity and level of responsibility involved in the case, but these were not the sole determining factors. It was submitted that in this case the Taxing Master had erred by giving undue weight to the value of the case in making the increase which he had done in relation to the instructions fee.

52. It was submitted that from the time records which had been provided by the plaintiff's solicitor, the total number of hours expended on the case of 296.48 hours was not excessive, or unusual for a catastrophic medical negligence case. Indeed, it was submitted that when a deduction was made for time spent "*reading in*" to the file due to the fact that it had been taken over from another firm of solicitors, which was not recoverable on a party and party basis, the true level of hours spent on the case was of the order of 250/260 hours. Furthermore, the majority of the time expended on the file had been done by a solicitor who qualified in 2014, as opposed to the senior partner. While there was no doubt that the solicitor progressed the case diligently and with skill, it

was submitted that the case law established that the solicitor's place within the hierarchy of fee earners should be taken into account: see *Sheehan v. Corr* at para. 98.

53. Finally, in relation to the use of comparator cases, it was submitted on behalf of the defendants that they had submitted two sets of comparators: The first being where a full defence on liability had been maintained after the notice of trial, which revealed a range of instructions fees from €287,500 up to €340,000 and the second being a set of comparators involving assessment only cases where the instructions fees ranged from €171,500 to €265,000. It was submitted that the plaintiff's schedule of comparator cases was somewhat misleading, in that all but two of these cases involved full fights on liability and all of the cases proceeded to trial with the exception of one case, *CMcG v. NUIG*, which had an instruction fee of €465,000, but which had settled a few days in advance of the hearing. Whereas this case had settled three months prior to the hearing date.

54. Reference had been made to the fact that both parties had referred to the case of *MC v. HSE & LM* as a comparator. While that had been referred to by the defendants at the upper end of the liability cases in their list, it was submitted that there were very significant differences between that case and the present case, which demonstrated that the allowance of a total instruction fee of €340,000 in this case was unjust. In the *MC* case there had been a full fight on liability, together with issues on causation. There were six experts retained in relation to liability, who had provided nine reports; being three times the number of liability reports in the present case. The dispute on liability was underlined by the fact that the case was settled for €5m, which was agreed to represent 50% of the full value of the case. However, the case had run all the way to trial and did not settle until the second day of the hearing. There were two defendants, who had been separately represented. The claim had been complicated by the fact that the injuries were sustained in 1997, but the matter had not come on for hearing until 2017. The second defendant, who had retired at the age of 65 in 2004, had raised a preliminary issue in relation to the risk of an unfair trial due to the lapse of time. Furthermore, the passage of time had made the matter more complex, as liability had to be determined by reference to the standard of care in 1997, as opposed to more modern standards. Finally, the instructions fee in that case of €340,000 was agreed to include all scheduled items, postage and sundries and a wardship application.

55. Having regard to the very obvious differences between the *MC* case and the present case, it was suggested that it was unjust for the same instructions fee to be awarded in the present case, which was infinitely less complex, being essentially an action for assessment of damages.

56. It was submitted that having regard to all these matters, it was clear that an error had been made by the Taxing Master in making the additional allowances that he had done in the objections ruling and that this had given rise to an unjust decision in respect of the allowable instructions fee and on that basis the court should intervene pursuant to its jurisdiction under s.27(3) of the 1995 Act.

57. In response, the plaintiff lodged written submissions running to twenty-seven pages. It is not necessary to repeat the points that were made in relation to the value of the case and the importance of the case, which had been set out in extenso in the submissions made to the Taxing Master in advance of the hearing on the objections.

58. In relation to the specific submissions made by the defendants in relation to the review by the High Court, it was submitted that the defendants had misunderstood the nature of the objections hearing which was provided for under O.38 of the RSC. Order 38 made it abundantly clear that on a review of taxation, the Taxing Master shall "*reconsider and review his taxation upon such objections".* It was submitted that this meant that the Taxing Master was entitled to reconsider the evidence that had been placed before him at the taxation hearing and to do so in the light of such further arguments as may be put forward by the party bringing in the objections. It was not necessary for such party to either bring in fresh evidence, or new information, or allude to any material that had been overlooked at the taxation hearing.

59. It was submitted that the procedure provided for under O.99, whereby there was an initial ruling on taxation, followed by a hearing in relation to objections and a further ruling by the Taxing Master, was one that was *sui generis* to the taxation process. It was clearly established in the case law that the Taxing Master was entitled to reconsider and review his original decision when considering the objections that had been carried in before him: see *DMPT v. Moran* [2015] 3 I.R. 224 at p.246. Counsel submitted that in effect this meant that the Taxing Master was able to change his mind and come to a different allowance in respect of an item, in the light of either further information that was provided, or in the light of further argument that he heard from the parties.

