Neutral Citation No [2012] NIQB 28 | *Ref:* **McCL8473**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/04/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON

IN THE MATTER OF AN APPEAL UNDER SECTION 28(2) OF THE CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

AND IN THE MATTER OF THE QUEEN –v- NEIL FRASER LATIMER

BETWEEN:

JOHN J RICE AND COMPANY

Appellants:

and

THE LORD CHANCELLOR

Respondent:

McCLOSKEY J

The Appeal

[1] This is an appeal under Section 28(2D) of the Criminal Appeal (Northern Ireland) Act 1980 against a decision of the Taxing Master dated 1st December 2004 whereby he determined the amounts payable to the Appellants for professional

services rendered to their legally assisted client in connection with criminal appeal proceedings in the Northern Ireland Court of Appeal.

[2] As many practitioners will recognise at once from the title hereof, Neil Fraser Latimer was a Defendant in a prosecution of some notoriety. In brief compass, the landmark dates and events are the following:

(a) On 1st July 1986, the Defendant was convicted of murder and possession of a revolver with intent to endanger life at Belfast Crown Court.

(b) On 4th May 1988, his first appeal against conviction was dismissed.

(c) On 29th July 1992, his second appeal against conviction was dismissed.

(d) On 9th May 2001, the Criminal Cases Review Commission ("*the Commission*") referred the Defendant's case to the Court of Appeal afresh, pursuant to Section 10 of the Criminal Appeal Act 1999.

(e) This further [third] appeal was heard by the Court of Appeal on 17th, 18th, 19th, 21st, 24th and 25th November 2003.

(f) On 9th February 2004, the Court of Appeal dismissed this further challenge, affirming the convictions.

The Appellants are the firm of solicitors who represented the Defendant in the final appeal, initiated by the reference made by the Commission. They had first acted for the Appellant in the second of the aforementioned three appeals.

[3] The essence of this present appeal entails a complaint by the Appellants that the amounts determined by the Taxing Master for their professional fees are inadequate.

The Decision of the Taxing Master

[4] The context within which the impugned decision falls to be evaluated by this court is provided by certain passages in the "Solicitors' Report" submitted by the Appellants to the Taxing Master:

> "*Instructing solicitors respectfully claim enhanced fees for all court attendances and preparation work done in connection with the above appeal on the basis of exceptional competence and dispatch and the exceptional circumstances of this murder appeal …*

> [Involvement in the 1992 appeal] … *enabled instructing solicitors to deal with the overall preparation of this appeal with considerable expedition and dispatch …*
>
> *The Appellant now relied upon fresh … psychiatric and psychological evidence …* [from three experts] …
>
> *The evidence from Dr. John Alderdice and Dr. Fred Browne related to fresh evidence concerning the main Crown witness known as 'Witness A' and her medical history …*
>
> *The fresh evidence from Professor Gudjonsson … concluded that the Appellant was psychologically vulnerable, was of limited intelligence and possessed such unusual personal traits that would make him vulnerable during interview …*
>
> *Also … it was contended that he was detained …* [contrary to] … *Article 6(3)(c)* [ECHR] … *and was denied a right to a fair trial …*
>
> [The new expert evidence was contested by the Crown]
>
> *… given the background to the case and given the Appellant's own demanding nature the appeal was most demanding from instructing solicitors' point of view …*
>
> [Having summarised the totality of the evidence] …
>
> *All this evidence was complex and inter-related and demanded personal attention by* [Mr. Dougan, solicitor] …
>
> *The unique aspect of this case involved the fact that this was the third appeal against the Appellant's convictions.*"

In the final paragraph of the Solicitors' Report, it was contended:

> "*For the above reasons and particularly because of the exceptional nature of this appeal and the exceptional competence and dispatch as illustrated above, enhanced fees commensurate with the fees claimed by counsel are respectfully sought*".

The report is dated 12th June 2004.

