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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 14/12/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN: 1996 No 411

SHARON ELIZABETH GALWAY

Petitioner;

and

DAVID GALWAY

Respondent.

BETWEEN: 1997 No 948

MARY CARSE

Petitioner;

and

THOMAS DEREK CARSE

Respondent.

JUDGMENT

GIRVAN J

INTRODUCTION

These two matters come before this court by way of applications for review of Taxing Master's decisions given in the two separate sets of proceedings. In both cases the petitioners were legally aided parties whose costs fell to be taxed under the relevant provisions. In both sets of proceedings the solicitors and counsel are aggrieved by the Taxing Master's decisions which significantly reduced the solicitors' costs and counsel's fees allowed in respect of work carried out in those proceedings.

The applications were made under Order 62 rule 35. Under rule 35(1) any party dissatisfied with the decision of the Taxing Master on a review under rule 33 may apply to a judge for an order to review that decision either in whole or in part provided that one of the parties to the taxation proceedings has requested the Taxing Master to state the reasons for his decision under rule 34(1). On an application under rule 35 the judge may make such order as the circumstances require and in particular may order the Taxing Master's certificates to be amended or, except where the dispute as to the items under review is as to an amount only, order the item to be remitted to the Taxing Master for taxation.

Pursuant to the directions of Higgins J the court sat with an Assessor, His Honour Judge Burgess. This judgment reflects the combined views of the judge and the assessor.

THE FACTS IN GALWAY v GALWAY

In the case of *Galway v Galway* the petitioner was granted a certificate by the Law Society on 13 November 1995 to prosecute a suit for divorce on the grounds of unreasonable behaviour. A decree nisi was granted on 20 June 1996. Proceedings for ancillary relief were concluded on 12 November 1996. The petitioner's costs were ordered to be taxed in accordance with Schedule 2 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. A bill of costs was prepared and lodged in the Taxing Office.

On 13 January 1998 the Taxing Master gave notice that he proposed to allow a taxation in the sum of £6,324.05 by way of solicitors' remuneration and £6,130.20 by way of disbursements (including counsel's fees) making a total of £12,454.25. This was as compared to the amount claimed of £18,101.00. The solicitors for the petitioner, McGrady Collins & Co sought a hearing under rule 5(5) of the Matrimonial Causes (Costs) Rules (Northern Ireland) 1981 and the matter was listed for hearing on 26 March 1998 when the Taxing Master heard Miss Collins of the solicitors and Mr Kerr the costs drawer. He delivered a reserved speaking judgment on 14 May 1998. The solicitor sought a review of

the taxation and notices of objections were lodged on 2 September 1998. The matter came on for hearing on 7 January 1999 and the Taxing Master issued his certificate on 18 February 1999. On review the Taxing Master allowed a total sum of £13,603.93 inclusive of VAT.

In the review the solicitors raised 6 objections.

Objection 1 related to counsel's brief fee for the divorce hearing. The divorce was a contested one. Counsel had marked a fee of £950.00. The Taxing Master allowed £650.00. On the review the Taxing Master dismissed the objection. An issue thus arises as to whether counsel should be allowed a figure in excess of £650.00 on the brief fee.

In relation to this objection the Taxing Master stated in this judgment that "there is nothing in the file to indicate the lengthy preparation claimed by counsel." He expressed the view in emotive terms that it seemed "extraordinary" that a very senior junior counsel could objectively have spent the time claimed in researching the law and preparing for the hearing. He set out details of brief fees claimed in defended divorces which became undefended and fees allowed on taxation. The fees allowed ranged from £250.00 in one case to £600.00 in the case of McCann v McCann. No explanation is given in the Master's reasoning as to the reasons for the width of the range of the fees. The Taxing Master considered that the fee of £650.00 fixed by him reflected the small body of papers required to be considered for the hearing and pointed out that a very lengthy consultation item (£150.00) had been allowed together with the fees claimed for drafting the affidavits and settling the replies in answer.

Objection 2 related to solicitors' profit costs on the defended divorce hearing. This related to item 38 on the schedule's bill of costs. This claimed 2½ hours attendance on the petitioner, 3½ hours for attendance on expert witnesses (reduced by the Taxing Master to 1 hour) 4½ hours expended in documents (reduced by the Taxing Master to 3 hours) 1½ hours

for negotiation (which the Taxing Master disallowed allowing 1 hour for waiting time). He dismissed the objection.

Objection 3 related to counsel's brief fee in respect of an application for maintenance pending suit. Counsel marked £450.00 the Taxing Master allowed £250.00 and dismissed the objection at review.