60. It was submitted that in these circumstances, the Taxing Master was entitled to reconsider the instructions fee that he had allowed for periods three and five in the light of the further submissions that had been made on behalf of the plaintiff's solicitor. Having considered those submissions and having regard to the reasons that he had given in paras. 59 and 61 of his ruling on the objections, he was entitled to come to the conclusion that he had underestimated the work done during period three and had undervalued the work done during the final period leading up to the negotiations and as a result thereof, to make an increase in the instructions fee for both periods. It was submitted that he had given adequate reasons as to why he had made an increase in respect of each period.

61. It was submitted that it was simply incorrect for the defendants to argue that the Taxing Master could only change his mind if new evidence was brought in, or if the solicitor for the costs could point to some element that had not been adverted to by the Taxing Master in his original ruling. It was submitted that both the wording of O.38 and the decision in the *DMPT* case made it abundantly clear that that was not so.

62. It was submitted that the High Court can only intervene if there is clear evidence before it that leads it to the conclusion that the Taxing Master had made an error which had lead him to make a decision that was unjust: see *Sheehan v. Corr* at para. 98; *Bloomer v.*

Incorporated Law Society of Ireland [2000] 1 I.R. 383 at p.387*; Boyne v. Dublin Bus* [2008] 1 I.R. 92 at p.115 and *Lowe Taverns (Tallaght) Limited v. South Dublin County Council* [2006] IEHC 383 at p.4 – 6 of the judgment.

63. In relation to the time records, it was submitted that these were "*haphazard*" and *"incomplete".* Furthermore, it was submitted that the case law established that the Taxing Master was only obliged to have regard to them insofar as the records themselves permitted. In this case, on a purely time basis, the total fee provided was €96,806, whereas even the defendant had suggested a fee of €200,000 and the Taxing Master had initially allowed a fee of €295,000. This showed that the time records were only one factor, but that when one took into account other factors, as was required by O.99, r. 37(22) (ii), it was clear that the time records themselves were not a large factor in determining the appropriate fee. Furthermore, as the defendants had not raised any objection in relation to the Taxing Master's treatment of the time records at the original ruling on taxation, and had not brought in any objections thereon, it was submitted that they could not now raise that as an issue before the court.

64. Counsel submitted in relation to the memo which had been referred to by the defendants dated 27th February, 2017, that it was wrong to give an interpretation to that memo which was to the effect that the case was simple in nature. That had been a conversation between two solicitors in relation to the heads of special damages that had yet to be furnished in a comprehensive form to the defendants' solicitor. All the plaintiff's solicitor was doing in that memo was confirming that there were no unusual heads of damage that would not ordinarily arise in a catastrophic injury case, such as, for example, the necessity to obtain state of the art medical treatment in the UK or the US. However, it was quite wrong to interpret that memo as meaning that the case was lacking in complexity.

65. It was further submitted that this case was not a simple assessment of damages case in that there was a significant disagreement between the experts in relation to the infant plaintiff's life expectancy. As pointed out earlier, the defendants' expert put that at up to 23 years, whereas the plaintiff's expert was of the view that the plaintiff would live until he was 34 years of age. This was a very significant difference between the experts and would have a significant bearing on the overall value of the case. Accordingly, it was an issue that required extensive consideration on the part of the plaintiff's legal advisers.

66. It was submitted that it was well established on the case law that the High Court should show curial deference to the decision of the Taxing Master, as he was a recognised expert in the area of the assessment of legal costs. In such circumstances, it was submitted that the court should only intervene where it was satisfied, not only that there was an error on the part of the Taxing Master, but that that error had led to an injustice in his decision: see *Minister for Finance v. Goodman (No. 2)* [1999] 3 I.R. 333 at p.345.

67. Finally, in relation to the comparator cases, it was submitted that it was clear from the taxation ruling that the Taxing Master had considered all the comparator cases put before him. It was not appropriate to do a minute analysis of one case against the other. The

purpose of comparators was to provide a "*sense check*" in relation to values generally, whereby the value of an item allowed or disallowed in a particular case would be compared with a range of values in other cases. The defendants had sought to suggest that it was unjust that the same instructions fee should be granted in the present case as in the *MC* case, due to what it perceived as being relevant differences between the two cases. However, while it was true that this was an assessment and the *MC* case had involved a full fight on liability, it ignored the fact that there was the significant issue of life expectancy in this case, which was going to be one of some considerable difficulty and would have a very marked effect on the overall value of the case. In these circumstances and having regard to the fact that that case had settled for €5m, albeit on a 50/50 basis, whereas this case had settled for €15m at full value; it was submitted that having regard to these factors, it was not unjust for the same instructions fee to be allowed in both cases.

68. Finally, it was submitted that the Taxing Master had given adequate reasons in his objections ruling in relation to the increases that he had made to the overall instructions fee. It was submitted that an increase of €45,000 was not unreasonable having regard to the totality of the circumstances in this case.

