Judgment

Title:	DMPT -v- Taxing Master Moran & ors
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Judgment by:	Laffoy J.
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Judgments by	Link to Judgment	Result	Concurring
Laffoy J.	Link	Appeal allowed	Murray J., Hardiman J., O'Donnell Donal J., Dunne J.

THE SUPREME COURT

JUDICIAL REVIEW

[Appeal No. 422/06]

Murray J.

Hardiman J.

O'Donnell J.

Laffoy J.

Dunne J.

BETWEEN

DMPT

Applicant/Appellant

AND

TAXING MASTER CHARLES A. MORAN,

MEMBERS FOR THE TIME BEING OF THE SUPERIOR RULES COMMITTEE,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

C.T.

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTIES

Judgment of Ms. Justice Laffoy delivered on the 29th day of April, 2015

Factual and procedural background

1. The issues on this appeal between the appellant and the respondents (being the Taxing Master and other State parties) have arisen out of the taxation of costs for which the appellant had become liable in matrimonial proceedings between the appellant and the first notice party. There were two orders for costs which were the subject of the taxation process, namely:

> (a) an order of the High Court (Lavan J.) dated 28th November, 2001 awarding the first notice party her costs (including reserved costs) against the appellant; and
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> (b) an order of the Supreme Court dated 15th October, 2002 awarding the first notice party her costs of the appeal against the appellant.

The taxation process in relation to the taxation of the costs of the first notice party under those orders was at hearing before the Taxing Master on 14th October, 2003, on three days in June 2004 and again on 8th July, 2004, on which last date the Taxing Master gave his decision orally as to the costs he was allowing and the costs he was disallowing. Although requested by the appellant's legal cost accountant to give reasons for his decision, the Taxing Master did not do so.

2. Subsequently, on 29th July, 2004, objections as to the level of costs allowed by the Taxing Master in relation to the taxation of the costs pursuant to the High Court order, but not the Supreme Court order, were filed on behalf of the appellant. The objections related to the costs allowed on three items in the High Court bill of costs, namely: the instructions fee; postage and telephone expenses and sundries; and the fee charged by a firm of chartered accountants. Although he initiated the procedure, the appellant did not pursue those objections by way of review before the Taxing Master pursuant to Order 99, rule 38 of the Rules of the Superior Courts 1986 (the 1986 Rules), as he might have. Instead, the appellant applied to the High *Court ex parte* on 1st November, 2004 for leave to apply by way of judicial review for certain reliefs.

3. By order of the High Court (McKechnie J.) made on 3rd November, 2004, the appellant was given leave to apply by way of judicial review for certain reliefs on the grounds set out in the order. Having regard to the issues which arise on the appeal, it is convenient to record at this juncture the contents of that order. The reliefs which the appellant was given leave to apply for were:

> (1) the following declaratory reliefs and reliefs ancillary thereto:
>
> > (a) a declaration that Order 99, rules 38(1), (2) and (3) of the 1986 Rules are*ultra vires* and void insofar as they require the appellant to make application to the Taxing Master by way of objection to the decision of the Taxing Master himself prior to making application to the High Court for review of the said decision, or, alternatively,
> >
> > (b) a declaration that the said provisions are incompatible with the European Convention on Human Rights (the Convention) pursuant to s. 5(1) of the European Convention on Human Rights Act 2003 (the Act of 2003), and/or
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> > (c) an order of prohibition restraining the Taxing Master from further embarking on an objections procedure in proceedings between the appellant and the first notice party, and/or
> >
> > (d) an order of *certiorari* setting aside such proceedings if any as have been conducted on foot of such an objections procedure;
>
> (2) an order by way of *mandamus* and/or a mandatory injunction requiring the Taxing Master to give reasons for his decision dated 8th July, 2004;
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> (3) an order of *mandamus* or, alternatively, a mandatory injunction requiring the Taxing Master to make a written record of his decision

dated 8th July, 2004, or, alternatively, an order pursuant to Order 84 of the 1986 Rules; and

(4) subject to the reliefs as aforesaid, damages for breach of duty, including statutory and constitutional duty and/or damages for breach of the Convention pursuant to s. 3(2) of the Act of 2003.

