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Ref: **WEI9079**

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

Delivered: **10.12.2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION FOR REVIEW OF A DECISION BY THE TAXING MASTER PURSUANT TO ORDER 62 RULE 35 OF THE RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) 1980

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BETWEEN:

P J FLANAGAN AND COMPANY

Applicants;

-and-

THE TAXING MASTER

Respondent.

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WEIR J

The nature of the proceedings

[1] The applicants, a firm of solicitors, being dissatisfied with a decision of the Taxing Master on a review under Rule 33 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") apply under Order 62 Rule 35 for an order that a judge review that decision. The application for review ought to have been brought within 14 days of the certificate of the Taxing Master but instead of proceeding by way of application for review the applicants inadvertently and incorrectly commenced an appeal within the 14 days. The error was not appreciated for some considerable time so that the correct application for a review was not issued until 22 October 2013 and therefore with it was coupled an application pursuant to Order 3 Rule 5 of the Rules seeking an order extending the time for applying for the review. Both matters were dealt with before me at the hearing on 28 November 2013 at

which a letter from solicitors on behalf of the Taxing Master dated 9 October 2013 was read signifying that the Master had no objection to the grant of leave for the requisite extension of time. It was also clear that, notwithstanding that the wrong procedure had been used, the applicants had launched their mistaken appeal in good time and that no-one had been prejudiced, except perhaps the applicants themselves, by the consequent delay. I therefore extended the time for the bringing of the application to the date upon which it was in fact brought.

The background to the application

[2] This appears in some detail from the affidavit of Christopher McGettigan, a partner in the applicants, sworn on 17 October 2013 and I therefore merely summarise the background here. The solicitor acted for a Mrs W in relation to divorce and ancillary relief proceedings. After the Decree Nisi had been pronounced on foot of her petition, ancillary relief proceedings were issued out of this court on 9 December 2010. The client was a legally assisted person throughout the proceedings. There were a total of seven attendances by the solicitor between the first directions hearing and the final approval of the consent order. The solicitor attended on all those occasions and in due course furnished his bill of costs to the Taxing Master for legal aid taxation. The Taxing Master initially disallowed three of those attendances on the ground that they were not reasonably incurred items of claim. The solicitor then requested a review of the disallowed items under Order 62 Rule 33 and upon that reconsideration the Taxing Master reinstated one of the disallowed appearances, that for 3 March 2011, but continued to disallow those for 24 March and 14 April 2011. The Master issued his decision in a 12 page judgment dated 27 November 2012 in which he explained his rationale for maintaining the disallowance of the two appearances claimed for. I set out here that portion of the judgment on page 3 which deals in detail with the two appearances in question:

> "On 24 March 2011, the Mention lasted four minutes. Mr McGettigan again attended counsel. Counsel appeared for the Respondent (who was still not legally-aided). The Respondent's solicitor (also from Enniskillen) did not attend counsel. The Master made an 'Unless' order as the Respondent was still in default of his replying affidavit. A similar order in relation to costs was made (this refers to the Matrimonial Master having certified for counsel at previous hearings) and the matter listed for review on 14 April (being the return date for filing of the Respondent's Affidavit).
>
> On provisional taxation, I taxed off the solicitor's claim for £479.69 for attending counsel (who was certified and allowed her claim of £100). I again

> declined to allow that sum on the formal taxation on 17 September 2012.
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> The Review on 14 April lasted five minutes. Again, Mr McGettigan attended counsel. Again, counsel for the Respondent attended without his instructing solicitor. Again, on provisional and formal taxations, I disallowed and taxed off the solicitor's claim for £479.69. The replying affidavit had been filed the day before; he spoke with counsel for the Respondent; the Petitioner also attended the Review."

Later, at page 5 of the judgment, the Master says:

> "At the hearing of the Objections, I accepted entirely the *bona fides* of Mr McGettigan's position. We went through the other reviews, mentions and directions hearings. In relation to the disallowed hearings he had made his own judgment call that his attendance was necessary. On the 24 March review, there were serious delays by the Respondent, his affidavit and discovery was outstanding; he had changed solicitors and Mr McGettigan felt that the Respondent was being disingenuous. For the April review, he wanted to consult with counsel to settle the Core Issues statement to be filed. The petitioner herself attended that review."

