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

Delivered: **28.09.2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTERS OF APPEALS PURSUANT TO SECTION 28(2D) OF THE CRIMINAL APPEAL (NI) ACT 1980 AGAINST DECISIONS OF THE TAXING MASTER

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BETWEEN:

SEAMUS TREACY QC
AND
FIONA DOHERTY BL
AND
TREVOR SMYTH AND COMPANY, SOLICITORS

Appellants;

-and-

THE LORD CHANCELLOR

Respondent;

-and-

BETWEEN:

SEAMUS TREACY QC
AND
RONAN DALY BL
AND
JOHN J RICE AND COMPANY, SOLICITORS

Appellants;

-and-

THE LORD CHANCELLOR

Respondent.

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WEIR J

The nature of the proceedings

[1] These are appeals brought under Section 2(d) of the Criminal Appeal (NI) Act 1980 ("the Act") in relation to the amount of the expenses allowed to the appellants by the taxing master in relation to two criminal appeals heard by the Court of Appeal. The Master assessed the expenses in each case and, both solicitors and counsel being dissatisfied with the amount of the expenses allowed by him in both, they applied to him to review his decision. In each case the Master carried out a review but declined to increase any of the amounts awarded and confirmed his assessments. The solicitors and counsel therefore appealed to this court. By virtue of Section 28(2F) this court has the power to confirm or vary the amount allowed by the taxing master and its decision is final. The powers of the court include "power to increase or reduce the amount allowed by the master to such extent as the High Court thinks fit". I was informed by senior counsel for the three appellant counsel that the Lord Chancellor did not consider that the appeals raised any question of principle and that he was therefore not represented and neither consented to nor opposed the appeals.

[2] The two appeals were heard together but the factual circumstances of the cases to which they relate were obviously different and I will therefore come to deal with each in turn.

[3] While these appeals are brought under the specific provisions of the Act which deal with legal aid in criminal appeal cases, there is a considerable body of authority dealing with corresponding provisions elsewhere concerning the fees for legal aid in criminal trials at first instance where the principle to be observed in assessing fees for counsel and solicitors is to allow fair remuneration according to the work reasonably undertaken and properly done. It seems to me that that approach, while not specified in the Act, is that which I ought to adopt, as the Master sought to do in these cases. It also seems to me that the general principles enunciated in the various authorities in relation to legally-aided trials at first instance are equally applicable to these appeals and ought also to be adopted by me.

[4] For example, In Adair v Lord High Chancellor [1996] NIJB 237 at 247g *et seq* Carswell LJ said as follows:

> "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."

The nature of the first Appeal - R v O'Doherty

[3] This was an appeal that followed a reference to the court by the Criminal Cases Review Commission ("CCRC"). The appellant had been convicted on a charge of aggravated burglary and another of grievous bodily harm and sentenced to twelve years' imprisonment. He appealed against his conviction and sentence to the Court of Appeal but his appeal was not successful. Thereafter a different firm of solicitors, Trevor Smyth and Company, commenced to act for the appellant and began to carefully research a crucial element of the prosecution case against the appellant which was the reliability of the particular type of voice analysis that had been carried out on behalf of the prosecution and of which evidence had been given at the trial. Counsel were also consulted and worked co-operatively with the solicitors on a *pro bono* basis to present what appears to have been a formidable submission to the CCRC which included complicated reports of experts in the field of acoustics. This is a difficult and unaccustomed area for practitioners but as a result of detailed and effective work the matter was referred back to the Court of Appeal by the CCRC and the appeal was subsequently allowed. Senior counsel marked a brief fee of £65,000 and that of junior counsel was marked, in accordance with convention, at two thirds of that of her leader. There were a number of other incidental fees and refresher claims which were by and large allowed and were not the subject of challenge before me. The sole area of dispute was the very large discrepancy between the brief fee claimed by senior counsel and that allowed by the Master which he confirmed following his review.