[5] In his preliminary assessment dated 2nd November 2004, the Taxing Master assessed solicitors' fees of £40,000 plus VAT. Following objection, a hearing ensued. At this hearing two central issues were ventilated:

(i) The allowance of only 156 hours preparation time in circumstances where 178.5 hours had been claimed.

(ii) The assessment of an uplift of 150%, whereas an uplift of 200% had been claimed.

The Master's ultimate written decision was formulated in the following terms:

> "*In the light of the explanations offered by the solicitors I am now satisfied that this case involved rather lengthier preparation … than I had allowed. I have now reviewed the claim of the solicitors, the papers in this case and the file of the Taxing Office in relation to the costs at the Crown Court. Previously I had allowed £40,000 on the basis of 156 hours preparation, 26.66 hours attending court and 40.66 hours travel/waiting and 324 items of correspondence. I am satisfied that the figure should be increased and an uplift allowed.*"

In his determination, the Master increased the allowable preparation time from 156 to 168.5 hours. The net result was to augment his initial assessment from £40,000 to £45,000 (plus VAT).

Consideration and Conclusions

[6] Mr. Steer (of counsel) explained to the court that this appeal is founded on two contentions:

(i) The uplift of 150% does not represent fair and reasonable remuneration and is unexplained.

(ii) The deduction of 10 hours preparation time is unreasonable and unexplained.

In support of the submission that the Commission's reference stimulated an appeal giving rise to exceptional circumstances and exceptional competence and dispatch, Mr. Steer drew attention to six factors:

(a) The referral by the Commission.

(b) The two previous appeals.

(c) The duration of the appeal hearing – 6 days.

(d) The complex nature of the new expert opinion evidence.

(e) The medical records relating to 'Witness A'.

(f) The length of the Court of Appeal judgment – 51 pages.

[7] Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 enshrines the principle of fair remuneration for work reasonably undertaken and properly done. By Rule 4(3) of the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 ("*the 1992 Rules*"), the measurement of costs in respect of work undertaken pursuant to a Criminal Aid Certificate shall be made by reference to "*all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved*". By virtue of Rule 6(1), the five permissible types of remunerable work are preparation, advocacy, attendance at court with counsel, travelling/waiting and routine letters. By paragraph 1(b) of Part 1 of Schedule 1 to the 1992 Rules, fees in excess of "*the relevant basic rate*" may be allowed where it appears that –

> "*... taking into account all the relevant circumstances of the case, the amount of fees payable at such specified rate would not reasonably reflect –*
>
> *(a) the exceptional competence and dispatch with which the work was done, or*
>
> *(b) the exceptional circumstances of the case*".

[8] This appeal is brought under Section 28(2D) of the Criminal Appeal (Northern Ireland) Act 1980, which provides, insofar as material, as follows:

> "*(1)Except as provided by the M1Costs in Criminal Cases Act (Northern Ireland) 1968 or any other Northern Ireland legislation, no costs shall be allowed on the hearing and determination of an appeal under this Part of this Act, or of proceedings preliminary or incidental to such an appeal.*
>
> *(2)**[**F1**The following expenses, that is to say – **]***
>
> *(a)the expenses of any solicitor or counsel assigned to an appellant under **[**F2**section 19(1)**]** of this Act;*
>
> *(b)the expenses of any witnesses attending on the order of the Court of Appeal, or examined in any proceedings incidental to the appeal;*
>
> *(c)the expenses of the appearance of an appellant on the hearing of his appeal, or in proceedings preliminary or incidental thereto;*
>
> *(d)all expenses of or incidental to any examination of witnesses conducted by a person appointed by the Court for the purpose; and*

(e)all expenses of or incidental to any reference of a question to a special commissioner appointed by the Court, or of any person appointed as assessor to the Court ***[****F3**shall, up to an amount allowed by the Master (Taxing Office) be defrayed, in the case of expenses within paragraph (a), by the Lord Chancellor and, in any other case by the****[****F4**Director of Public Prosecutions****]]****.*