5. The Law

69. The principles of law that are applicable in this case are reasonably well settled. The duty of the Taxing Master when assessing the appropriate instructions fee for the solicitor for the costs, is to carry out a detailed root and branch examination of the work actually done and then, having regard to the matters set out in O.99, r.37(22) (ii) to come to a conclusion in relation to the monetary value of that work. In *CD v. Minister for Health and Children,* Herbert J., in a passage that has been approved in many subsequent cases, described the exercise that the Taxing Master must carry out when assessing the instructions fee, in the following way:-

> *"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 solicitors 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 Officer's Act 1995. Without such an analysis, his discretion to allow in whole or in part as fair and reasonable or, to disallow, any item in a general instructions fee would not be validly exercised."

70. In *Sheehan v. Corr*, Laffoy J. giving the judgment of the Supreme Court, cited with approval the dicta of Herbert J. in the CD case at para. 43 and elaborated on the duties of the Taxing Master when assessing an instructions fee in the following way at para. 78:-

"Following the analysis of the passages from the judgment of Herbert J. in C.D. v. Minister for Health [2008] IEHC 299, (Unreported, High Court, Herbert J., 23 July 2008) quoted earlier, I concluded that the proper approach to the taxation by the Taxing Master of the general instructions fee is as outlined therein, it being in accordance with s. 27 of the 1995 Act, and O. 99, and with particular emphasis on the statement in the second passage quoted, that value does not have to be put on each of the individual items making up the general instructions fee. In relation to the circumstances outlined in O. 99, r. 37(22)(ii), the relevance and importance of each of those circumstances will vary from case to case, so that the sequence in which it is appropriate to consider them will vary from case to case. As a central feature of the function of the Taxing Master in the taxation of costs under s. 27(1) is to examine the nature and extent of the work done, with a view to assessing the value of the work done, Herbert J. was correct in pointing to ascertaining precisely what work was done as the starting position for the exercise by the Taxing Master of his function. That task is to be done by reference not only to the bill of costs, but also supporting documentation. Time is a factor to which the Taxing Master must have regard. If it is in issue, he should indicate the amount of time he or she considers should reasonably have been devoted to the work, but as Herbert J. stated, he or she should do so to the extent that the nature of the work and the information available to him or her permits. In relation to time, the availability of supporting documentation is clearly of significance. Supporting documentation may be in the form of a contemporaneous record of time spent, or, perhaps, a document estimating the time spent based on other contemporaneous evidence, or, if allowed by the Taxing Master, it might be in the form of a retrospective reconstruction of the time spent on the work done. It is for the Taxing Master to assess the evidential value of the documentation available in support of costs claimed. Therefore, it is undoubtedly in the interest of a solicitor or barrister that time records, or other documents containing accurate and credible evidence of time spent, are available to the Taxing Master, in the event that a dispute arises in the course of the taxation, because such documentary evidence goes, albeit not exclusively, to the nature, extent and value of the work done. However, as has been made clear earlier, there is no obligation on the solicitor or barrister to maintain time records, or to include time records in the bill of costs. On a different point, identifying the doer of the work, and his or her place in the hierarchy of fee earners, at the same time as identifying the work done, is a sensible approach. Herbert J., in my view, correctly

places consideration of other relevant circumstances, outlined in O. 99, r. 37(22)(ii), such as what he refers to as "special skill", and other matters prescribed by O. 99, for example, by r. 37(18), such as the necessity of the work for the attainment of justice, after ascertainment of the work done. In short, the passages from the judgment of Herbert J. provide useful guidance for the Taxing Master in the assessment of the general instructions fee, although, of course, they do not cover the vast range of situations which may arise in taxation matters."

71. The court is satisfied that the passages cited above from *CD v. Minister for Health and Children* and *Sheehan v. Corr* represent a correct statement of the legal obligation that is cast upon the Taxing Master when assessing the instructions fee pursuant to the provisions of s.27 of the 1995 Act.

72. The second issue that arises in this case is the role of the Taxing Master when carrying out a review of his initial taxation ruling when objections have been carried in pursuant to O.99, r.38. In *DMPT v. Moran*, Laffoy J. again giving the decision of the Supreme Court, looked at this issue and stated as follows at paras. 46 and 47:-

"[46] 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. The objections must be in writing and the grounds and reasons for the objections must be set out. When that is done within the stipulated time limit, the dissatisfied party may apply to the Taxing Master to "review the taxation" in respect of the relevant items. The Taxing Master's task is laid down very precisely in r. 38(2): it is to "reconsider and review his taxation upon such objections". He has the discretion to receive "further evidence" in respect of the objections, the epithet "further" suggesting that what is involved is, as counsel for the respondents submitted, an amplification of the evidence which had hitherto been before him. When he has conducted his review, the Taxing Master must commit his decision and the grounds and reasons therefor to writing.

