Neutral Citation No. [2012] NIMaster 4 | ***Ref:*** **RED**

Judgment: approved by the Court for handing down | ***Delivered:*** **22/3/2012**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION UNDER THE LEGAL AID FOR CROWN COURT PROCEEDINGS (COSTS) RULES (NORTHERN IRELAND) 2005

MASTER REDPATH

[1] This application relates to the status of re-determination decisions purportedly made under the Legal Aid for Crown Court Proceedings (Costs) (Northern Ireland) Rules 2005 (the 2005 Rules).

[2] The operation of these Rules in relation to Very High Cost Certificates (VHCCs) has been much in the public domain in recent months. In my view, a good deal of confusion seems to exist concerning the operation of these Rules. I feel therefore it would be useful to give some brief background information concerning the operation of the Rules in relation to VHCCs before going on to discuss the issues arising in these applications.

[3] The aim of the Rules was clearly to provide greater predictability as to how much money would be required to cover the cost of Criminal Legal Aid and the original intention appears to have been to pay lawyers on a standardised basis. However it seems to have been accepted by the Lord Chancellor's Department that a certain category of cases would not be adequately remunerated under the Rules and the Taxing Master was enabled under Rule 4 of the Rules read in conjunction with Rule 17 to exercise a discretion as to the level of fees after taking into account the relevant circumstances including the nature, importance, complexity or difficulty of the work and the time involved, within the context also of Article 37(2) of the Legal Aid and Assistance (Northern Ireland) Order 1981 (as amended).

[4] In the case of R v Gorman I gave reasons for the assessments in that case and the same reasons apply to assessment of all VHCC cases. These reasons were circulated in the Spring of last year. In these reasons I set out in detail my approach to assessing fees in these cases. I do not believe that these reasons have ever been published and accordingly I am publishing them with the judgment.

[5] It appears to have been envisaged at the time of the promulgation of the Rules that there would be approximately 5 of these VHCCs issued each year. In fact it appears there were in the region of 60 issued each year which

gives rise to approximately 180 assessments per annum. All of these related to complex, sometimes very lengthy cases, and the Taxing Office became inundated with VHCCs cases for taxation. Not surprisingly the result of this was that by the end of 2008 there were over 300 claims awaiting processing in which solicitors and counsel had not been paid; even though the trial may have taken place some years prior to that date, and even though they may already have paid income tax and VAT on the fees they had charged. Accordingly the lawyers involved indicated that they would no longer be in a position to accept instructions in these cases until they were assured that the payment of their fees would take place timeously.

[6] In order to deal with the situation, I was assigned to provide judicial assistance to the Taxing Master together with additional administrative staff, in an endeavour to clear this backlog. In addition the Lord Chancellor's Department agreed to pay 60% of the fees as marked by the lawyers as an interim payment with any excess to be recovered in due course for those who had already submitted their returns and for returns submitted for a period thereafter.

[7] Under the original Rules, the procedure for determining these fees was fourfold. There was an initial assessment dealt with on the papers only. As I have already said my method of assessing these fees was set out in the Gorman case.

[8] Counsel or solicitors dissatisfied with the assessment could ask for a re-determination. At the re-determination hearing counsel and solicitors were given the opportunity of addressing the court, producing the full papers in the case and giving reasons as to why the original assessment was considered inadequate by them. This perhaps, unsurprisingly, led in a large number of cases to an increase in the fees assessed and in some cases to a considerable increase in the fees assessed. Upon re-determination, where the claimants so requested, the court was under a duty to give reasons. Those dissatisfied with the result of the re-determination, then had an opportunity to appeal further to another Master; and if they were dissatisfied with the outcome of that appeal, to appeal to a High Court Judge.

[9] Both Master Bailie and myself considered this to be an unsatisfactory and overly cumbersome process, and following representations to the Lord Chancellor's Department the Rules were amended in 2009 essentially to cut out the appeal from one Master to another, and to provide for the Department of Justice (the Department), who had taken over responsibility for these matters, to be put on notice of any application for a review, (previously called a re-determination), and the opportunity to make submissions at the review hearing.