Counsel's claimed brief fee in O'Doherty

[4] The main element of the submissions advanced on behalf of counsel before the Master was a review of what were said to have been the comparative difficulties of this case as against those of the previous case of R v Magee in which the same senior counsel had marked a fee of £55,000 on the brief and had been allowed £40,000 by the Master. The contention was, that by comparison with Magee, the O'Doherty case was much heavier. To examine this proposition the Master got up the papers in the Magee case and found that when justifying his claimed brief fee in that case senior counsel had described it as "one of considerable importance and complexity", pointed out that the prosecution had been represented by two senior counsel, that the case had significant implications for future cases and that he had not been instructed in the original trial and therefore had to consider the transcripts of that trial in detail. The Master also drew attention to the fact that the volume of documents to be considered by counsel in Magee was more than twice the volume in the instant case. But he did acknowledge that no fresh evidence had been called in Magee before the Court of Appeal. The Master also seems to have been influenced by the fees paid to the two senior counsel for the prosecution which were £18,000 each on the brief.

[5] I consider that there is very considerable difficulty in trying to extrapolate from the brief fee paid in one case the appropriate fee for another. In the first place all cases are different and some have aspects which are more complex when

compared with others but also are likely to have aspects that are less difficult. There is also a, perhaps natural, tendency on the part of counsel when submitting reports in support of a brief fee marked to emphasise the particular difficulties and complexities of the instant case together with its importance both of itself and for future cases and not to lay as much stress upon its less difficult features for reasons that are perhaps obvious. Similarly, if a case becomes the subject of a dispute in relation to its brief fee it is not unusual in my experience for counsel to then adopt the reverse position in relation to the earlier case whose relative difficulty and importance may safely be depreciated since the fees for it will by then have been conclusively settled.

[6] Concerning the assistance to be gained from comparing the fees paid to Crown counsel in the same case, while there is clear English and Northern Ireland authority for the proposition that they may look to, it seems to me that the help to be gained from them is minimal. In the first place it is not possible to make any accurate comparison of the amount of work carried out on behalf of the prosecution as against that carried out for the defence. Secondly, whatever may be the value of such a comparison in England and Wales where there appears to be a procedure for Crown counsel to appeal to an independent body a fee proposed by the prosecution service if counsel considers it to be too low, I am not aware of any such arrangement here. For many years it has been proposed by the Northern Ireland Bar that there ought to be an independent review mechanism where proposed prosecution fees are disputed and discussions have taken place at various times about devising such but so far as I am aware none has ever been put in place. The result of that lacuna is that counsel instructed by the prosecution are ultimately obliged to settle for whatever fees the prosecution service is willing, after discussion, to pay them and the absence of any independent review procedure is well known at the Bar to have had an enduring depreciating effect over the years upon the fees paid to prosecuting counsel when compared to those paid to those appearing for the defence who happily enjoy mechanisms for the review of legal aid defence fees including the procedure being applied here. I therefore do not regard a comparison of prosecution and defence fees paid in any Northern Ireland case as being of much more than passing interest in the assessment of the proper defence fees for the same case.

[7] The real difficulty in this case, both for counsel and solicitors, is that of attempting to apportion the work done *pro bono* in order to persuade the CCRC that the matter ought to be referred back to the Court of Appeal as against the work done thereafter. It is not disputed that, as the expression "*pro bono*" conveys, the work undertaken before legal aid was secured following the CCRC reference to the Court of Appeal cannot be the subject of legal aid remuneration. It is also quite clear from the description of the way in which this case was painstakingly researched, prepared and submitted to the CCRC that a very significant proportion of the overall work must have been done at the *pro bono* stage. The work in the case before the Court of Appeal really involved the presentation to it of the material which had already been

researched, gathered and presented *pro bono* to the CCRC and for which no legal aid fee can be claimed.

[8] Having said that, the effective presentation of the material to the Court of Appeal both before and at the hearing was clearly a difficult and lengthy process. I have already said that the scientific area of acoustics is not one with which criminal or other lawyers are familiar and the same may equally be said of those courts and tribunals who have to grapple with such issues on the rare occasions when this arcane science is material to their decisions. The fact that the case took three days to argue and resulted in a judgment of the Court of Appeal extending to 28 pages is eloquent testimony to the proposition that this can by no means have been a straightforward matter from the point at which it was referred to the Court of Appeal which is the only period with which I can be concerned.