[47] 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. On any view, the Taxing Master's function is to reconsider and to review his earlier decision in the light of the additional arguments before him and, perhaps, additional evidence and, in the performance of that function, he acts independently of both parties involved in the taxation process. From an objective perspective, it is difficult to see why the Taxing Master would be naturally predisposed to support his original decision. The situation of the Taxing Master is not similar to either the example given by Kenny J., or the factual circumstances he was considering, in Corrigan v. Irish Land

Commission [1977] I.R. 317. The example given by Kenny J. at p. 333 was that before 1877:-

> *"…an appeal lay from a judge of the Court of Common Pleas and of the Exchequer Division to that court sitting in banc (all the judges of that Division), and the judge who heard the case originally was allowed to sit as a member of the court when it sat in banc."*

In relation to that situation, Kenny J. observed that the judge who gave the original decision would naturally be predisposed to support his original view.

73. Thus, the court is satisfied that when carrying out a review of his initial taxation ruling under O.99, r.38, the Taxing Master is required to "*reconsider and review*" his rulings on the initial taxation. It is not an appeal as such from his previous ruling, but affords him an opportunity to reconsider same in the light of arguments put forward by the party carrying in the objections to the initial ruling. It is not necessary that such party should provide new evidence or additional information, though of course that can be provided at the objections hearing if the party so wishes. However, it is not necessary that such additional information be furnished in order for the Taxing Master to reconsider his initial ruling.

74. The third legal issue raised in these proceedings, is in relation to the duty which is cast upon the Taxing Master to give reasons as to why he was allowing certain elements in the Bill of Costs and disallowing others. In the *CD* case, Herbert J. defined the duty of the Taxing Master to give reasons for his decision in the following way:-

> *"In my judgment it is neither necessary nor desirable and, indeed in the absence of a time costing system, it would usually be impossible for the Taxing Master to value individual items making up a claim to a general instructions fee. While it is necessary for the Taxing Master to give reasons for his or her decisions, it is neither necessary nor desirable that this should take the form of a lengthy dissertation or legal discourse. It should be possible for the paying party and for this court on review quickly and efficiently to identify at a glance the items of costs claimed, whether it has been allowed or disallowed and the reason or reasons why. It is not necessary for the Taxing Master to provide, nor is it desirable that the High Court on a review of taxation should have to consider, lengthy opinions referring to evidence given and submissions made before the Taxing Master and, citing and analysing numerous legal authorities. This would provide for clarity, the efficient use of court time, prevent delay and, result in a great saving of time and expense. It should present no insuperable problem as the Taxing Master is an expert as well as exercising a quasi-judicial function under the Statute.*

75. In *DMPT v. Moran,* Laffoy J. considered the whole question of the duty on decision makers to give reasons at paras. 52-61 of her judgment. In the course of reviewing the relevant case law, she cited the following passage from the judgment of Fennelly J. in *Mallak v. Minister for Justice* [2012] 3 I.R. 297:-

"65. This body of cases demonstrates that, over a period approaching 30 years, our courts have recognised a significant range of circumstances in which a failure or refusal by a decision maker to explain or give reasons for a decision may amount to a ground for quashing it. Costello J. attached importance, quite correctly, to the presence or absence from the statutory scheme of a right of appeal. The absence of a statement of reasons may render such a right nugatory."

76. In the *DMPT* case, Laffoy J. had to consider whether there was a duty on the Taxing Master to give reasons for his decisions made at the initial taxation ruling, notwithstanding that there was no specific obligation to do so cast upon him by the Rules of the Superior Courts. She came to the conclusion that in order to enable a party to understand whether he ought to carry in objections to the initial ruling, it was necessary for the Taxing Master to set out reasons as to why he had reached the decisions that he had on various items in dispute in the Bill of Costs. She summarised her conclusions in the following way at para. 61:-

> *"In summary, whether the decision of the Taxing Master is to make an allowance which the party bearing liability for the costs thinks is too high or a disallowance which the party claiming the costs thinks is excessive, if the dissatisfied party is not in a position, to use the term used by Fennelly J. in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297, to "understand" why the Taxing Master came up with that result because he will not give reasons, the dissatisfied party is put in an impossible situation. Without reasons for, and thus understanding of, the decision of the Taxing Master, the dissatisfied party will have to assess whether to:-*
>
> *(a) move on to the second stage of the taxation process, having gone through the cumbersome and expensive first stage, in the knowledge that the expenditure he incurs in the second stage will be borne by him, or,*
>
> *(b) accept that decision as the final determinative decision.*
>
> *Accordingly, the failure to give reasons at the end of the initial stage at the request of the dissatisfied party in relation to items in dispute must infringe the right of the parties to the taxation process to fair procedures and constitutional justice."*

77. The duty on the Taxing Master to give reasons for his decisions has also been recognised in a number of other cases: see *Superquinn Limited v. Bray UDC* [2001] 1 I.R. 459, at p.480 and *Caffola v. Kilkenny & Ors*. [2010] 2 I.L.R.M. 207 at p.214.