The Taxing Master's reasoning took account of what he considered to be the admitted overlap in relation to the hearing for maintenance pending suit, the interim avoidance of disposition application, the full ancillary relief application and the negotiations of a Chancery action for which there was no Legal Aid and in respect of which the respondent's mother was the plaintiff. He took account of the fact that counsel had not been separately briefed to appear on the application. He considered that the issues raised had already been effectively dealt with in the magistrates court and the case was settled for a weekly figure less than the amount fixed in the magistrates court.

Objection 4 related to counsel's brief fee on an application for interim capital provision. Counsel marked £600.00 and the Taxing Master upheld his revision on the review to allow £300.00.

In relation to that item the Taxing Master took account of the fact that there was no separate brief furnished in relation to the application, the application was inter-related to the other proceedings and in fact no interim capital sum was awarded.

Objection 5 related to counsel's brief fee on the ancillary relief application in which counsel had marked £2,500.00. The Taxing Master on appeal maintained his assessment of £1,500.00. The Taxing Master commented on the absence of preparation times and the generality of counsel's comments about the work involved in preparing the brief.

The Master took into account a number of cases which he considered to be comparable. The award to the petitioner was £70,058.00. The matrimonial home was valued

at £70,000.00 and the farm which the respondent's mother owned was valued at £200,000.00. There was an overlap between the work on the ancillary relief application and the Chancery action. He rejected any comparability between brief fees for personal injury claims and the present matter and he adversely commented on the absence of preparation times so often sought as a guide.

Objection 6 related to solicitors' profit costs in preparation in relation to the ancillary relief matter. The solicitors claimed £5,600.00 and the Taxing Master allowed £2,600.00.

In arriving at his conclusion the Taxing Master laid considerable weight on the elements of what he described as unquantified pre-certificate work alleged to have been done. He found the view that the times claimed were abnormally high, felt it difficult to justify the claim that the solicitors had spent the time alleged on timed telephoned calls to the petitioner, found it difficult to justify the claim by the solicitor on time spent in considering the estate agent's report and consideration of documents and in negotiations. He rejected time spent in speaking to the petitioner's mother. He considered the records unsatisfactory. He reduced the solicitors time claimed of 35 hours 40 minutes to 13 hours. In his judgment the Taxing Master does not in clear terms state clearly that he has found that the hours claimed were not done which would be a finding of dishonesty nor does he make it clear that he is making a finding in respect of some of the hours claimed for the solicitors took an excessive time to do the work claimed.

THE FACTS IN CARSE v CARSE

In the case of *Carse v Carse* the petitioner Mary Carse was granted emergency legal aid on 27 February 1997 and a full certificate dated 3 April 1997 to prosecute a suit for divorce on the grounds of unreasonable behaviour. John Ross & Son acted on her behalf. She issued her petition on 22 April 1997 and obtained a decree nisi on 28 November 1997. In June 1997 she issued a summons for maintenance pending suit. On 18 December 1997 she

issued a summons for ancillary relief. By an order of 17 June 1998 the Master made a consent Tomlin Order annexing a signed agreement of that date providing for the payment of a lump sum of £165,000.00 to the petitioner. She was relieved of the liability of a joint account in the Northern Bank and confirmed in the ownership of the family car. She also had assigned to her a policy of insurance. On 17 September 1998 the solicitors lodged their bill of costs in the Taxing Office for provisional assessment and on 12 October 1998 the Master assessed the costs provisionally and solicitors applied for a hearing. On 29 October 1998 the Taxing Master heard the cost drawer Mr Kerr and counsel. In his judgment of 17 December 1998 the Taxing Master made some changes to its original assessment. On item 37a, being counsel's brief fee for the application for maintenance pending suit he increased the brief fee to £300.00 as compared to counsel's marked fee of £400.00. On item 62 being counsel's brief fee for the adjourned hearing of the ancillary relief he allowed counsel a fee of £150.00. On item 66 for another adjourned hearing of the ancillary relief application he allowed £200.00 (in comparison to counsel's marked fee of £150.00). In respect of item 72 he reduced counsel's marked fee of £5,000.00 to £2,000.00. In relation to the solicitors' claimed sum of £8,200.00 based on 49.25 hours, 353 items of correspondence and travel and mileage at an average hourly rate of £64.00 with an uplift of 50% the Taxing Master increased his earlier allowance of £4,250.00 to £5,250.00, still considerably below the claimed amounts.

The petitioner objected to 2 aspects of the Taxing Master's taxation and applied for a review and the review was heard on 22nd April 1999. The objections related to the assessment of counsel's brief fee on the ancillary relief application and the solicitors' profit costs for preparation. The Taxing Master dismissed the objections maintaining the figures that he had fixed in his judgment of 17 February 1998.