[*F5**(2AA)The expenses of any solicitor or counsel assigned to a person pursuant to a grant of legal aid under section 19(1A) or (1B) of this Act shall, up to an amount allowed by the Master (Taxing Office), be defrayed by the Lord Chancellor.****]***

[*F6**(2A)Where a solicitor or counsel is dissatisfied with the amount of any expenses allowed by the Master (Taxing Office) under subsection (2)(a)* ***[****F7**or (2AA)****]*** *above, he may apply to that Master to review his decision.*

(2B)On a review under subsection (2A) the Master (Taxing Office) may confirm or vary the amount of expenses allowed by him.

(2C)An application under subsection (2A) shall be made, and a review under that subsection shall be conducted, in accordance with rules of court.

(2D)Where a solicitor or counsel is dissatisfied with the decision of the Master (Taxing Office) on a review under subsection (2A) above, he may appeal against that decision to the High Court and the Lord Chancellor may appear and be represented on any such appeal.

(2E)Where the Lord Chancellor is dissatisfied with the decision of the Master (Taxing Office) on a review under subsection (2A) above in relation to the expenses of a solicitor or counsel, he may appeal against that decision to the High Court and the solicitor or barrister may appear or be represented on any such appeal.

(2F)On any appeal under subsection (2D) or (2E) above the High Court may confirm or vary the amount of expenses allowed by the Master (Taxing Office) and the decision of the High Court shall be final.

(2G)The power of the Master (Taxing Office) or the High Court to vary the amount of expenses allowed under subsection (2)(a) ***[****F8**or (2AA)****]*** *above includes power to increase or reduce that amount to such extent as the Master or (as the case may be) the High Court thinks fit; and the reference in* ***[****F9**subsections (2) and (2AA)****]*** *above to the amount allowed by the Master (Taxing Office) shall, in a*

> *case where that amount has been so varied, be construed as a reference to that amount as so varied.]*
>
> *(3)Where in any proceedings on an appeal to the Court under this Part of this Act or preliminary or incidental to such an appeal an interpreter is required because of an appellant's lack of English, the expenses properly incurred on his employment shall be defrayed by the [F10Department of Justice] up to an amount allowed by the Court."*

Accordingly, in the realm of criminal appeals, there is a specially designated statutory regime for the payment of all kinds of "*expenses*", including those incurred by solicitor and counsel in representing an assisted person: see Section 28(2AA), which was inserted by the Criminal Justice Act 2003. The financing agency is the Lord Chancellor. The agency which measures the expenses payable is the Taxing Master, whose decisions are subject to two levels of challenge. The first is a request to the Master to conduct a review. The second, following exhaustion of the first recourse, is an appeal to the High Court. The powers of this court are to "*confirm or vary*" the amount of expenses determined by the Master, per subsection (2F). While Section 28 is silent on the issue of governing criteria, there is no discernible statutory intention to exclude or modify the well established general principles and criteria in the statutory provisions summarised in paragraph [7] above. I consider, as did Weir J in a recent decision ([2011] NIQB 80), that appeals of the present *genre* are to be determined by this court giving effect to these general principles and criteria expressed in the statutory provisions to which I have referred above. In passing, it is evident that this was also the approach of the Master in the present case.

[9] In determining this appeal, the approach to be adopted by this court is settled. It was formulated by Carswell LJ in ***Adair and Others –v- Lord High Chancellor*** [1996] NIJB 237 (at p. 247) in these terms:

> *"I conclude therefore that the taxing master and the judge in all of the reviewing or appellate processes have full powers to fix the fees at the level they think right to satisfy the principle of allowing fair remuneration. The judge has in my opinion as wide a power as the taxing master or the appropriate authority, and is not limited to a 'band of fairness' type of approach. This accords with the view expressed by Garland J in Lord High Chancellor v Wright [1993] 4 All ER 74 at 77. I consider that the judge should consider the fees certified by the taxing master and the objections presented by the appellants. If he is satisfied from his consideration that the taxing master has erred in principle or that the amount allowed does not represent fair remuneration, then he is free to re-assess and if he thinks fit to vary that amount. It will be a matter for him whether he*

returns to the determination made by the appropriate authority and uses it as a yardstick or a starting point for his own assessment, or whether he decides upon the proper level in some other manner, and he may have recourse to any relevant materials which will assist him to fix what constitutes fair remuneration. Nor do I consider that it is necessary for an appellant to establish some error in principle on the part of the taxing master to enable the court to vary the amount of a fee certified by him … Such an approach would hark back to the self-denying ordinance adopted by the courts in cases of costs in civil proceedings decided before the change made in the RSC (NI) 1980 … If an error of principle is shown to exist, the judge will of course look at the fee to see what it should be if assessed by reference to the correct principle. But he may also vary it if he is satisfied that for any other reason, which may be simple under or over-assessment, it does not represent fair remuneration. I would, however, reiterate my remarks in Boyd v Ellison [1995] N.I. 435 at 437 that 'in matters particularly within the knowledge and expertise of the taxing master the court should not lightly overturn his decision.' I would only observe that although the taxing master is constantly dealing with counsel's fees and has much experience in doing so, the judge who has himself had long experience at the Bar may be well placed to exercise his judgment on matters relating to work done by counsel and the degree of difficulty involved in a given case.".

Thus there is a discernible element of permissible elasticity in the approach which this court should properly adopt in the exercise of its appellate powers. In short, the jurisdiction of this court is not of a merely supervisory or review nature, nor is it to be equated with the limited approach to be applied where an appeal is pursued on a point of law. It is, rather, a full appellate jurisdiction. This is the approach which I shall apply in determining this appeal.

[10] Self evidently, sheer bulk and volume, which are long established characteristics of many criminal (and other) cases, do not, *per se*, equate with exceptionality. What is required of the Taxing Master and, on appeal, this court is a critical, informed and qualitative assessment of all the materials available. Where a criminal appeal has a duration of several days hearing and generates a lengthy judgment of the Court of Appeal, these factors will normally be indicative of complexity and will frequently attract the imprint of exceptionality. Each of these factors is present in the current equation. A further factor of note is that of new evidence: this was expert evidence involving psychiatrists and psychologists and it was contested. The present equation also has the not insubstantial ingredient of a protracted history, which had features of a lengthy and complex initial trial involving multiple Defendants and two subsequent unsuccessful appeals to the

Court of Appeal. I consider that these several factors, in the circumstances of the present case, give rise to the assessment that this appeal was unusual and far from straightforward. Having regard to this combination of factors, the conclusion that this case was exceptional is readily made. The question to be determined is whether there are grounds upon which this court should properly interfere with the Taxing Master's assessment that the uplift be measured at 150%.

[11] Where the decision at first instance is fully reasoned, the exhortation of Carswell LJ that "*… in matters particularly within the knowledge and expertise of the Taxing Master the court should not lightly overturn his decision*" (***Boyd –v- Ellison*** [1995] NI 435, p. 437) will apply with particular vigour, subject to any demonstrable error of principle or otherwise. The Taxing Master's written decision in the present case is to be scrutinised accordingly. Although the representations made by the Appellant objecting to the preliminary assessment clearly ventilated two issues of substance namely the inadequacy of the uplift of 150% and the impropriety of the reduction in hours, the Master, in his decision, dealt only with the latter issue. He explained, somewhat laconically, why he was disposed to increase the allowable preparation hours from 156 to 168.5. However, he did not address *at all* the issue of uplift. Rather, his decision simply records the Appellant's representation that the uplift should be 200% rather than 150%. I have rehearsed in paragraph [5] above the key passage in the Master's decision. With the exception of the bare mention in the final sentence thereof, this is entirely silent on the question of uplift. The passage is properly described as conclusionary. It follows that the Master's decision is unexplained in two key respects:

(i) His reasons for assessing an uplift of 150%.