78. The court is satisfied on the basis of the above authorities, that there is a duty on the Taxing Master to set out clearly the reasons why he has reached a particular decision in relation to allowances, or disallowances that he has made. This is necessary so as to enable the paying party to know why he has been directed to pay a particular amount, or to enable the solicitor for the costs to know why he has been denied a particular portion of the fees claimed by him. However, it is not necessary for the Taxing Master to set out an exhaustive statement of his reasons in the form of a judgment. It is only necessary

for him to set out sufficient detail to enable the party to know why the particular allowance or disallowance has been made.

79. Finally, it is well settled at Irish law that the jurisdiction of this court on a review pursuant to s.27(3) of the 1995 Act is such that the court can only interfere with the decisions made by the Taxing Master on particular items, if it is satisfied firstly, that the Taxing Master has made an error in reaching that decision and secondly, that the decision reached by the Taxing Master on the particular item renders his decision unjust. In *Bloomer v. Incorporated Law Society of Ireland (No. 2),* Geoghegan J. explained this jurisdiction in the following terms at p.387:-

> *"In considering whether the Taxing Master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to, or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the Taxing Master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in the consideration of the facts but of course the court must also consider whether the Taxing Master has fallen into error in either law or jurisdiction.*
>
> *If this Court finds that the Taxing Master has erred in the sense described, this Court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the Taxing Master in fact arrives at the correct figures or at figures within a range which it might have reasonably have been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision."*

80. In *Sheehan v. Corr*, Laffoy J. considered the jurisdiction of the High Court to interfere with the decision of the Taxing Master on a review of taxation pursuant to s.27(3) of the 1995 Act. She noted that the jurisdiction conferred on the Taxing Master by s.27(2) of the 1995 Act entitled him to make a decision in respect of a particular allowance or disallowance if he considered it "*to be fair and reasonable in the circumstances of the case".* However, that jurisdiction was subject to review by the High Court under s.27(3) of the 1995 Act, which jurisdiction she described in the following way at para. 98:-

> *"But that jurisdiction was subject to review by the High Court under s.27(3) of the Act of 1995, under the provisions of which the High Court may review a decision subject to compliance with two requirements. 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."

81. The jurisdiction of the High Court under s.27(3) of the 1995 Act, was also considered by Kearns J. in *Superquinn Limited v. Bray UDC* (No. 2) where he stated as follows at p.475:-

> *"Now under s.27(3) of the Act of 1995 it can intervene 'provided only that the High Court is satisfied that the Taxing Master… has erred as to the amount of the allowance of disallowance so that the decision of the Taxing Master… is unjust'.*
>
> *This wording seems to represent a significant shift of emphasis and to impose a heavier burden on any party seeking to challenge a ruling of the Taxing Master. This interpretation is acknowledged at p.350 of the Minister for Finance v. Goodman (No. 2) [1999] 3 IR 333 and can scarcely be a matter of doubt. It would suggest (when taken in conjunction with s.27(1) and (2)), that the court should exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice."*

82. Kearns J. went on in that judgment to state that in reaching a decision as to whether or not the decision of the Taxing Master was unjust, the High Court must reach its own decision as to what would constitute a just allowance in the circumstances. He stated as follows at p.476:-

> *"In discharging its function the High Court inexorably must, if it can, form a view itself of the particular item of costs or the amount it would have awarded in any given situation. Otherwise, there is no basis upon which any conclusion as to 'injustice' can exist in the absence of some mistake of principle."*

83. The dicta cited from the preceding cases seem to me to encapsulate the jurisdiction of the High Court to intervene with a decision of the Taxing Master when exercising its review pursuant to s.27(3) of the 1995 Act.

84. It is against this legal backdrop, that the court has reached its conclusions in this case, which are set out in the next section of the judgment.

6. Conclusions

85. In this case the defendants have objected to the increases made in respect of the instructions fee payable to the plaintiff's solicitors in respect of periods three and five. In order to determine whether the Taxing Master has made an error in relation to these increases, it is necessary to look at each of these periods.

86. In relation to period three it is necessary to look at this period in its context in the overall development of the litigation. The plaintiff through his next friend, had first consulted with his former solicitor in January 2009. Preliminary investigations had been carried out and reports had been obtained in relation to both liability and causation, which were favourable to the plaintiff. On that basis, a personal injury summons was issued on his

behalf on 8th March, 2011. A lot of work had been done by the plaintiff's former solicitor in relation to both liability and quantum, up to and including obtaining an advice of proofs from an experienced senior counsel, by the time the file was transferred to the plaintiff's second solicitor in May 2015.