[10] Unfortunately a number of cases were listed before me as re-determinations under the 2005 Rules when they should have been listed as reviews under the amending 2009 Rules. The cases are as follows:-

Case	**Claimed**	**Assessed**	**Re-determination**
R v Clarke A Solicitors	£59,093.75 + VAT	£22,000 + VAT	£45,000 + VAT
R v Notorantonio B Solicitors	£164,580.13 + VAT	£125,000 + VAT	£140,000 + VAT
R v Sayers Mr C QC Mr D BL	 £241,890 + VAT £123,615 + VAT	 £40,000 + VAT £27,000 + VAT	 £60,000 + VAT £40.000 + VAT
R v McFarland Mr C QC Mr E BL	 £64,106.54 + VAT £41,613.59 + VAT	 £10,000 + VAT £7,000 + VAT	 Decision pending outcome of this application Decision pending outcome of this application
R v Hannaway Mr C QC Mr B BL	 £55,700 + VAT £34,894.17 + VAT	 £30,000 + VAT £22,000 + VAT	 £40,000 + VAT £30,000 + VAT
R v Petraitis U Solicitors Mr G BL (Leading Junior) Mr H BL	 £41,541.42 + VAT £38,967.50 + VAT £39,344.33 + VAT	 £30,000 + VAT £25,000 + VAT £22,000 + VAT	 Decision pending outcome of this application £32,000 + VAT £25,000 + VAT
R v McCracken Mr I QC	 £225,000 + VAT	 £70,000 + VAT	 £130,000 + VAT

Mr J BL	£150,000 + VAT	£50,000 + VAT	£85,000 + VAT
<u>R v Johnston</u> Mr C QC	£245,520 + VAT	£60,000 + VAT	£120,000 + VAT
Mr L BL	£150,000 + VAT	£40,000 + VAT	£80,000 + VAT
<u>R v Seagar</u> Mr K QC	£225,000 + VAT	£60,000 + VAT	£120,000 + VAT
Mr G BL	£150,000 + VAT	£40,000 + VAT	£80,000 + VAT
<u>R v Hughes</u> Mr M QC	£212.515.60 + VAT	£50,000 + VAT	£175,000 + VAT
Mr N BL	£153,175.56 + VAT	£40,000 + VAT	£120,000 + VAT
<u>R v Hughes</u> Mr O BL	£154,226.51 + VAT	£40,000 + VAT	£120,000 + VAT
<u>R v Hughes</u> Mr C QC	£238.154.90 + VAT	£50,000 + VAT	£175,000 + VAT
Q Solicitors	£140,845.98 + VAT	£40,000 + VAT	£120,000 + VAT
<u>R v Kelly</u> Mr P BL (Leading Junior)	£242,055 + VAT	£50,000 + VAT	£175,000 + VAT
Mr J BL	£161,097.18 + VAT	£40,000 + VAT	£120,000 + VAT
<u>R v Kincaid</u> Mr R QC	£123,310 + VAT	£65,000 + VAT	£85,000 + VAT
Mr H BL	£79,433.33 + VAT	£48,000 + VAT	£60,000 + VAT
<u>R v Ching</u> S Solicitors	£58,646.07 + VAT	£58,646.07 + VAT	£70,549.57 + VAT

R v Mackle T Solicitors	£132,326.23 + VAT	£110,000 + VAT	£125,000 + VAT

In the R v Ching the solicitor's fee was increased as incorrect rates had been charged and some work not claimed for.

[11] As I have said, unfortunately, the Department were not put on notice of these re-determination hearings. This became apparent and they now wish to intervene.

[12] It seemed to me at an early stage in this process that the important thing here was not so much the status of these reviews, but the means by which these fees were assessed. I therefore suggested that the parties fast track one of these cases to be heard on appeal by a High Court Judge for determination of that issue. This proposal did not find favour with the parties and accordingly all of Counsel's reviews were listed before me to allow the objections raised by the Department to be aired. For a number of reasons this took quite a time to organise and eventually came on for hearing in September 2011. Mr Swift QC was instructed by the Department and Mr Plemey QC instructed by those counsel affected by these applications. The solicitors involved were put on notice but made no representations at the hearing.

[13] Although the arguments in the case were lengthy and complex, the matters of substance really came down to two issues: that of appropriate remedy and whether the re-determinations were void or voidable.