(ii) His reasons for rejecting the contention that the uplift should be 200%.

I consider that in the absence of *any reasons* for either of these two key matters, the degree of deference to be accorded to the experience and expertise of the Master is diminished, while the courses open to this court are expanded accordingly. In this respect, I note that comparable shortcomings were identified by Weir J in ***Ingram & Company –v- The Lord Chancellor*** [2004] NIQB 80, paragraph [7].

[12] At the time when ***Rice –v- Lord Chancellor*** [1997] NIJB 27 was decided, some seventeen years ago, it was widely accepted that in a murder case the minimum uplift would normally be 100%, with an upper limit of around 200%: per Pringle J, p. 33I – 34A. This has developed subsequently. In ***Higgins Holywood Deasley –v- The Appropriate Authority*** [Record No. T/CC/02/00339], where the Master, in a fully reasoned decision, found that there were exceptional circumstances, coupled with exceptional competence and dispatch (describing the case as "*extraordinary*"), he allowed an uplift of 234% for the work of the senior solicitor concerned. This decision was made on 16th October 2002. During the hearing of this appeal, the court was informed, without challenge, that, subsequently, the Master has allowed uplifts of ***300%*** in the following cases:

(a) ***R –v- Doran***, a HMCE prosecution in respect of money laundering and fuel smuggling, decided on 13th June 2006. [A copy of this decision was supplied].

(b) ***R –v- Murray and McChesney***, a prosecution involving an international cigarette smuggling operation, decided on 23rd December 2010.

[13] Having carefully considered all materials available, I exercise the appellate jurisdiction of this court in accordance with the principles and approach laid out above. I consider that the exercise of this jurisdiction will normally involve an element of intuitive judgment, supplemented by the experience of the appellate judge. The present case is no exception in this respect. As I have already observed, the exceptional nature of the criminal appeal giving rise to this challenge is beyond plausible dispute. I am also required to consider whether there was *exceptional competence and dispatch* on the part of the Appellants. The conclusions which I have reached on both issues are reflected in the following passages from ***Ingram & Company –v- The Lord Chancellor*** (*supra*):

> "[12*] In the circumstances I am left to make my own unaided assessment of the appropriate uplift. 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.*"

In adopting the first of these conclusions, I give full effect to the various factors of exceptionality and complexity ventilated in the Solicitors' Report, none of which was challenged by the Master in his decision. In my espousal of the second of these conclusions, in common with Weir J while I am satisfied that the Appellants carried out their work with exceptional competence, I find no evidence of exceptional dispatch. In particular, I am unpersuaded by the suggestion that exceptional dispatch should be found on the basis of the previous involvement of the Appellants as solicitors in the second in the trilogy of unsuccessful appeals to the Court of Appeal. Insofar as there is implicit in this discrete argument a suggestion that the Appellants should receive additional remuneration because their previous involvement gave rise to a saving to the public purse in the third and final appeal, I consider this misconceived. In my view, the statutory scheme is neither designed nor intended to provide remuneration of this kind. As regards the further issue raised by this appeal, I adopt a short passage from the recent judgment of Weir J

([2011] NIQB 80) which, as I observed during the hearing, seems to me tailor made for the present case:

> "[15] … *I do not alter the hours assessed by the Master since I have neither the material nor the experience to enable me to substitute any estimate of mine for his in a narrow debate between 60 hours and 75 hours.*"

The dimensions of the debate in the present case, 178.5 versus 168.5 hours, are narrower still. I find no basis for interfering with this aspect of the Master's assessment.

Disposal

[14] To give effect to the above conclusions, the uplift of 150% measured by the Master in the amount of £22,482.72 plus VAT is increased by one-third, to 200%, (rounded to £7,500) giving rise to the rounded figure of £30,000 plus VAT. This results in an assessment of £52,500 plus VAT, in substitution for £45,000. Finally, giving effect to the usual practice in successful appeals of this kind, the costs of the appeal will be disbursed out of public funds.