In relation to counsel's brief fee the Taxing Master's decision indicates that he based his decision on an intuitive feel arising from long experience. He pointed out there was

usually a distinction between what counsel marked and what counsel accepted. His initial view that £2,000.00 was the correct figure was not based on comparables as such but when he looked at comparables he was fortified in his assessment.

In respect of solicitors' preparation costs he indicated that contemporaneous time records were not the end of the argument in every case and one must look at the time spent and question if the times were objectively reasonable in all the circumstances. He did not consider in this case that the times claimed were reasonable. In arriving at an estimate of 53.9 hours he indicated that had there been a larger uplift he would have taken a rather less generous view of the hours allowed. He considered that the hypothetical solicitor would have spent significantly less time on the claimed items of work.

THE ARGUMENTS

Mr Thompson QC on behalf of the petitioner helpfully referred the court to the relevant authorities relating to the proper approach of the court to an application to review the decision of the Taxing Master. He contended that the present case raised issues on which the court's ruling could give a more general guidance.

Both sets of solicitors were typically small Northern Ireland firms. Their bills were properly structured on the A-B basis with the A figure being the proper charge for an hour for the time spent on the cases having regard to the reasonable estimate of the overhead expenses of the solicitors' firms including the reasonable salary of the solicitors employed on the case if he or she was an employee or a notional salary if he or she were a partner. The B figure is such additional sum as is proper by way of profit costs in the case. In the case of John Ross & Son in *Carse v Carse* the hourly rate charged was £64.00. In the case of *Galway v Galway* McGrady Collins fee was £61.50. These figures were not themselves the subject of the application for review. In the case of Carse the uplift sought was 50%. In Galway the uplift initially sought was 100% but it was now accepted that 50% was appropriate. If the Master's

decision stood the solicitors were effectively deprived of their uplift which would make their work entirely uneconomic. Matrimonial litigation is difficult and stressful and clients require the assistance of expert lawyers who must be fairly remunerated for their work. Mr Thompson argued that the Taxing Master's approach if it stood would result in this type of work becoming uneconomic and this would ultimately lead to the denial of citizens' rights of access to the machinery of justice as guaranteed by the European Convention on Human Rights.

In relation to counsels fees it was argued that the general method of agreeing a proper brief fee with counsel is that stated by Pennyquick J in Simpson Motor Sales (London) Ltd v Hendon Corporation [1964] 3 All ER 833 at 838 followed and applied by Carswell LJ in Carr (a Minor) v Poots [1995] NI 420. In a situation the brief fee falls to be assessed and allowed in the light of the full history of the trial as then known (Love v Renton [1992] 3 All ER 190). The judge is able to assess counsel's fee for himself if he considers that the Taxing Master's approach is wrong.

In relation to the Taxing Master's approach to the hours claimed by the solicitors the Taxing Master had taken the view that in both cases that the hours claimed were inflated and in *Galway* pre-certificate costs were effectively being claimed. The findings of an inflated time claim in each case was highly unfair to the solicitors and was a serious reflection on their integrity. Time if anything will be under-recorded in practice. Solicitors are in a "no-win" situation for if they record time accurately as here the Taxing Master may disregard it. If they do not the Taxing Master criticises the solicitors for failing to do so.

On the question of pre-certificate work in *Galway v Galway* the Taxing Master considered that pre-certificate work was included in the bill but this was wholly unwarranted. In his own practice directions solicitors were advised to ensure that such items were not included by accident or design. The penalty for breach of that admonition might be a

reduction in the quantum of the taxation items which might be allowed. In the present case solicitors had complied with the direction and yet the Taxing Master felt free to levy a penalty. The bill was properly prepared to exclude pre-certificate work and the bill opened after the full was granted.

The Taxing Master's reduction of allowable hours was arbitrary and he expressed himself in a way which at times left it unclear whether he was finding that some of the hours claimed were not spent at all or that too much time was taken on certain items. Mr Thompson said that the overall the impression given was that there was a finding of an element of dishonesty.

The Taxing Master fell into error in referring to the test of the "hypothetical solicitor" in considering the reasonableness of the costs. In determining the range of work that a solicitor may regard as reasonable it is not the objective yard stick of the hypothetical solicitor which is relevant but the work which in the light of the knowledge at the time a solicitor considered as necessary in the interests of the client (Francis & Francis v Dickerson [1955] 3 All ER 836). The Taxing Master referred to comparables in the context of hours spent but this was misconceived the spent in other cases was no guide to the reasonableness or otherwise of the time spent in the subject cases. Matrimonial property disputes do not conform to any meaningful pattern in relation to time, issues or the personality of the parties.