87. By that time, voluntary discovery had been made by the plaintiff's next friend in 2013 and the defendants had filed a "*holding"* defence, wherein they had put liability in issue, but had made it abundantly clear that their defence was made without sight of the plaintiff's medical records, or without having received advices on liability.

88. In relation to the work done by Cantillons Solicitors, they had submitted extensive computerised time records running to some thirty-seven pages. The records themselves appear to be very detailed. They are made up of a number of columns which identify the date on which the work was done; in the next column it identifies the earner by whom the work was done. The next column identifies the activity type; the next column identifies a narrative of the work done; in another column it identifies the time taken in respect of each item of work; then the rate at which that person was charged out and the value for the particular piece of work and ends up in the right hand column with a running balance, that increases as each item of work is done. From a perusal of the records, it appears that they are in fact comprehensive in nature. On page 1 for example, there are items recorded from as little time as six minutes; twelve minutes and eighteen minutes, up to other items of work which were recorded as lasting for three hours and thirty minutes; ten hours and four hours. The fact that these time records were being relied upon by the plaintiff's solicitor, is shown by the fact that, firstly, they submitted the time records in the course of the taxation hearing and secondly, the time records were referred to extensively in the Bill of Costs, in a total of twenty-seven items.

89. It was submitted before the Taxing Master and again before this court, that the time records were "*haphazard*" and "*incomplete*". However, at no stage did the plaintiff's solicitor indicate in what way the records were either haphazard or incomplete. There was no evidence that the computer programme had malfunctioned in any way. There was no evidence that data was either not entered accurately, or that persons in the firm had failed to enter work into the computerised records as they did the work. In the absence of such evidence, neither the Taxing Master, nor this court, could come to the conclusion that these records were haphazard or incomplete.

90. When one looks at the seven-month period in question in period three, being May 2015 to December 2015, a number of things become obvious: firstly, the solicitor who was mainly involved in the work, Ms. Lyndy Cantillon, was a newly qualified solicitor, who had qualified in 2014. While she is undoubtedly a very competent solicitor, it is difficult to understand how the conclusion could be reached that the case was of considerable complexity at that stage, when it was entrusted to the hands of a solicitor who had qualified only one year prior to the period in question.

91. Looking at the actual work that was recorded in that period, it was clear that the substantial periods that were spent working on the case by Ms. Cantillon, being periods of

three hours and thirty minutes; ten hours; four hours and a second period of four hours, were spent "*reading in*" to the file which had recently been obtained from Niall Brosnan & Co. That work was carried out on 23rd and 24th August, 2015; 13th, 14th, 16th and 17th September, 2015 and also involved meetings with the client on 17th September, 2015. The court can well appreciate that Ms. Cantillon had to spend considerable time reviewing the entire file from the former solicitor, including the expert reports and she also would have had to have spent a considerable period of time reading the undoubtedly voluminous medical records from The Children's Hospital in Crumlin and from Enable Ireland.

92. However, the defendants make a valid point that not all of this time, if any of it, would have been billable on a party and party basis, due to the fact that where a party decides to change solicitor for whatever reason, they cannot bill the opposing side with the cost of the new solicitor "*reading in*" to the file that he or she has obtained from the previous solicitor.

93. Looking at the time records in relation to what was done during this seven-month period, with the exception of the "*reading in*" to the case that was done by Ms. Cantillon, the only other positive steps that appear to have been taken during that period, were consultations with the plaintiff's parents and the sending of a letter on 28th August, 2015 to the defendants' solicitor inquiring as to whether they had reached any firm stance on the liability issue. That was a very wise letter to send, as it was clear from the file that had been presented to Cantillons Solicitors, that the defence initially filed by the defendants was purely a "*holding"* defence. Ultimately, it was that letter which led to the formal withdrawal of liability by the defendants in January 2016 and the filing of an amended defence in February 2016.

94. However, it was probably not until the following year, 2016, that the various medical experts were written to in relation to furnishing reports in relation to the quantum aspects of the case. With the exception of one report, being a report from Dr. William Kinsella, which had been received on 5th September, 2015, from an assessment that he had carried out of the plaintiff at the request of Niall Brosnan & Co. on 12th December, 2014; all the other reports were obtained by Cantillons Solicitors during 2016. They received reports from Dr. O'Rourke, Mr. Chakraborty, Ms. Rachel Ormond, Tony O'Keeffe, Barry Byron and from O'Sullivan & Devine between August and December 2016. So all of these reports fall outside period three.