[14] In addition the Bar attempted to argue, as a preliminary point:-

1. The Department had not produced evidence that the contested decisions were not in fact Rule 17A reviews under the 2009 Rules;
2. That the 2009 Rules permitted the Taxing Master to conduct these matters as Rule 13 redeterminations.

As regards point 1 I clearly dealt with these matters as Rule 13 redeterminations and at no stage did I believe that these were in fact Rule 17(a) reviews. I believe that the point is without merit.

As regards point 2 I accept the Department's argument that the plain intention of the amendment to the Rules was to replace, and not compliment the Rule 13 procedure. I believe that this is clear from any reading of the rules, the amendments and transitional provisions. I therefore believe that this point also lacks merit.

The appropriate remedy

[15] The first of the matters was whether as argued by the Department, their application was the appropriate way of dealing with this issue, or as argued by the affected counsel, that the matter should properly be dealt with by way of judicial review.

[16] Mr Swift QC for the Department argued that the decisions taken were not amenable to Judicial Review and that the re-determinations as held were either void or alternatively irregular and should be set aside ex debito justitiae. Having taken into account the transitional provisions in the 2009 Rules he argued, and I accept as I have already pointed out, that where an assessment had been made by the Taxing Master before 20 July 2009 both the initial assessment and any re-determination/onward appeal should be conducted in accordance with the 2005 Rules.

[17] Where however an assessment has been made by the Taxing Master after 20 July 2009 even though the initial assessment has been made on the basis of the 2005 Rules, any review of that assessment must be conducted within the procedure set out in the 2009 Rules.

[18] The jurisdiction regarding the taxation of costs is found in Section 60 of the Judicature (Northern Ireland) Act 1978:-

> "60-(1) The jurisdiction of the High Court, the Court of Appeal and the Crown Court in relation to the taxation of costs shall be vested in the Master (Taxing Office) or such other statutory officer as may be designated for the purpose by the Lord Chief Justice and shall be exercised in accordance with rules of court".

The Taxing Office is a department of the Supreme Court within Section 68 and Schedule 2 column (1) of the Judicature Act 1978. The Master (Taxing Office) is not within the general definition of a Master for the purposes of the Rules of the Court of Judicature (Northern Ireland) Rules 1980 see Order 1, Rule 3.

> "(1) `masters' means a master or registrar of the Supreme Court mentioned in the first column of schedule 3 to the Act other than the Master (Taxing Office);
>
> (2) in these Rules, unless the context otherwise requires, the court `means the High Court or any one or more judges thereof whether sitting in court

> or in chambers or any master but the forgoing provision shall not be taken as affecting any provision of these Rules or, in particular, Order 32 Rule 11, by virtue of which the jurisdiction of the master is defined and regulated".

Order 32 Rule 11 provides for the jurisdiction of masters (other than the Taxing Master).

> 11-(1) a master shall have power to transact all such business and exercise all such jurisdiction as maybe transacted and exercised by a judge in chambers, except in respect of the following matters and proceedings, that is to say …
>
> (c) applications to review any taxation of costs.

Order 62 Rule 19 of the RSC defines the Taxing Master Powers of the Act provides:-

> Who may tax costs
>
> "19-(1) subject to paragraph (2), the Taxing Master shall have power to tax (a) the costs of or arising out of any proceedings to which this order applies (b) any other costs the taxation of which is ordered by the court.
> (2) Whereby or under a statutory provision any costs are be taxed by the Master of the Supreme Court, only the Taxing Master shall tax these costs".

Any reference to the Supreme Court above has now been amended to the Court of Judicature in Northern Ireland. I furthermore make no distinction between my status in taxing these costs and that of the Taxing Master.

[19] A considerable amount of English case law was quoted to me by both sides which made it clear I felt that in England and Wales the Taxing Master is not subject to Judicial Review. See inter alia R v The Supreme Court Taxing Officer, ex parte John Singh & Company Court of Appeal Civil Division 31 July 1996 (unreported). I am not sure these authorities were of any considerable assistance in the decision I have to make.

[20] To decide the issue in this jurisdiction I do not feel that it is necessary to go beyond the legislative provisions I have already quoted and case law arising within this jurisdiction.