Mr Thompson argued that the procedure adopted by the Taxing Master was intrinsically unfair. If he felt that there was a question whether the claims of hours spent were dishonest or that the hours actually spent were unjustified by the exigencies of the case the solicitors should have been made privy to the Taxing Master's misgivings and be given an opportunity to meet those misgivings. There was a structural unfairness in the Taxing Master's approach.

Mr Hanna QC who appeared on behalf of the Lord Chancellor made clear that he did not appear for the Taxing Master. Under regulation 24 of the Legal Aid (General) Regulations (Northern Ireland) 1965 the Lord Chancellor may appoint a solicitor to intervene in the proceedings for a review of the taxation by a judge. The solicitor appointed by the Lord Chancellor under regulation 24(4) may appear by counsel and be heard in the review "with a view to ensuring that considerations which are proper to be taken into account are placed before the court, whether they relate to the interests of the fund or of the assisted person or to the fair remuneration of solicitors and counsel acting for assisted persons." The solicitor appointed by the Lord Chancellor thus acts as a form of *amicus curiae*.

Mr Hanna helpfully took the court through the structure of taxation under Order 62 and considered the authorities setting out the extent of the court's powers on a review.

Mr Hanna said that in respect of the solicitors costs there were three questions for the Taxing Master namely:

a. Was the work done?

b. Was it reasonably done?

c. Was the time claimed reasonable in all the circumstances?

The Taxing Master is not bound to accept the solicitor's view. He may be entitled to conclude that the solicitors should have got through the file in less time. The Master must give clear reasons for disallowing items. Mr Hanna QC accepted that it was difficult to resist some of the criticisms of the Taxing Master's approach made by Mr Thompson on behalf of the solicitors. There were however instances where the Taxing Master was entitled to disallow time claims (for example where he determined that solicitor's claims in respect of dealing with the petitioner's mother should be disallowed).

COUNSELS' FEES

Dealing firstly with the question of the taxation of counsel's fees it appears in cases such as Thompson v Department of the Environment [1986] NI 196 and Carr (a Minor) v Poots [1995] NI 420 that the court is normally reluctant to interfere with assessments made by the Taxing Master in matters where he possesses particular expertise and the court does not lightly overturn the decision of the Taxing Master. It is clear also from Carr (a Minor) v Poots that if the court considers that the Taxing Master's figures are manifestly too low it will interfere. If the Taxing Master has gone wrong in principle or has taken into account irrelevant considerations or left out of account relevant considerations his decision would be flawed so that the court would be bound to look at the matter afresh with no preconceived view that the Taxing Master's decision should stand.

Order 62 rule 17 directs that the provisions of Appendix 2 should apply to the taxation of all costs. Appendix 2 paragraph 1 provides that all costs should be in the discretion of the Taxing Master, unlike the predecessor provisions for assessment.

The classic expression of the appropriate way to assess counsel's fees is set out in Simpsons Motor Sales (London) Ltd v Hendon Corporation [1964] 3 All ER 833 at 838:

> "One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fees sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief."

The exercise contemplated is somewhat artificial and as the Taxing Master in his decision makes clear there is an element of intuitive thinking involved in determining what is the appropriate fee for counsel in any given case. In *Carse v Carse* the Taxing Master reveals an apparent scepticism about counsels' motivation in fixing their brief fees, impliedly indicating that he considers that counsel mark their fees at a higher level than they really expect to receive. Indeed he describes this factor in his thought processes as "a major guideline" in the approach to the assessment of counsel's fees. It would be wrong in

principle for the Taxing Master to start off from the premise that counsel mark fees to which they do not consider they are entitled in the hope that by pitching their claims high they may hope to obtain a more realistic fee than would otherwise be the case. By starting off on that premise the Taxing Master would be wrongly assuming that prima facie there should be a reduction in the fees marked. Furthermore it is a false assumption that because counsel in other cases have accepted reduced fees that that necessarily means that the reduced fee is the proper benchmark for other cases. It must be appreciated that the taxation process is cumbersome, time consuming and expensive. Economic pressures will lead solicitors and counsel, albeit reluctantly to accept reduced figures whilst stoutly maintaining the fairness and reasonableness of the fees originally marked and stoutly maintaining the error in the Taxing Master's assessment.