95. It is also relevant to note that out of the total amount claimed on the basis of the time records alone of €96,806, only approximately €12,000 was referable to work done during 2015. When compared to the allowance made for the work done by the former solicitors in the period 2009 to 2015, it is hard to see how they only obtained an instruction fee of €45,000 in total. That may be partly due to the fact that a number of their experts were discarded by the second firm of solicitors and therefore work in connection with their reports could not be claimed for. Even so, the allowance made by the Taxing Master at the taxation ruling of €75,000 for the work done by Cantillons Solicitors during the period

May to December 2015, seems to be a very reasonable sum. It also compares favourably with the instructions fee assessed for the entirety of 2016 of €78,000, which was not challenged by the plaintiff's solicitor.

96. The reason given by the Taxing Master for the increase in the instructions fee in period three, was that he had underestimated the work done during that period. It is hard to see how that was possible because (a) he had been given the entire of the solicitor's file at the original taxation hearing; (b) he had given an extensive description of that work in his original ruling on taxation and (c) from the time records that had been submitted by the plaintiff's solicitor, the work done during that period had been recorded in minute detail. Accordingly, he had a very full and detailed account of all of the work done by the solicitor during period three.

97. Against that background, if the Taxing Master was going to increase the sum allowed by €19,000, it was necessary that he should set out clearly the basis on which that had been done. That has not been done in this case. It is hard to see how, what must be regarded as a generous instruction fee of €75,000 for this period, could be increased by €19,000, without a clear idea of the work which he had left out of his earlier assessment. No such indication is given. In these circumstances, the court has to come to the conclusion that the Taxing Master has erred in making the increase in the instruction fee of €19,000 for period three. The court is further of the view that such error constitutes the decision to increase the instruction fee for this period as an unjust one. Accordingly, the court sets aside the increase made by the Taxing Master in respect of the instruction fee for period three.

98. Turning to the increase in respect of period five, which was the final seven months of the action between January and July 2017. The Taxing Master increased the instructions fee for this period by €26,000 bringing the fee for the period from €97,000 to €123,000. He did this on the basis that he had undervalued the work done in this period. He stated that it was a very intense period and that a lot of strands had to be pulled together in advance of the negotiations held on 12th July, 2017.

99. It is undoubtedly true that the case was a very large one, which was of fundamental importance to the infant plaintiff and his parents. Considerable work was done in the months leading up to the negotiations held in July 2017. From the expert reports furnished to the court, it appears that Cantillons retained ten experts, who furnished seventeen reports in total, nine of which were furnished in 2017. This was entirely proper, as it was appropriate that all necessary reports would be updated in advance of the hearing of the action.

100. During this period, the solicitor was engaged in pulling together all the strands of evidence that would be necessary for the negotiations, which it was hoped would lead to a lump sum settlement that would provide for the plaintiff for the rest of his life. The solicitor had to ensure that all necessary reports were in place to back up the figures that would be proposed in the course of the negotiations.

101. In addition, in this case, it was necessary for the solicitor and the barrister retained to consider carefully the question of life expectancy. That was an issue of central importance in the case given the difference of opinion between the plaintiff's expert and the defendants' expert in this regard. The defendants' expert thought that the plaintiff would live to age 23, whereas the plaintiff's expert was of the view that he would live until age 34.

102. Given the ultimate settlement value of the case, it is possible that this difference in life expectancy could be seen as representing, broadly speaking, approximately one-third of the value of the case. This is particularly so, due to the fact that some of the expert reports estimated that the plaintiff would require new accommodation from age 23 onwards. Obviously, such expense, together with the ongoing care costs, would not arise if the court were to hold with the defendants on the issue of life expectancy. Accordingly, this issue had to be considered very carefully.

103. This issue itself was one of considerable complexity. In his first report dated 3rd August, 2016, Dr. Declan O'Rourke, Paediatric Neurologist, had given a detailed opinion stating that the infant plaintiff would probably live until he was 30 years of age. He had referred to six separate studies in coming to that opinion. In an addendum report furnished on 27th February, 2017, he had revised that estimate by use of percentage based adjustment and had come to the view that the plaintiff would live to just short of his 34th birthday. The defendants' expert, Dr. Nicola Ryall, Consultant in Rehabilitation Medicine, stated in her report dated 31st January, 2012, that it was her opinion that the plaintiff would live to approximately 23 years. She had relied on the report by Strauss *et al,* which had also been relied upon by Dr. O'Rourke. Thus, this issue would require the plaintiff's legal advisers to have an in depth knowledge, not only of the views expressed by both of these medical experts, but also of the underlying studies on which those views were based.

104. During this period, not only was it necessary to obtain updated reports from all of the plaintiff's experts, these had to be considered in light of the defendants' expert's reports. It was necessary for the plaintiff's solicitor and barrister to have a clear understanding, not only of what their own experts would say, but also of what the defendant's experts would say on all relevant issues, so as to be in a position to adequately advise the plaintiff's next friend as to the likely ultimate value of the case should it go to trial.