4. By the order of 3rd November, 2004 the appellant was given leave to apply for the foregoing reliefs on the following grounds:

(i) that Order 99, rules 38(1), (2) and (3) of the 1986 Rules are *ultra vires* and void insofar as they require the appellant to make an application to the Taxing Master by way of objection to the decision of the Taxing Master himself prior to the making of an application to the High Court for review of the said decision by reason of the fact that the said provisions have no or no sufficient statutory basis and are *ultra vires* the terms of s. 36 of the Courts of Justice Act 1924 (the Act of 1924), s. 68 of the Courts of Justice Act 1936 (the Act of 1936) and ss. 14 and 48 of the Courts (Supplemental Provisions) Act 1961 (the Act of 1961) and/or otherwise not authorised to be made and/or confirmed by the other State parties;

(ii) that the said provisions are contrary to the appellant's rights pursuant to the Constitution, in particular his right to fair procedures pursuant to Article 40.3 of the Constitution, in that they require the appellant to apply to the Taxing Master in the first instance by way of review of the decision of the Taxing Master, in breach of the requirements of natural and/or constitutional justice and, in particular, of the doctrine of *nemo iudex in causa sua*, or alternatively by reason of the fact that the said provisions require such an application to be made as a pre-requisite to application being made to the High Court by way of review of the Taxing Master's decision on costs and are therefore an unjustified impediment to the appellant having access to the courts, contrary to Article 40.3 and/or Article 34 of the Constitution and that further, or alternatively, the said provisions are incompatible with the Convention pursuant to the Act of 2003 by reason of breaches of the right to a fair and public hearing by an independent and impartial tribunal pursuant to Article 6 of the Convention, and/or as an unjustified restriction on the right to an effective remedy contrary to Article 13 of the Convention;

(iii) that, without prejudice to the foregoing, the appellant at the conclusion of the Taxing Master's decision dated 8th July, 2004 requested reasons for the said decision and, notwithstanding the said request, the Taxing Master wrongfully failed to give such reasons contrary to Article 40.3 of the Constitution and/or Article 6 of the Convention; and

(iv) that the appellant has and/or will suffer loss and damage as a result of being required to submit to the objections procedure as a preliminary requisite in order to have access to the High Court to obtain relief against the decision of the Taxing Master.

5. In his affidavit grounding the application for leave, which was sworn on 29th October, 2004, the appellant averred that the total expense which would be incurred by him in connection with the procedure before the Taxing Master under rule 38(1) would be of the order of €42,350 inclusive of VAT. That assessment has

not been disputed. At that stage, the objections and the review application had been listed for hearing for two days in November 2004. The appellant complained of the magnitude of the inconvenience and expense that would be occasioned to him in that process.

6. The dispute the subject of the proceedings was, in reality, a dispute between the appellant, on the one hand, and the Taxing Master and the other State parties who were named as respondents, all of whom were represented by the Chief State Solicitor, on the other hand. The first notice party did not participate in the proceedings, either at first instance or on the appeal. As I understand it, neither did the second notice party.

7. The application for judicial review was heard in the High Court by McGovern J., who delivered judgment on 31st July, 2006. In that judgment, which will be considered later, McGovern J. held that the reliefs sought by the appellant should be refused. Subsequently, that decision was given effect to in an order dated 3rd October, 2006, from which the appellant has appealed to this Court.

8. At the core of the appellant's case is a fundamental challenge to the provisions of the 1986 Rules which govern the taxation of costs awarded to one party against another party, usually referred to as party and party costs, in civil proceedings in the High Court and the Supreme Court, which provisions are now to be found in Order 99 of the 1986 Rules. While it is necessary to outline the rule challenged (Order 99, rule 38(1), (2) and (3)) in the context of the legislative bases of Order 99 at this juncture, because of the fundamental importance of Order 99 in the administration of civil litigation, I consider it is also appropriate to address the statutory authority for Order 99 and how it has been implemented in depth.

Legislative bases of Order 99

9. In the half century before 1922 the statutory *fons et origo* of the constitution of the Superior Courts in Ireland and the regulation of their administration was the Supreme Court of Judicature Act (Ireland) 1877 (the Act of 1877). Section 61 of the Act of 1877 made provision for the making of rules, to be styled Rules of Court, for carrying the Act of 1877 into effect and, in particular, for certain matters which were therein set out, including at subs. (3):

> "Generally, for regulating any matters relating to the practice and procedure of the said courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein . . .."

By way of explanation, in the context of the Act of 1877, the Supreme Court meant the High Court of Justice and the Court of Appeal in Ireland.