While comparable fee claims and allowances are relevant, as indicative of the going rate in the market considerable care must be taken in looking at comparables. As in any field of valuation the evidential weight attaching to comparable values will depend very much on the degree of comparability. In the field of matrimonial financial disputes in ancillary relief applications no 2 cases will be the same. It has been recognised that it will be difficult to draw up a meaningful scale fee structure for such cases. The Taxing Master would appear to have put excessive weight on "comparables" in his approach to the assessment of counsel's fees in *Galway v Galway* and moreover relied on his decision in *Galway* in his decision in *Carse* which is itself the subject of a review application to the Court in these proceedings. In *Carse* itself he appears to have looked to comparables, albeit after the event, to fortify his initial intuitive assessment of the proper fee.

In relation to appropriate brief fees in the defended divorce proceedings in *Galway v Galway* the comparables referred to ranged from £250.00 to £600.00 though no details are provided as to how the £600.00 fee in the McCann case was considered

appropriate in that situation. Moreover McCann was a defended case which became undefended unlike *Galway* which became a fully defended divorce.

Matrimonial disputes frequently have emotional elements not so markedly present in other cases, for example, personal injury cases. These emotional elements together with frequently bitterly contested factual disputes makes such cases generally at least as difficult to prepare and present as personal injury cases. Personal injury scales are not wholly irrelevant as suggested by the Taxing Master for the appropriate brief fee in a matrimonial financial dispute may on occasions be justifiably higher than the scale fee in a personal injury claim where the same amount is at stake. The swings and roundabouts argument that is called in aid to justify personal injury scales has considerably less force in the context of matrimonial financial disputes where there are significantly more roundabouts and fewer swings. In *Galway* the defended divorce brief fee fixed at £650.00 we consider to be too low and increase it to £800.00. We do not consider that the Taxing Master's assessments of the brief fees on the maintenance pending suit and interim capital provision applications should be disturbed. The brief fee on the ancillary relief application we consider should be £2,000.00.

In *Carse v Carse* we consider that counsel's brief fee should fairly be fixed at the sum of £3,000.00.

THE SOLICITORS' COSTS

In relation to the Taxing Master's decisions in respect of the solicitors' costs we consider that his decisions cannot stand. The decisions fail to reveal in a clear way whether the Taxing Master was finding dishonesty or a failure by the solicitors to do items of work within a reasonable time.

The dictates of fairness would require a decision maker such as the Taxing Master if he is minded to make adverse findings of this nature to give a full opportunity to deal with the

Taxing Master's misgivings. In a taxation the Taxing Master carries out a difficult role of being detective, inquisitor and judge. In an inter parties taxation his role is more closely aligned to that of a traditional judicial officer in an accusatorial system. Since in a taxation the Taxing Master is carrying out functions which in an accusatorial system are not normally vested in the one person it is important to ensure that the procedures are as fair as the circumstances permit. Solicitors should not be left unclear as to whether the Taxing Master is making or minded to make findings of dishonesty or of a form of incompetence and should be given a full opportunity to meet any such case.

The procedures involved in these taxations involved the Taxing Master in arriving at provisional determinations followed by more formalised decisions followed by reviews with an ultimate review by this court. Overall the rules provide ultimately for proper access to an independent tribunal for the purposes of article 6 of the European Convention on Human Rights. That, however, does not mean the solicitors are not entitled to procedural fairness at each stage of the enquiry.

In the case of the solicitors' costs reliance on comparables (which we discussed above in the context of counsel's fees) raise different issues in the context of the solicitors' costs. In determining the accuracy or reasonableness of time spent by solicitors in the present cases it would appear to be dangerous to rely on "comparables" since no two cases are the same and time spent on one case with different issues will throw little light on what time is appropriate in the instant cases. Additionally in the case of Carse the Taxing Master appears to have omitted from consideration for no apparent reason some 90 items of correspondence.

Against this background we consider that it is necessary to look completely afresh at the papers to determine the correct level of solicitors' costs.

GALWAY v GALWAY – ASSESSMENT OF SOLICITORS' COSTS

In this case it is important to record that there is no evidence whatsoever that the Bill lodged for taxation contains any semblance of dishonesty, whether that be in terms of seeking to claim for work not done or claiming excessive time dishonestly for work done.

As regards the Bill itself it is necessary to make a number of points at the outset to allow for our approach to be understood both in relation to the original Bill and the calculations of the Taxing Master.