[9] It is of course impossible to scientifically calculate the appropriate brief fee. I am however perfectly satisfied that the figure of £15,000 allowed to senior counsel on the brief was quite insufficient to represent fair remuneration for the legally-aided aspect of this case. It seems to me that the reasonable brief fee cannot be less than that allowed by the Master in Magee and should perhaps be somewhat more but before reduction is made for the substantial *pro bono* element of the work. Again the material available is insufficient to enable a mathematical apportionment. Doing the best I can to reflect all the factors in the case it seems to me that the appropriate brief fee for senior counsel after excluding the *pro bono* work is £30,000 and I vary the Master's award upwards to that figure. In addition I allow the various other sums which the Master allowed to senior counsel and which were not the subject of this appeal amounting to £5,570, a total of £35,570.

The solicitors' claimed fees in O'Doherty

[10] This aspect of the appeal presents even greater difficulties than those associated with the assessment of counsel's fees. I say that because it is very difficult for a court to effectively review the number of hours claimed and I bear closely in mind the observations of Carswell LJ in Adair quoted above that in matters particularly within the knowledge and expertise of the taxing master the court should not lightly overturn his decision. In the course of his written decision on the review, between pages 18 and 22, the Master expressed trenchant criticism of the solicitors on a number of fronts, principally that they had failed to disaggregate the *pro-bono* work from the work for the Court of Appeal, that the time that they claimed to have spent on certain aspects of the work was unacceptably long and that their time recording was insufficiently precise and the Master gives a number of examples in support of his dissatisfaction. However, albeit with some diffidence, I conclude that the Master has been somewhat severe in his approach to the matter. He does not seem to me to make sufficient allowance for the extremely difficult, technical and unaccustomed area of acoustics with which this appeal was principally concerned and the figure of 70 hours which he chose in substitution for the solicitors' claimed

number of 224 hours preparation for the appeal is itself a "ball-park" figure or, as he described it, a "value judgment". It seems to me that that figure is, on the material available, rather conservative and possibly depressed by the Master's overall unhappiness with the solicitors' approach to time recording and the times claimed to have been spent on particular tasks. Doing the best I can I assess a reasonable figure for solicitors' hours at 125.

[11] In relation to the question of uplift, the judgment of the Master does not record that any submissions were advanced by the solicitors at the review hearing other than in relation to the question of hours spent which I have dealt with in the preceding paragraph. Equally no reference to altering the 100% uplift allowed in his initial decision is made by the Master and he applies that percentage in his calculation on the review. However, on the hearing of the appeal before me counsel submitted that the claim of 150% by way of uplift (or even more) would be appropriate having regard to the observations of Pringle J in John J Rice and Company v The Lord Chancellor [1997] NIJB 27 where at 34b he said:

> "This trial was an exceptional one and an uplift of 100% is clearly insufficient. I consider that, although I am hesitant to depart from the uplift measured by the experienced appropriate authority, there should be an uplift of 165%. This still leaves room beneath the upper limit of 200% for a higher uplift in a case where, as well as exceptional circumstances comparable to those in the present case, there was also exceptional competence and dispatch."

It may well be that the particular solicitor concerned in the work for the appeal and who represented his firm before the Master at the review lost sight of his claim for an uplift in excess of 100% in the course of the Master's searching scrutiny of the recording of his hours. But since I am entitled to look at the matter afresh and the grounds of appeal are wide enough to cover the point it seems to me that this clearly was an exceptional case for all the reasons discussed above and that an uplift of 100% does not fairly represent the solicitors' entitlement. This was not a murder case unlike that with which Pringle J was concerned but I do not consider that much reduction should be made on that account alone since many murder cases are less difficult and require considerably less research than did O'Doherty. I consider that the uplift of 150% claimed by the solicitors is reasonable and I vary the Master's award accordingly. The application of my increased figures for hours and percentage uplift when taken together alter the figure of £10,000 awarded by the Master for preparation to one of £13,312.50 to which I add the additional items of claim allowed by the Master which were not the subject of appeal making a total revised figure of £15,912.50.