[21] There have been two decisions in this jurisdiction in relation to taxation of criminal costs both of which related to costs before the Court of Criminal Appeal which reinforce this view. They are Re: Weir & Higgins Application [1988] NI338, and Re Rice's Application [1998] NI 265(CA).

[22] In Re Weir & Higgins Application [1988] NI338 it was held that there were three possible methods of reviewing a taxation of costs by the Taxing Master. The first mechanism is a review of the taxation under Order 62 by a single judge of the High Court, available under Order 62, Rule 35-(1).

> "Any party who is 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 whether in whole or part provided that one of the parties to the taxation proceedings have requested the Taxing Master to state the reasons for his decision in accordance with the Rule 34(4)".

[23] The High Court can of course also review the decisions of a Taxing Master by use of the courts inherent jurisdiction.

[24] The third method of review would be by Judicial Review but only against the exercise of the officer's statutory powers designated independently of his Supreme Court duties.

[25] Weir's application involved fees under Section 28 of the Criminal Appeal (Northern Ireland) Act 1980. In the Weir case Lord Lowry LCJ held that the exercise of the Section 28 power did not fall within any of the three categories listed above. It was not an Order 62 decision nor was it an exercise of a delegated power. He held that the Master was not a persona designata, as he was acting as an officer of the court but not under delegated authority and as such was not subject to Judicial Review. In that case the court held reluctantly that there was in fact no review mechanism for the Master's decisions under Section 28. That lacuna was subsequently addressed. This decision was upheld subsequently in Rice's application referred to above. In Rice's application Lord Carswell LCJ on page 9 of the judgment quoted extensively from the Weir judgment as follows:-

> "Lord Lowry LCJ turned finally to consider whether a decision under section 28(2) can be judicially reviewed. He accepted the proposition, whose validity is not challenged by counsel for the

applicant, that in order for it to be subject to judicial review the Master must be performing a function which is independent of his duty as an officer of the court, in which case he is said to be a persona designata. He therefore posed the issue in the following terms at page 353E:

"The problem for our consideration is whether the Taxing Master, under section 28(2), is to be viewed as a statutory officer of the Supreme Court acting as such when assessing costs incurred in a part of the Supreme Court, namely, the Court of Appeal, or as a *persona designata* appointed to act independently of the judges in discharging a function analogous to that, for example, imposed by the Act of 1845. It will be noted that, in excluding Order 62, we have held that the Taxing Master exercises his own jurisdiction and not a delegated jurisdiction; we have therefore to say which point is decisive, the fact that the Taxing Master's role is here independent of the judges or the fact that he is an officer of a superior court making a decision about costs incurred in that court".

Having referred to a number of authorities, which were in our opinion apposite to deciding the issue, Lord Lowry came to the conclusion which he and the other members of the court had reached. It is plain that he felt compelled somewhat unwillingly to reach this conclusion by the logic of his findings, for in the concluding part of the judgment he expressed the strong view that a modern system of assessment, review and appeal was required, saying of the existing provisions that –

"the machinery of section 28(2) is indeed rusty and constitutes a very blunt instrument for administering an important part of the criminal legal aid process."

The court's conclusion was that the Master was not a persona designata, for he was acting as an officer of the court (although not under delegated authority), and as such was not subject to judicial review. Lord Lowry appreciated the consequence of the finding of the court that the Master was not acting within

> Order 62 nor under delegated authority, but yet was not a persona designata. He expressed this in a passage at page 355E:
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> "To hold that the Taxing Master is not operating within Order 62 and that at the same time he is not acting as a *persona designata* would place him in territory where, although not a delegate of the Court of Appeal or the High Court, he is nevertheless acting as a Master not subject to judicial review. We accept that this is the result of the 1978 amendment, now embodied in the 1980 Act. We could understand, without unequivocally accepting, the suggestion that, if the Court of Criminal Appeal had remained and the Act had merely transferred the assessment function to the Taxing Master, the latter might for the purpose of section 28(2) have become a *persona designata*. But the concept is much harder to entertain when the main jurisdiction belongs to the Court of Appeal and the assessment jurisdiction to its statutory officer. We consider it impossible to say of the Taxing Master as Brett LJ said of the Taxing Master in the Sandback case supra, that in allowing expenses incurred in the Court of Appeal he - `does not act as a Master' or, as was said of the judge in R v Hayward supra, that he does not represent the court to which he is attached'".