- There are two items under appeal in respect of Solicitors' costs. The first is in respect of the divorce, and the second in respect of ancillary relief.
- In both cases the Taxing Master has made substantial reductions in the time allowed. In the case of the divorce the time claimed was 12 hours and the time allowed 7½ hours, a reduction of more than 35%. This is not a marginal amount and the court has therefore considered the matter afresh.
- In the case of the ancillary relief the calculations require to be carefully compared. This is because the percentage uplift allowed by the Master was reduced from 100% to 50%. The amount claimed in the original Bill was £5,600. Allowing for the reduction in the uplift to 50%, which is not challenged by the Solicitor, the amount claimed for this part of the proceedings would be £4,200. That figure was reduced by the Taxing Master to £2,600, a reduction of over 40%. The reduction in time was from 45 hours 28 minutes to 27 hours 6 minutes, a reduction also of over 40% - such an appreciable reduction that it has led the court to look at the whole matter again.
- There was reference in the opinion of the Taxing Master to pre-certificate costs, that is an amount of £1,200 which was referred to on the files as being sought at an earlier stage of the proceedings for work done before the legal aid certificate was granted and issued.

A number of arguments were deployed in the papers in respect of this matter. The Taxing Master appears to have taken this matter into account in his thinking but he expressed the matter in such terms as to leave us with no indication as to how that was reflected in his calculations. Clearly the Bill to be taxed cannot seek payment for such pre-certificate work. However, in response to the Opinion of the Taxing Master the costs drawer is specific that there is no time or work claimed for in the Bill for taxation.

The view of the Court having considered the files is that the assertion of the costs drawer is to be accepted. However the costs drawer in his response of the 17 March 1999 page 3 of his comments states as follows:-

> `… if there was pre-certificate work for which, as frequently happens and which I suspect happened in this case, the solicitor was not paid but which advanced the case the Master should take the benefit of that work into account by being more generous in his allowances'.

The Court cannot accept that the Bill should reflect anything other than the work done post-certificate, and even if earlier work saves time and money later that is not a matter to be paid under any guise whatsoever by the Legal Aid Fund.

- As will be seen in the Carse case, the problem of telephone calls is in issue. The Solicitor in the Bill designated the vast majority of these calls as timed calls, and indeed furnished a schedule of the time allocated to such calls. This then converts to time for the purpose of the calculation of costs. It appears clear to the court both from the narrative of the Opinion and in the brief schedule of the time and calls allowed set out at page 22 of the Opinion that the Taxing Master regarded the vast majority to be untimed calls. At page 19 of the Taxing Master's Opinion he asserts that:

> `I cannot accept that only 10 telephone calls were un-timed. It is clear from the file records that the solicitors have gone over the file at the conclusion of the case and attributed certain

> times, with a very broad brush, to the notes on the files of the various telephone calls.'

The Taxing Master goes further, making two additional points:

(a) that calls to the Petitioner's mother and father should be excluded; and

(b) that a series of calls were handled by `junior' staff who should have simply said they could not help and would arrange for a return call to be made.

Having read the files and looked at the points, and in particular the illustrations given by the Taxing Master, the Court agrees that there are concerns as to some of the telephone attendances and that an adjustment is required. There are grounds for coming to the decision that to an extent a later attribution of time was made, and it is noted that there is no rebuttal of the comment in the response of the costs drawer to the Opinion. However just as a perceived broad brush approach on the part of the Solicitors would be undesirable, so too would such an approach which moves to the other end of the scale, dismissing the Schedule of timed calls in their entirety. We have considered the Taxing Master's Opinion carefully in this regard. His approach to the calculation of time is set out at page 22 of the Opinion, and two examples show that at some point he appears to have accepted some `timed calls' (but not in a way that allows for comment since they are not particularised) and at another point appears to have discounted them altogether.

At page 22 he states:-

> `The Summary produced by the Solicitors at the foot of this Item in the Bill of Costs is as follows:-
>
> *Summary*
>
> *35 hours 40 minutes*
> *88 letters out*
> *10 untimed phone calls*
> *1 notice*

> All in all I take the view that here the Schedule should look like this:-
>
> **SUMMARY**
>
> Petitioner 3 hours
> Discovery 2 hours
> Documents 2 hours
> Negotiations 6 hours (13 hours)
> 88 letters out
> 52 routine telephone calls
> 1 Notice
>
> This is the equivalent to 27.1 hours which at £61.60 amounts to £1,666.65 for Part A.'

The first point to note is that the Taxing Master refers to 52 `routine telephone calls' – not `timed' or `untimed'. His calculation shows this figure is included in the 27.1 hours as 5.2 hours – the figure based on the time allowed for untimed calls. In referring to them as `routine' we assume that he has decided these calls should not have taken more than 6 minutes each. The Solicitor time of 35 hours 40 minutes includes all telephone calls except 10 `untimed' telephone calls, which are set out under the relevant heading. This matter will be referred to below.

Turning to the two examples:-

(a) Under the heading `Attendance on Petitioner' the time for personal attendance is recorded as 2 hours with a further 6.35 hours attributable to `timed' telephone calls, a total of 8 hours 35 minutes. As can be seen above the Taxing Master allowed 3 hours, which suggest he allowed 1 hour for timed calls.