The hearing before me

[3] At the hearing before me Mr McGettigan sought and was granted leave to present the application because of the unfortunate last minute indisposition of his counsel. His presentation was a model of brevity, clarity and restraint. The Taxing Master did not appear at the hearing but had helpfully filed a lengthy affidavit in reply to Mr McGettigan's grounding affidavit which threw further light upon his approach.

[4] Mr McGettigan said that in his view his attendance at both the disputed appearances was required. On 24 March 2011 the situation was that the Respondent was not engaging with the disclosure process to enable the ancillary relief to proceed and it was necessary to apply to the Matrimonial Master to make an "Unless" order so as to try to secure the co-operation of the Respondent. The terms of the relevant part of that order are as follows:

> "Unless the Respondent files an Affidavit as to his means and assets within 21 days from the date hereof

he is required to attend the next review on 14 April 2011 to be examined under Oath."

In fact the Affidavit was not received until at or after close of business on 13 April 2011 at a time when Mr McGettigan had already travelled to Belfast from Enniskillen to stay there overnight before what he had anticipated would be the necessary examination of the Respondent under Oath. The very late receipt of the requisite affidavit and exhibits then obviously rendered the need for such examination unnecessary but Mr McGettigan had had no prior notice that the documents would be received, coming as they did without notice at the eleventh hour. Mr McGettigan therefore attended at court on the following morning, 14 April, where his client and counsel were also present in anticipation of an extended hearing.

[5] I take a quite different view of the reasonableness of Mr McGettigan's attendance at both hearings from that of the Taxing Master. It seems to me in the case of both that Mr McGettigan was quite right to anticipate that there might well be matters requiring his personal input and that he could not reasonably have expected the belated co-operation of the Respondent which truncated the planned course of the 14 April hearing for which he and his client had arranged to be present. Since no issue appears to have been taken by the Taxing Master with the quantum claimed in respect of each hearing and the travelling incurred in attending them, I therefore order that the Taxing Master's certificate be amended to add back the sum of £959.38 together with Value Added Tax at 20% being the total disallowed by the Master. I am satisfied that all the other items which the Master did allow were properly so allowed and I do not alter his decision in respect of any of those.

Issues of principle

[6] This review might be left at this point but for the fact that both Mr McGettigan and the Taxing Master consider that the issues at stake extend more generally beyond the admittedly modest sums at stake in this particular case. In the letter from his solicitors of 9 October 2013 it is stated that the Master and other judicial colleagues "anxiously await an early decision providing guidance in determining the issues raised by this case". Mr McGettigan indicated that the same point has arisen in relation to other cases of his and that he understands that professional colleagues have also encountered the issue. Accordingly I shall try to say something which I hope may be of assistance should similar cases arise in the future. I begin this exercise by noting that in the reasons given by the Taxing Master he refers to a number of English authorities where issues of the amounts allowable on legal aid were discussed. Some of the authorities are of some vintage but the Taxing Master observes, and I agree with him, that the principles to be derived from them are still sound today. I distil from those judgments, *inter alia*, the following:

(i) Country solicitors (and their clients) are not to be disadvantaged over those practising more proximately to the High Court by reason of their

geographical remoteness. As the sole seat of the Court of Judicature is at Belfast it is inevitable that some solicitors, witnesses and parties have to travel significant distances. This ought not to be the subject of differential adverse treatment. If a solicitor's attendance at court is objectively reasonable then it will become no less reasonable because he has had to travel from Enniskillen rather than Royal Avenue.

(ii) As to whether the personal attendance of a solicitor is necessary or proper so that the cost thereof can be said to have been reasonably incurred in all the circumstances of the case, that is a question to be determined in every case upon the particular circumstances surrounding the attendance in question. The assisted person in a legally aided case, his solicitor and his counsel are to have exactly the same freedom in the conduct of an assisted case and the benefit of exactly the same professional relationship as they would have if the client were not an assisted person.