[26] In exercising my jurisdiction under the 2005 Rules I hold that I am exercising a jurisdiction analogous to that exercised under Section 28 of the Criminal Appeal (Northern Ireland) Act 1980, albeit in relation to the Crown Court and not the Court of Appeal, but I think for the purposes of this exercise there may be no distinction. I hold that I am bound by the decisions in Weir and Rice and that accordingly the remedy of Judicial Review is not available in these particular cases. I pointed out to counsel that the Rules provide of course, for an Appeal process which ultimately ends up in an Appeal from a Master to a High Court Judge. I cannot believe that the High Court Judge in exercising that jurisdiction is not exercising a High Court jurisdiction, and I cannot believe that the judge exercising that jurisdiction, would in turn be amenable to judicial review in so doing.

[27] In particular the provisions of S60 of the 1978 Act convince me that the Master (Taxing) has a High Court, Court of Appeal and Crown Court jurisdiction to tax cost vested in him and as such is a Master of the Court of Judicature in Northern Ireland exercising a High Court jurisdiction in relation to taxation of costs and not amenable to judicial review.

Void or Voidable

[28] I now come to the issue of whether or not these decisions are void or voidable.

[29] The Rules provide, at Rule 14(6):-

> "The Taxing Master may, and if so directed by the Lord Chancellor either generally or in a particular case shall, send the Lord Chancellor a copy of the notice of appeal together with copies of such other documents as the Lord Chancellor may require".

This now applies to reviews under the amended rules.

[30] This then provides an opportunity for the now Department of Justice to intervene in reviews. No such directions were issued in relation to these either generally or in particular cases by the Lord Chancellor's Department or the Department, but as a result of my not being adverted to the fact that these were reviews under the amended Rules I gave no consideration to the exercise of my discretion as to whether or not to involve the Department. I made it clear from the outset of the hearing that had I addressed my mind to this issue in these cases I most certainly would have referred the matter to the Department with a view to them intervening.

[31] The Department argued that there were two grounds for setting aside these re-determinations:-

(a) On the grounds that they were void at the outset (see Nicholls v Kinsey judgment of the Court of Appeal in England and Wales 23 January 1994) or
(b) If they were valid at the outset ex debito justitiae see Issacs v Robertson [AC 97].

[32] The argument continued that it did not matter whether the purported Rule 13 re-determinations were regarded as void from the outset or voidable but they could still be set aside, as I have already said, ex debito justitiae. It was submitted on behalf of the Department that the Nicholls v Kinsey approach was appropriate in the present facts because the decision "bore the brand of invalidity upon its forehead" and "it expressly incorporated its own death sentence". The argument was further advanced, and I think this is correct that the decision in Nicholls v Kinsey neither turned or depended on the fact that the lower court was not a court of unlimited jurisdiction. What was important was the fact that the court order was on its face, outside the scope of its jurisdiction.

[33] It seems to me that on my reading of the rules, had these matters been properly listed before me, and had I decided in my discretion (in the absence of any Lord Chancellor's directions in these cases) to proceed without the intervention of the Department these decisions may have been unimpeachable. However, I candidly concede that I did not turn my mind to the exercise of that discretion and accordingly, having taken all the arguments into consideration, I am of the view that these decisions, as a result of what has occurred, are fundamentally flawed and cannot be seen as anything other than void. The representatives of the affected counsel endeavoured to argue that given all the facts in the case and given that everyone involved was acting in good faith, that I should exercise a discretion to allow these re-determinations to stand. Even if I did have a discretion to refuse to set them aside on the grounds of delay, prejudice etc as argued I would not so exercise it. Accordingly, I am holding that these re-determinations are void and as a consequence will have to be re-heard.

[34] Accordingly, if it is the wishes of the affected counsel, and the solicitors, to proceed with these reviews I will direct that the Taxing Office put the Department of Justice on notice, provide them with the relevant paperwork, and re-list the matters for re-hearing. There will of course be considerable expense involved in all of that and even with the intervention of the Department, having reviewed the papers in full in these cases and upon hearing the Department's and the lawyers submissions, it may or may not be that there will be significant changes to the decisions that I have already taken. That however remains to be seen in due course.