10. In 1905, pursuant to the power contained in s. 61 of the Act of 1877, Rules of Court entitled "Rules of the Supreme Court (Ireland) 1905" (the 1905 Rules) were made. Even though made over a hundred years ago, in general, the provisions in the 1905 Rules are quite similar in many respects to the Rules of Court which now govern the High Court and the Supreme Court, namely, the 1986 Rules, as amended. In particular, as will be demonstrated later, there is amazing similarity between the provisions of the Order in the 1986 Rules which now governs costs, Order 99, which are in issue on this appeal, and the corresponding provisions of Order LXV of the 1905 Rules, which dealt with costs.

11. After 1922, the Act of 1924 cited in the Order of 3rd November, 2004, was enacted for the establishment of courts in this jurisdiction pursuant to the Constitution of Saorstát Éireann. In Part 1 of the Act of 1924 the High Court and the Supreme Court were established. Section 36 dealt with Rules of Court and empowered the Minister for Home Affairs to make rules to be styled "Rules of Court" for carrying Part I of the Act of 1924 into effect. Section 36 provided that, in particular, the rules might cover specified matters, the first matter referred to being "pleading, practice and procedure generally" in all civil cases. It was provided that such rules should be made only with the concurrence of a majority of a committee consisting of judges of the Superior Courts, members of the solicitors profession and members of the Bar.

12. Part VI of the Act of 1936, also cited in the Order of 3rd November, 2004, varied the statutory provisions then in force in relation to the making of rules of court. By 1936, the power to make rules had been transferred from the Minister for Home Affairs to the Minister for Justice. Section 68(1) of the Act of 1936 provided as follows:

> "From and after the passing of this Act the power of making, annulling, or altering rules of court and making new rules conferred by section 36 of the [Act of 1924] shall cease to be exercisable by the Minister for Justice, and in lieu thereof it is hereby enacted that, subject and without prejudice to the provisions of this Act in regard to the fees chargeable in court offices, the said power shall be exercisable by the Superior Courts Rules Committee with the concurrence of the Minister for Justice."

The constitution of the Superior Courts Rules Committee (the Rules Committee) had been dealt with in the immediately preceding section of the Act of 1936, s. 67.

13. Twenty four years after the enactment of the Constitution of Ireland, the courts provided for in Article 34.1 were established by the Courts (Establishment and Constitution) Act 1961 and by the Act of 1961, also cited in the Order of 3rd November, 2004. Section 14 of the Act of 1961 deals with the exercise of jurisdiction by the superior courts and subs. (2) provides as follows:

> "The jurisdiction which is by virtue of this Act vested in or exercisable by the Supreme Court, the High Court, the Chief Justice, the President of the High Court, the Central Criminal Court and the Court of Criminal Appeal respectively shall be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court, and, where no provision is contained in such rules and so long as there is no rule with reference thereto, it shall be exercised as nearly as possible in the same manner as it might have been exercised by the respective existing courts or judges by which or by whom such jurisdiction was, immediately before the operative date, respectively exercisable."

In subs. (1) of s. 14 it is provided that the expression "rules of court" in that section means rules made under s. 36 of the Act of 1924, as applied by s. 48 of the Act of 1961.

14. Sub-section (3) of s. 14, to which the appellant attached some significance, provides:

> "Rules of court may, in relation to proceedings and matters (not being criminal proceedings or matters or matters relating to the liberty of the person) in the High Court and Supreme Court,

> authorise the Master of the High Court and other principal officers, within the meaning of the Court Officers Acts, 1926 to 1951, to exercise functions, powers and jurisdiction in uncontested cases and to take accounts, conduct inquiries and make orders of an interlocutory nature."

While a Taxing Master is a "principal officer" within the meaning of that sub-section, in my view, it is not the case that the authority of the Rules Committee to make the impugned rule, Order 99, rule 38, is derived from subs. (3). Rather it is derived from subs. (2) of s. 14.

15. Section 48 of the Act of 1961, which was obviously intended to be a transitional provision, was concerned with the application of existing enactments, for example, the Courts of Justice Acts 1924 to 1961 and the then existing rules of court to the newly established courts. Sub-section (4) provided that rules of court made under the Courts of Justice Acts 1924 to 1961 and in force immediately before the operative date of the Act of 1961 should have effect subject to certain modifications.