(iii) The correct viewpoint to be adopted by a Taxing Officer is that of a hypothetical sensible solicitor considering what in the light of his *then knowledge* is reasonable in the interests of his lay client. I emphasise the words "then knowledge" because, of course, it is often extremely difficult to predict accurately what may happen at any hearing before a court. It is the common experience of all practitioners that a matter which is anticipated to be difficult, complex or lengthy may in the event resolve itself relatively easily and quickly. The reverse is equally true. It is always necessary for the solicitor (and counsel if instructed) to be prepared for the difficult eventuality. This means that the application of a "hindsight" approach such as the Taxing Master adopted in this case is unhelpful and unlikely to achieve a just result. The Tribunal best placed to assess whether the attendance of a solicitor or counsel is necessary is that before whom the appearance is made. It seems to me that there is much to commend the practical solution devised by Master Redpath and deposed to by the Taxing Master in his affidavit whereby, since September 2012, in those cases where the Master is satisfied that the attendance of solicitors upon counsel was necessary then his order will specifically say so. The Taxing Master said in his affidavit that:

> "It may well be the consequence of this [procedure] that the costs of the solicitor attending counsel will always be allowed. It would be quite irregular of the Taxing Master to disallow for an appearance the incidence of which has been allowed by the Master in the Family Division; any concerns that I might have had as to the reasonableness of the attendance are dealt with by the Master's order of the day. I must

> allow a reasonable amount for the attendance. Had [that procedure] been in place and the attendances at the time of the reviews noted and deemed reasonable, then this Appeal would not be taking place."

[7] The Master referred several times to the present economic difficulties which the country is facing from which I deduce that he has been inclined to look for ways of reducing what he describes as "continuing times of considerable pressures on the public purse". I do not consider that those economic difficulties are capable of, nor ought they, to affect the approach of the Taxing Master to the taxation of publicly - funded costs. If the legislature should choose to reduce the scope or extent of legal aid funding no doubt it will not scruple to do so. In my estimation it is not for the Taxing Master to assume that task, rather is it his duty to assess the proper costs in accordance with the scheme as it exists unless and until any such changes become effective.

[8] It seems to me that a useful guide to the appropriateness or otherwise of any course taken in a case by counsel or solicitors is to have regard to any guidance available from their respective professional bodies. The Code of Conduct for the Bar of Northern Ireland provides detailed and well-reasoned guidance which I consider it useful to set out here in full:

> "12.06 Apart from work in the Magistrates' Courts and work in other courts which only involves dealing with uncontentious matters, a barrister should not consult with a lay client or any witness or represent that client in court in the absence of the professional client or a member of the professional client's staff. If the professional client or a member of staff is absent, the barrister should decline to represent the lay client and the absence of the professional client or the member of staff should be brought to the attention of the court. Where, in exceptional circumstances, in the absence of the professional client or a member of staff the barrister consults with the lay client or represents the lay client in court, the barrister shall forthwith furnish a written memorandum of instruction received during the consultation or the outcome of the hearing to the professional client. Attention is drawn to the 'Guidance on Attendance by Solicitors on Counsel' contained in Appendix 4."

[9] At Appendix 4 appears "Guidance on Attendance by Solicitors on Counsel" which begins with a reference to the then Rule 11.10 of the Code of Conduct which has since been replaced by Rule 12.06 above. The thrust of both versions of the rule is similar. Having set out the then rule the guidance continues as follows:

"3. It is clear from the wording of the Rule that barristers have some discretion … Members are advised that this discretion should be exercised in very limited circumstances only, e.g. where a case is being mentioned in a court and there is agreement between the parties as a result of which the matter will be dealt with very quickly. This is especially the case where otherwise a solicitor would have to travel a considerable distance at public expense which could not be justified.

4. However it is emphasised that only in very limited circumstances should a barrister agree not to be attended. The discretion should never be exercised for any substantive hearing and should be exercised for directions hearings etc. only in limited circumstances such as those described above.

5. The Rule recognises the distinct roles of solicitors and barristers with the latter representing clients on the instructions of solicitors. It is difficult for barristers to fulfil that role when the solicitor is not present to give instructions.

6. In addition the presence of the solicitor ensures that there is less room for dispute about what has actually happened during a consultation or in court. A significant part of the work of the Professional Conduct Committee is taken up with investigating allegations made against barristers by clients when solicitors have not been present. The absence of the solicitor leaves barristers more vulnerable to allegations about their attitude, lack of preparation, poor presentation of the case etc.

7. It has been indicated by a Judge that he would not insist on a solicitor attending providing that counsel is attended by someone from the solicitor's firm. That is in accordance with the Rule which refers to the staff of the solicitor. However, even in that situation, a barrister should have no reservation in advising the solicitor that the person attending him/her should have some knowledge of the case so that the attendance of the person concerned is meaningful."