(b) Under the headings of `Expert Evidence', Searches and Enquiries' and `Other Parties', where the time claimed related solely to timed calls and untimed calls, no allowance has been made for time, and one assumes that any allowance has been made under `routine calls'. For example there is recorded in the Bill under the

subheading `Counsel' 2 hours 30 minutes representing 3 timed calls on Counsel. No allowance has been made for this by the Taxing Master.

The court is satisfied that a large percentage of the calls in question would have exceeded the notional figure of 6 minutes that an un-timed call would attract, and that a substantial number of the timed calls fall to be dealt with on the basis sought by the Solicitor. The court believes that the Taxing Master was too restrictive in his approach, himself verging on a broad-brush approach. An adjustment has to be made to reflect the concerns already expressed. This will result in a reduction since, just as will be seen in the Carse case below where the court is able to place confidence in the records of the Solicitor in that case, records that are flawed by a lack of contemporaneous timing will leave the solicitor vulnerable to a reduction.

As to the remaining two points (a) and (b) above it would be a mistake to generalise.

(a) In some cases events and circumstances will dictate that contact with and through a third party will be necessary. In others, while perhaps required for the peace of mind of a client, there will be good reason not to look to the public purse for recompense. In this case the court is satisfied that the calls were necessary, and by their in frequency do not represent an abuse of the taxation system.

(b) As to the role of `junior' staff here again generalisation would be wrong. In a legal system where many offices are run by sole practitioners or two person partnerships, there is a definite and productive role for the paralegal or the secretary. It has ever been so. The main concern would, of course, be the hourly rate payable. Fortunately in this case the time involved is marginal and has little effect on the final figure allowable, whether as a result of the rate or the time involved. A figure has been factored into the final figure calculated by the court for this aspect of the Bill.

<u>The Divorce</u>

Attendances on the Petitioner. There was no reduction in the time claimed of 2 hours 30 minutes, and we agree.

Attendance on Expert Witness. The Taxing Master was critical of the time expended, 3 hours 30 minutes. Indeed he expressed himself in trenchant terms as to the attendance on this witness by a solicitor, being of the view that a junior could have taken the bus to have the paperwork completed. The court takes a contrary view in every respect, not least in the context of the urgency and the importance of the work – an urgency the Taxing Master himself recognised later in his Opinion. Even with the benefit of hindsight which is not an available tool, the actions of the Solicitor were reasonable and proper, as was the time involved.

Documents. The claim of 4 hours 30 minutes was reduced to 3 hours, a reduction of 33 1/3%. The court agrees with the figure in the Bill and reinstates the original figure.

Negotiations. The courts reading of the file discloses the negotiations claimed and the figure claimed is reinstated.

The net effect of the above decisions is to approve the figure of £1,480 claimed in the original Bill.

Ancillary Relief

After considering the files, and taking into account the matters set out above, the court determines as follows:-

	Solicitor	Taxing Master	Court
Attendance on Petitioner	8 hours 35 mins	3 hours	7 hours 30 mins
Expert Evidence	50 mins	Nil	50 mins
Search and Enquiries	1 hour 25 mins	Nil	1 hour 25 mins
Other Parties	3 hours 50 mins	Nil	3 hours 50 mins
Discovery	2 hours 30 mins	2 hours	2 hours 30 mins

Documents	6 hours 20 mins	2 hours*	5 hours
Negotiations	12 hours 10 mins	6 hours	10 hours
Totals for time	35 hours 40 minutes	13 hours	31 hours 5 minutes

Letters out 88

10 untimed telephone calls

1 Notice

* In his summary set out above the Taxing Master records an allowance of 2 hours. However, on page 19 of the Opinion he records "I found it difficult to justify the claim by the Solicitor for 6 hours 20 minutes spent on consideration of the Documents in the case. I felt that 4 hours would be objectively reasonable." (The underlining is by the Court).

The calculation of the court for Part A is therefore £2,523.44. The total for Part A and B is therefore £3,784.16 which has been rounded up to £3,800 and this figure is certified for the Solicitors' costs in respect of the Ancillary Relief.

CARSE v CARSE

Reference has already been made to the failure by theTaxing Master to reveal in a clear way whether his reduction in the times allowed under virtually every heading in the Bill in this case was due to dishonesty in recording the work the solicitor did or the time taken to do the work they did do; or a failure by the solicitors to do the work in a reasonable amount of time.