105. Having regard to these factors, the Taxing Master was entitled to come to the conclusion that this was a period which required that a huge amount of concentration and energy be expended by the plaintiff's solicitor. It was also a period of great pressure on the solicitor, due to the fact that it was leading up to negotiations which would hopefully lead to a final lump sum settlement.

106. In the course of the hearing it was submitted on behalf of the defendants that the memo of the telephone conversation between Ms. Cantillon and Ms. Patrice O'Keeffe of the defendants' solicitor's office on 21st February, 2017, was indicative of the fact that the case, while large, was not out of the ordinary. That was a memo of a conversation

between two solicitors in relation to the fact that the matter had been specially fixed for hearing on 4th October, 2017. In the course of the memo, Ms. Cantillon recorded as follows:-

> *"She [Ms. O'Keeffe] said she is still awaiting the schedule of special damages and I told her that this is coming. I am just waiting for one or two other things. She asked me if it was the usual heads of damages in this and I said yes, there is nothing out of the ordinary. I checked the file and listed out SLT, OT, vocational, physiotherapy, care, accommodation, etc., nothing out of the ordinary. She said that that is fine."*

107. I do not accept the defendants' contention that this memo indicates that this was an easy or light case. It has to be seen in the context in which it was made. The defendants' solicitor stated that she was awaiting a schedule of special damages and she had asked whether it was likely to be the usual heads of damages; to which the plaintiff's solicitor indicated that it was and gave examples of some of the areas that would be covered. That is not an indication that it was an easy or light case. Rather, it was an indication to the defendants' solicitor that the usual heads of claim in such cases would be made, but that there would be nothing unusual in those heads of claim. By that would be meant a claim for innovative or cutting edge therapy in the UK or the US, or other matters of a similar nature. Accordingly, I do not think that the memo has the significance contended for by the defendants.

108. Finally, the Taxing Master was entitled to have regard to two factors in relation to the negotiations. Firstly, they resulted in what has to be regarded as a very sizeable settlement of €15m, together with an apology and an order for costs. Secondly, the negotiations took place over a period of thirteen hours, as recorded in the time records maintained by the plaintiff's solicitor. Thus, I think it is fair to say that the negotiations themselves were protracted and difficult.

109. When reconsidering the figure allowed as an instructions fee, for period five, the Taxing Master was looking not only at the work done, but more importantly, was looking at its complexity and value in the light of the intangibles provided for in O.99, r.37(22) (ii). That is a matter for which the Taxing Master was ideally placed. He has vast experience in assessing the value of work done by a solicitor at various stages of litigation. It is clear from the case law outlined earlier in this judgment, that the court should be slow to interfere with the judgment of the Taxing Master in these areas. The court can only do so if it is clear that the Taxing Master has made an error and that that has resulted in his decision being unjust.

110. The court cannot say that the Taxing Master was in error in making the decision to increase the instructions fee for this period by €26,000 on a reconsideration of the value of the work done in this period. The Taxing Master has given reasons why he has increased his assessment of the value of the work done. He has identified that the work was done at a time of considerable importance and at a very intense period in the months

leading up to the negotiations, which themselves were being held some three months prior to the trial of the action.

111. The court is satisfied that when looked at in the round, a total instructions fee in this case of €321,000 (allowing for the deduction of €19,000 as referred to earlier), is not out of line with the comparators furnished to the Taxing Master. The nearest case that is a comparator is the *MC* case, which although it was a case that involved substantial liability issues, it was settled for €5m. In this case, having regard to the issue in relation to life expectancy, allowing an instructions fee of €321,000, as against an instructions fee of €340,000 allowed in the *MC* case, does not appear to be unreasonable or unjust.

112. Furthermore, the sum allowed by the Taxing Master in respect of period five of €123,000 in respect of the seven months' work done in 2017, is sufficiently close to the allowance made by him initially for the seven months in period three, wherein the allowance of €75,000 was not objected to by the defendant. Having regard to the fact that the pressure in 2015 was nothing like the pressure that was on the solicitor in 2017, when the case was being finalised for negotiations and/or trial and when reports of a complex nature had to be finalised and then considered both in their own right and in the light of the defendants' reports, the fee allowed for this seven-month period at the increased level cannot be seen as being erroneous. Regard also has to be had to the fact that the case at its high water mark had a value of circa. €21m, per the plaintiff's actuary's report. Having regard to all these factors, I am satisfied that the Taxing Master was not in error in coming to the conclusion that on a reconsideration of all these matters there was justification for the increase which he made in the instructions fee for this period. Accordingly, this court will not interfere with the amount of the instructions fee for period five as determined by the Taxing Master following the objections hearing. This means that the overall instructions fee will be €321,000.

113. The court will accept written submissions from the parties within fourteen days of the date of this judgment in relation to what final order should be made having regard to the findings made by the court in this judgment and in relation to the costs of these proceedings.