16. In s. 55 of the Act of 1961 it is provided that the provisions set out in the Eighth Schedule are to apply in relation to offices and officers to be attached to the newly established courts. Among the officers attached to the Superior Courts by virtue of the Eighth Schedule are the Taxing Masters, who are ascribed the status of Principal Officer within the meaning of Part I of the Courts Officers Act 1926. Paragraph 19 of that Schedule provides that each of the Taxing Masters shall have and exercise the powers and authorities and perform and fulfil the duties and functions set out in the succeeding sub-paragraphs, sub-paragraph (a) stipulating that they shall have –

> "such powers, authorities, duties and functions as are for the time being conferred on or assigned to them by statute or rule of court".

In the succeeding sub-paragraphs of paragraph 19 it was provided, obviously as a transitional measure, that, unless and until otherwise provided by statute or rule of court, the Taxing Masters should have all such powers, authorities, duties and functions in relation to the High Court and the Supreme Court, as were formerly possessed and performed by the several Taxing Masters of the former Supreme Court of Judicature in Southern Ireland in relation to that court and also –

> "such other powers, authorities, duties and functions as were immediately before the passing of the Act of 1924 vested or imposed by law in or on the several Taxing Masters of the former Supreme Court of Judicature in Southern Ireland".

17. The objectives of the provisions of the Act of 1961 outlined above were clearly two-fold: first, to give statutory authority for the regulation of the procedures in the Superior Courts, including, significantly, liability for costs, by the Rules Committee; and, secondly, to ensure continuity of the existing rules until new rules were brought into force. In fact, following the enactment of the Act of 1961, the Rules of the Superior Courts 1962 were brought into force. Those rules continued in force until they were replaced by the 1986 Rules, made by the Rules Committee on 19th December, 1985 and concurred in by the Minister for Justice on the 17th January, 1986 as S.I. No. 15 of 1986. They came into operation with effect from 1st October, 1986.

Rule challenged as being *ultra vires* in the context of Order 99

18. The rule which the appellant contends is *ultra vires* is rule 38, in particular, sub-rules (1), (2) and (3), of Order 99 of the 1986 Rules. To put the challenged

rule in context, Order 99 deals with costs generally and the various elements of it are segregated into parts.

19. Part IV, which contains rule 14 to rule 37 inclusive, deals with taxation of costs. Rule 14 outlines the powers to tax which are conferred on the Taxing Master, which cover a range of circumstances, including the power to tax the costs of or arising out of any cause or matter in any of the Superior Courts. It is important to emphasise that, while rule 14(e) and rule 15 confer powers on the Taxing Master to tax costs on a solicitor and client basis in the circumstances outlined in each, what this appeal is concerned with is taxation on a party and party basis. The remainder of the rules in Part IV deal comprehensively with the manner in which the taxation process is to be implemented. For example, rule 37 sets out in thirty five sub-rules the general regulations which apply to all taxations. As submitted on behalf of the appellant, essentially the Taxing Master makes allowances or disallowances in respect of the different cost-items claimed in the bill of costs to have been incurred by the party whose costs are being taxed. The final result of the determination of the Taxing Master is a certificate of taxation setting out the costs as taxed. However, before that point is reached, there may be a review of the allowance or disallowance of a particular item or particular items on the basis of the objections of the dissatisfied party, as the wording of rule 38(1) quoted below demonstrates. It is to be noted that rule 33 specifically deals with taxation of solicitor and client costs. Rule 33(3) which is referred to in the judgment of McGovern J. is not relevant to the taxation of party and party costs to which this appeal relates.

20. Part V of Order 99 deals with review of taxation and contains rule 38 only. It is the validity of sub-rules (1), (2) and (3) only which the appellant challenges. The corresponding provision to rule 38 is to be found in rule 66 of Order LXV of the 1905 Rules. A comparison of rule 38(1), (2) and (3) and rule 66(1), (2), (3) of Order LXV discloses no material difference between the two rules. In short, nothing of materiality changed in the eighty one years between 1905 and 1986.

21. Rule 38(1) provides:

> "Any party who is dissatisfied with the allowance or disallowance by the Taxing Master of the whole or part of any items (including any special allowance) may, before the certificate is signed, but not later than fourteen days after the completion of the adjudication by the allowance or disallowance of the entire of the items in the bill of costs deliver to the other party interested therein, and carry in before the Taxing Master his objections in writing to such allowance or disallowance, specifying therein by a list in a short and concise form the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the Taxing Master to review the taxation in respect of the same. The Taxing Master may, if he shall think fit, and upon the application of the party entitled to the costs issue pending the consideration of such objections an interim certificate of taxation for or on account on the remainder of the items in the bill to which no objection has been taken and also for that part of the bill of costs in dispute which the Taxing Master may in his discretion consider reasonable. Such further certificate as may be necessary shall be issued by the Taxing Master after his decision upon such objections."

