Neutral Citation no. [2004] NIQB 80 | *Ref:* **WEIF5115**

Judgment: approved by the Court for handing down | *Delivered:* **29.10.2004**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (CROWN SIDE)

_____

IN THE MATTER OF AN APPEAL PURSUANT TO RULE 15(5) OF THE LEGAL AID IN CRIMINAL PROCEEDINGS (COSTS) RULES (NORTHERN IRELAND) 1992 AGAINST A DECISION OF THE TAXING MASTER.

BETWEEN:

G R INGRAM PRACTISING AS G R INGRAM AND COMPANY SOLICITORS

Appellant;

-and-

THE LORD CHANCELLOR

Respondent.

_____

WEIR J

[1] This is an appeal pursuant to leave granted by Higgins J from the decision of Master Napier on the determination made following an application to him to review his decision certifying under the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 ("the rules") the costs due to the appellant in relation to the trial of R v King, Phillips, McMillan and Ferguson. The appellant acted on behalf of the first two defendants who were each charged with the murder of a David Oliver Keys while both he and they were serving prisoners in the Maze Prison.

[2] There were initially four grounds of appeal but three of those were ultimately not pursued leaving only one issue, whether the Master had

allowed the appellant a sufficient percentage uplift in his basic costs to adequately reflect "the principle of allowing fair remuneration according to the work reasonably undertaken and properly done" by him. That principle is enshrined in Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and reiterated in Rule 11(2) of the rules.

[3] "The uplift" approach to the increase of basic rates was discussed and approved of by MacDermott LJ in Donnelly and Others v The Lord Chancellor [1994] NIJB 171 and it was not disputed on behalf of the Lord Chancellor in the present case that it remains the conventional mechanism in this jurisdiction where an addition to the basic rate is considered appropriate. I therefore propose to follow that convention.

[4] The Appropriate Authority assessed the appellant's uplift at 30% having regard to the exceptional circumstances of the case. The Taxing Master, in certifying the fees, adopted in his certificate the percentage uplift allowed by the Appropriate Authority and also its reasoning, saying "The Master noted that the Committee felt that the preparation times were excessive and agreed with the Committee that only a 30% uplift was merited in this case."

[5] The appellant requested the Taxing Master to review his decision which he did. At the review hearing the appellant contested the suggestion that his preparation times had been excessive and submitted, with reasons, that the Appropriate Authority was wrong to have so concluded and that the Master had in turn been wrong to agree with its conclusion. In his review the Master revisited the matter and in his written decision he appears largely to withdraw from his earlier view that the preparation time was excessive. I may say in passing that I have some difficulty in understanding why as a matter of principle an uplift percentage should be varied downwards to take account of excessive preparation time. If the hours of preparation time in any case were excessive I should expect those excess hours to be identified and disallowed rather than to have that aspect confused with the separate and distinct issues as to whether the case did or did not possess exceptional circumstances warranting an uplift and, if so, what any such uplift should be.

[6] In his decision on the review the Taxing Master found that the appellant's work was done in exceptional circumstances, thereby opening the way under Rule 9(5)(b) of the Rules to the award of an uplift. Presumably because he was by then satisfied that the hours claimed were by and large reasonable, he increased his earlier uplift from 30% to 100%, commenting that in a murder case n which a solicitor represents two defendants an uplift of 30% is "most unusual" and observing that "the normal uplift in any murder trial can be as much as 165%". This statement derives from the decision of Pringle J. In John J Rice & Company v Lord Chancellor and Donnelly and Wall (a firm) v Lord Chancellor [1997] NIJB 27. In that case the learned Judge

observed, from an examination of a collection of prior decisions of the Taxing Master that had been provided to the Court, that all he could conclude was that in a murder case the uplift is unlikely to be less than 100% and that 200% is probably the upper limit. This led him to allow 165% in that case leaving "room beneath the upper limit of 200% for a higher uplift in a case where, as well as exceptional circumstances comparable to those in the present case, there was also exceptional competence and dispatch" *ibid* at 34c. While those bands are not prescribed by any statute or regulation and while I appreciate that I have an unfettered discretion in relation to this matter I see no good reason to depart from them in making an assessment as to whether the amount allowed by the Taxing Master on review in this case represents fair remuneration nor was it submitted that I should do so.

[7] In Boyd v Ellison and Another [1995] NI 435 at 437 Carswell LJ (as he then was) reiterated a proposition that he had previously advanced namely "that in matters particularly within the knowledge and expertise of the Taxing Master the court should not lightly overturn his decision." I respectfully accept that general statement of principle but in this case my difficulty is that the Taxing Master has not explained in his decision on the review how he arrived at the revised uplift of 100%. His discussion of the issue is intermingled with comments on other sundry matters until he ultimately concludes by saying "in the light of the foregoing I believe that the uplift ought to be 100% rather than 30%." It seems tolerably clear that he had decided to move upwards from his earlier 30% because he became satisfied about the reasonableness of the hours claimed but there is no explanation as to how he decided to choose 100% in substitution.