The nature of the second Appeal - R v Walsh

[12] This was another case in which, as a result of protracted representations to the CCRC and ultimately the threat of an application for judicial review, the case was referred back to the Court of Appeal. It involved a challenge to the conviction of Mr Walsh for allegedly possessing a coffee jar bomb for which he had been sentenced to 14 years imprisonment. A previous appeal to the Court of Appeal had been unsuccessful as indeed was the appeal that followed upon the reference by the CCRC. As in the O'Doherty case a certain amount of *pro bono* work had been undertaken before the CCRC could be persuaded to make the reference although again the relative extent of this work is not very well documented. Counsel who appeared for the appellant counsel before the Master on the review is recorded as having said that "Senior counsel had been, *pro bono*, to the Commission and had prepared the dossier to go there. But he was not as heavily involved *pro bono* here as in O'Doherty". It seems that the hearing of the relevant appeal lasted two days and that the papers were relatively voluminous.

Counsel's claimed brief fee in Walsh

[13] Senior counsel's fee was marked at £55,000, the same as that which he had marked in the Magee case in which he was allowed and accepted £40,000. It must therefore be taken that, contrary to the submissions that were made before the Master, senior counsel had previously equated his work in the Magee and Walsh cases at the time of marking those briefs. Interestingly however, by the time that the review before the Master in Walsh came on, it appears that he had re-ordered the importance of those cases for the purposes of his then submissions by placing Walsh ahead of Magee in terms of difficulty. The information available to me is insufficient to enable my own evaluation of the comparative difficulties of Walsh and Magee but at one time senior counsel (who in theory should be in the best position to know) appears to have equated the two and also to have been content to accept a brief fee of £40,000 in Magee. I have earlier quoted counsel's own evaluation of the many difficulties inherent in Magee at the time when the brief fee in that case was being assessed and comparison of those factors with those apparent in Walsh does not encourage me to the view that Magee and Walsh are in fact be equated. There is too the difficulty of estimating the amount of work done *pro bono* which is important in two respects. In the first place work done *pro bono* obviously cannot be the subject of this claim and in the second place the existence of the work done *pro bono* meant that when the same counsel was subsequently instructed on the appeal his detailed prior *pro bono* familiarity with the case was bound to have considerably simplified and shortened the time spent in preparing for the legally-aided hearing. Making the best estimate that I can on the incomplete information available to me I have concluded that the figure of £15,000 allowed by the Master was insufficient in all the circumstances and I therefore substitute for it the figure of £25,000, to which must be added the other figures allowed by the Master which were not the subject of this appeal which means that the figure of £20,570 will be varied to £30,570.

The solicitors' claimed fees in Walsh

[15] It is not apparent from the Master's judgment on the review that his initial allowance of 60 hours for preparation as against the claim of 75 hours was the subject of challenge before him although it is contained in the Notice of Appeal before me. It would appear that the solicitors confined themselves before the Master to an objection to his uplift of 100%. Clearly there was a degree of exceptionality derived from the fact that this case had come to the Court of Appeal by way of the CCRC but otherwise it does not appear to have been remarkable, except perhaps for the fact that the hearing lasted two days. With some hesitation I have concluded that the uplift should be adjusted to 125% but I do not alter the hours assessed by the Master since I have neither the material nor the expertise to enable me to substitute any estimate of mine for his in a narrow debate between 60 hours and 75 hours. Accordingly the figure assessed by the Master for uplift is increased to £6,436.95, an addition of £1,287.45 to his total of £12,000, making £13,247.445 in all.

Finally

[16] The brief fees of junior counsel will be two thirds of the revised brief fees for senior counsel in each of these two cases and where counsel or solicitors are registered for VAT that element will be payable in addition. As the appeals have both succeeded I follow the practice adopted by MacDermott LJ and Pringle J in previous cases by directing that the costs of both appeals be paid out of public funds.