Having read the files, and in particular the records of attendances and the correspondence on the files, it must be recorded in the clearest of terms that there is no basis whatsoever for any suggestion of dishonesty. The court is completely satisfied both that the work was done and that there is not the slightest shred of evidence that there has been any

deliberate overstatement of the time involved. While the court has reduced the amount of time in certain areas it is on the bases set out below, none of which find any of their foundations in dishonesty.

A further principle requires to be stated. It is easy perhaps with the benefit of hindsight to conclude that certain steps taken were not in the event required. That approach must not be taken. Rather the person coming to the file after the event should adopt the view that a solicitor faced with the preparation of his or her client's case will by necessity need to examine every proper avenue of enquiry to protect and enhance his client's interest. It would be inappropriate to second-guess the decisions made in such circumstances save those that any reasonable person would have seen as not justifiable.

The court found no example on the files in this case of any steps that could fall into this class. The client was well served by a thorough but pragmatic investigation of the issues involved.

Turning to the Item 79 in the Bill, the Solicitor's claim for instruction, this is split into the different headings required by the Order. These will be set out below. In the Solicitor's Bill there is set out under each heading the appropriate amount of detail to allow for the claim to be identified in the files, that detail itself being particularised under 3 sections – attendances; correspondence; and telephone calls (timed and untimed). As regards attendances these are attributed to the specific time claimed, as are timed phone calls. As regards letters written out these are attributed a notional figure representing 6 minutes, to include both the time involved in the writing of the letter and considering the response. Of course, any letter which required specific attention and therefore a longer time would be included as an itemised claim. Untimed calls are attributed the same figure of 6 minutes.

The figures claimed under the headings together with the figures allowed in respect of each by the Taxing Master and those allowed by the Court are set out below.

In its approach the Court has two comments to make to explain the reductions made.

The first relates to untimed calls. No adjustment has been made for timed calls, which represent the minority (and by some percentage). This is because the court has been able to make a judgment between the record of what was transacted in those calls and the time claimed. Unfortunately there is not always the same detail in respect of the untimed calls, a number of which, to the extent that it is possible to make any judgment, appear capable of being dealt with in less than the notional time attributed. That is not to say that nothing is allowed. Rather the court has made the reduction that it feels represents the cumulative shortfalls between the notional figure claimed and what would have been the time taken. That approach to the untimed calls has been necessary given the large number of them – and therefore the impact on the time involved. The figures explain the court's concern – there were approximately 160 untimed calls while there were approximately 10 timed calls. The untimed calls extrapolate to 16 hours of time.

The second comment relates to the claim made for `Documents', a claim of some 22 hours 50 minutes. This heading covers the time taken by the solicitor reading documents, sometimes the same papers for hearings on different dates. These times invariably have been expressed in round figures – for example `2 hours' or `3 hours'. They therefore appear to the court to represent not a <u>timed</u> record, rather an estimate although from the attendance note on most if not all occasions a relatively contemporaneous record.

Here the court has taken a view that some of the times were unreasonably long, either because it felt the record was too general to be accurate, or that the time taken was longer than was reasonable. The court accepts that re-reading papers is necessary and does take time, but a file read within a relatively short time since the last time it was read and, given the stage in the proceedings it took place, when it would have been reasonably well known, does allow for a view to be taken that the time should not be that claimed.

The above represent the bases for reductions in this case from that sought. However the figure to be allowed is substantially higher than that allowed by the Taxing Master. The areas where these differences arise are shown in the following table. It should be noted that the times sought and allowed incorporate the letters and telephone calls.

Items of Work		Hours	
	Claimed	Taxing Master	Court
Petitioner/Attendances	18 hours 37 mins	9 hours 54 mins	16 hours 2 mins
Expert Witnesses and Search and Enquiries	8 hours 56 mins	8 hours 36 mins	7 hours 20 mins
Other Parties and Counsel	19 hours 48 mins	15 hours 12 mins	17 hours 48 mins
Discovery	3 hours 30 mins	2 hours	3 hours 30 mins
Documents	22 hours 50 mins	13 hours	18 hours 20 mins
Negotiations	10 hours 45 mins	6 hours	10 hours 45 mins
Totals	84 hours 37 mins	54 hours 42 mins	73 hours 45 mins

The factor A figure is therefore 73 hours 45 minutes at £64 per hour, which is £4,720.

The total of factor A and factor B (an uplift of 50%) is £7,080, and this is the figure determined by the court in respect of Item 79 of the Solicitors' Bill.

GIRL3078

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN: 1996 No 411

SHARON ELIZABETH GALWAY

Petitioner;

and

DAVID GALWAY

Respondent.

BETWEEN: 1997 No 948

MARY CARSE

Petitioner;

and

THOMAS DEREK CARSE

Respondent.

J U D G M E N T

O F

G I R V A N J