This Guidance provides an excellent explanation of the rationale behind the Rule which those experienced in contentious practice will immediately recognise and agree with. Of particular concern in the present difficult economic times to which the Taxing Master has referred are the matters dealt with at paragraph 6 of the Guidance. It has unfortunately become a more frequent occurrence for parties to proceedings which have been compromised by agreement to later seek to escape from the agreement or its consequences by contending that the party was induced to enter into the agreement by some unfair pressure or incorrect advice given by the solicitor or by counsel. I have encountered that situation several times in recent years and a documented example of it is to be found in my decision in McVeigh v McAleer [2011] NI Fam 18.

[10] Advice in this area for solicitors from the Law Society of Northern Ireland ("the Society") seems to be less readily available. Mr McGettigan says that he has for about a year been endeavouring to obtain from the Society advice as to the approach to attendance recommended by the Society but has been unable to obtain any concrete response. There appears to be nothing in print from the Society except that in the Spring 2013 edition of "The Writ", which is the journal of the Society, a document closely based on the Bar's Appendix 4 Guidance was printed under the heading "The Professional Conduct Committee of the Bar Council has requested the Society to publish the following document". As the document was thereafter set out without any adverse (or other) comment it may, I think, reasonably be inferred that the Society did not dissent from its terms so far as they bear upon its members.

[11] In the apparent absence of any local guidance from the Society, assistance may be gleaned from guidance issued in England by its Law Society. In the Guide to the Professional Conduct of Solicitors 8th Edition at paragraph 21.05 under the heading "Attending Counsel at Court" the following "Principle" appears:

> "Where counsel has been instructed, the instructing solicitor is under a duty to attend or arrange for the attendance of a responsible representative throughout the proceedings, save that attendance may be dispensed with in the magistrates' Court or in certain categories of Crown court proceeding where, in either case, the solicitor is satisfied that it is reasonable in the particular circumstances of the case that counsel be unattended and, in particular, that the interests of the client and the interests of justice will not be prejudiced."

[12] This available guidance provided to practitioners by the two professional bodies seems to me to be consonant and grounded in good common sense. I distill from it the core principle that the attendance upon counsel by solicitors is to be the norm and only to be departed from in exceptional circumstances. There will of

course, as the Bar Guidance recognises, be some cases where it is not necessary for counsel to be attended and similarly where the attendance of counsel is not required. However, those instances will be few and far between, should be obvious in advance and are capable of being readily supervised by the Masters or Judges before whom the particular applications are being heard. No responsible barrister or solicitor would wish to attend court where such attendance could be reliably forecast in advance to be unnecessary. Apart from any other consideration, the fees allowed for attendance at hearings such as those which are the subject of the present review are by no means so munificent as to attract solicitors to leave the business of their offices to travel to court.

[13] Finally, I observe that on several occasions the Taxing Master has referred to the fact that the Respondent to the proceedings in question here, who was not legally aided, did not have a solicitor in attendance. He seems to have drawn from that the conclusion that solicitors' attendance was not necessary and would not have been incurred by Mr McGettigan either had his client not been legally aided. Apart from the fact that that conclusion would run counter to his express finding, which I endorse, that Mr McGettigan had at all times acted *bona fide* it also seems to me to be a most unreliable guide. My own experience at Bar and Bench tells me that there are solicitors who, sometimes for good but more often for poor reason, fail to turn up at court to attend counsel. Relatively junior counsel seem to me the most frequent recipients of such unprofessional treatment, presumably because their inexperience makes it difficult for them to feel able to insist, as they should do, upon their solicitor's attendance. In such cases it is my practice to require the errant solicitor to attend before me to explain his or her absence and as a result I have found that the incidence of such unacceptable behaviour in my court has very much reduced.

[14] Whether the attendance of a solicitor or counsel is reasonable must, as I have earlier said, depend upon the particular circumstances judged by the practitioner at the time when the attendance is being arranged, not after it has taken place. In those cases where the Master has certified for the attendance of solicitor or counsel or alternatively has disallowed the attendance of solicitor or counsel that will, as the Taxing Master recognises, be the end of the matter. In any case where the Master dealing with the appearance has not so certified then in my view the Taxing Master should allow the practitioner a wide margin of appreciation as to whether his attendance is or is not required and not disallow that attendance unless it can clearly be seen, when judged prospectively and not retrospectively, to have been inappropriate or unnecessary.