[8] Another firm of solicitors which acted for another of the defendants, who pleaded guilty on the second day of the trial, was awarded an uplift of 200% and it seems that the Taxing Master was of the view that there was within that percentage an allowance for the element of "exceptional competence and dispatch". There must indeed have been such if the Appropriate Authority was following the approach of Pringle J described above but I have no information as to what led the Appropriate Authority to the view that such an addition was appropriate nor as to what caused the Taxing Master to endorse it other than his description of that firm's preparation times as "tight". There seems to be a suggestion that advising a client to plead guilty at an early stage in a trial is, of itself, an indication of "exceptional competence and dispatch". I can see that in some circumstances it might but it might equally well be a function of evident difficulty facing a defendant in maintaining a plea of not guilty in the face of overwhelming evidence. I simply do not know the position in the case of this particular defendant.

[9] I do however know what the Taxing Master regards as being embraced by the expression "exceptional competence and dispatch with which the work was done" because at page 6 of his decision on the review he says as follows:

> "The exceptional competence and dispatch with which the work was done is to cover the cases of Solicitors with great experience and expertise whose experience and expertise [ie competence] shortens the time which might otherwise normally have been expended on the trial. A well documented instance of this is where the solicitor, by his experience and expertise advises a defendant to enter an early plea of guilty which saves the time of the court and the lawyers involved in the case."

[10] I can well see that advising a defendant to enter an early plea of guilty may in some circumstances be evidence of exceptional competence and dispatch but, as in the example I gave above, it may in other cases be no more than the acceptance of what would be obvious to any solicitor on the facts of a particular case , namely that the case is a hopeless contest and that to persist in it may well result in the client receiving a heavier sentence due to his failure to plead guilty in a timely fashion. Nor do I understand why the Taxing Master says that "exceptional competence and dispatch with which the work was done" covers the case of solicitors with great experience and expertise. It seems to me that the expression involves an examination of the way in which the work was done in the particular case rather than of the experience or expertise, great or otherwise, of the particular solicitor. Furthermore, I do not understand why the Taxing Master regards it as relevant that the work should have shortened the time that might otherwise normally have been expended on the trial. The critical question relates not to the time that might otherwise normally have been spent on ***the trial*** but on the time that has been spent on doing ***the work*** for which the solicitor is claiming. It seems to me wrong that a claim based upon exceptional competence and dispatch with which a solicitor's work is said to be have been done be assessed by reference to how quickly that solicitor's client ceases to contest his guilt because, as I have sought to indicate, there may well be reasons quite unrelated to the competence and dispatch with which ***the work*** was done by the solicitor that lead to either the abbreviation or the prolongation of ***a trial.***

[11] In any event I have no indication of how the figure of 200% for the other solicitors was arrived at other than that it equals what Pringle J regarded as the maximum uplifts allowed in practice for both the "exceptional circumstances" factor and the "exceptional competence and dispatch" factor. It would certainly have been helpful to have had some understanding from the Appropriate Authority or the Taxing Master as to how the figure of 200% was arrived at.

[12] In the circumstances I am left to make my own unaided assessment of the appropriate uplift. The absence of an adequate explanation from the Taxing Master for his 100% uplift means that I feel freer than I otherwise might have done to depart from his decision on a matter involving solicitors' as opposed to counsels' fees. The Taxing Master sets out in considerable detail at pages 3 and 4 of his decision the difficulties that were encountered by the appellant by reason of the fact that this murder occurred within the Maze Prison in a wing which had ceased to be used since the murder and which had to be effectively reconstructed so as to judge what conditions would have been like at the time. A great deal of forensic work had to be done and a number of visits were required to the wing together with a great many consultations with the clients. There were also difficult issues related to the character and reliability of the chief prosecution witness which necessitated very close attention to the material disclosed by the prosecution. As a result of painstaking pre-trial investigative work it was possible to discredit this witness during cross – examination to such effect that the learned trial Judge stopped the trial and acquitted the accused after ten days of hearing. It seems to me that these circumstances, which I have only briefly summarised, indicate that this was an exceptionally difficult case warranting the maximum conventional allowance under the heading of "exceptional circumstances".

[13] With regard to the separate element of "exceptional competence and dispatch" I consider that while there is clear evidence of exceptional competence there is not evidence of exceptional dispatch. As I have said, the dispatch (and the competence) must relate to the way in which the solicitor's work was done and not to the speed with which the trial, or a particular client's part in it, comes to an end. I therefore make no allowance under that heading.

[14] Accordingly the uplift of 100% allowed by the Taxing Master in his decision giving £25,547.84 becomes, using 165% in substitution, £42,153.93. This has the effect of increasing the total amount allowed by the Taxing Master from £60,000 to £76,606.09 and, pursuant to Rule 14(7) of the Rules I amend the Taxing Master's decision on review accordingly.

[15] As the appeal has succeeded, following the practice adopted by MacDermott LJ and Pringle J in previous such cases I direct that the costs of the appeal be paid out of public funds.