While a comparison of rule 38(1) and rule 66(1) of Order LXV discloses some textual difference, there is no difference in substance between the two provisions. There was an additional sentence in rule 66(1), which is now reflected in rule 37(35) of Order 99, but nothing turns on that. In this case, the Taxing Master had

issued an interim certificate under Order 99, rule 38(1) in relation to the High Court costs on 4th November, 2004, before having been served with the order of the High Court of 3rd November, 2004, which had stayed the effect of an interim certificate, save to the extent that it related to costs not in dispute, until the determination of the judicial review proceedings. A subsequent dispute in relation to the interim certificate between the appellant, the respondents and the first notice party was resolved by consent and no issue arises on the appeal in relation to it.

22. Rule 38(2) provides:

> "Upon such application the Taxing Master shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if so required by any party, he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. The Taxing Master may, if he thinks fit, tax the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation."

Aside from the inclusion of the last sentence in rule 38(2), which was not in Order 66(2), while there are a few textual differences, there is no material difference between rule 38(2) and rule 66(2) of Order LXV.

23. An important factor is that the last sentence in rule 38(2) has not been applicable since the enactment of s. 27(6) of the Courts and Court Officers Act 1995 (the Act of 1995) which, insofar as is relevant, provides:

> "Without prejudice to the provisions of Order 99, rule 29(12) and (14) . . . on the taxation of a bill of costs (whether on a solicitor and client or party and party basis) no solicitor or legal cost accountant or other cost drawer shall be entitled to any fees, disbursements, charges or expenses in relation to the taxation of costs as against the opposing party, but save as against the party who incurred such fees, disbursements, charges or expenses."

As was held by the Supreme Court in *Gannon v. Flynn* [2001] 3 I.R. 531, subject to the savings in s. 27(6) in relation to rule 29(12) and (14), which were not applicable in that case and are not applicable in this case, that sub-section abolished any power or discretion which the Taxing Master had under the 1986 Rules to award costs in relation to the taxation of costs as against the opposing party. It is worth observing, *en passant*, that, in general, s. 27 varied the powers of both the Taxing Master in relation to the taxation of costs in the High Court and of the County Registrar in relation to taxation of costs in the Circuit Court. Further, subs. (3) conferred a statutory power on the High Court to review a decision of the Taxing Master.

24. A number of features of the review procedure provided for in rule 38(1) and (2) following on from rule 37 stand out and have been the subject of the discussion on the hearing of the appeal, namely:

> (a) the re-consideration and review of his taxation (that is to say, the allowances and disallowances he has made) on the objections of the dissatisfied party being carried in is conducted by the Taxing Master who conducted, and made the determination on, the first stage in the taxation process;

(b) while it is expressly provided that the Taxing Master shall state in writing the grounds and reasons for his decision on the review, there is no similar express requirement in relation to the first stage of the process, when the Taxing Master makes the determination on the allowances and disallowances, except to the extent stipulated in rule 37(35), which mandates that he shall specify the grounds for making "a special allowance", and, as happened in this case, in practice, no reasons are given at the conclusion of the initial stage;

(c) unless objections are brought in and an application for reconsideration and review is made under rule 38(2), the allowances and disallowances take effect when the Taxing Master signs the certificate of taxation, although I consider that it is clearly implicit in rule 38 that the Taxing Master does not have authority to sign an effective certificate until the time period for initiating the bringing in of objections and seeking a review under rule 38(1) has expired, that is to say, fourteen days after the completion of the adjudication; and

(d) since the enactment of s. 27(6), the dissatisfied party has to bear the costs of the review by the Taxing Master of his taxation, so that, in this case, if the appellant had pursued his application under rule 38(1), he would have had to bear the costs thereof, which have been assessed at €42,350, himself even if the outcome of the review had been favourable to him.

In relation to the observations at (c) above, the commentary in Flynn and Halpin on *Taxation of Costs*, which was published in 1999, indicates (at p. 665) that at that time the practice was that a dissatisfied party would seek a stay on the issue of the certificate and, in the event of a stay being applied for and granted, the certificate of taxation could not issue and would not be signed by the Taxing Master until the expiration of the stay.

25. Rule 38(3) provides:

"Any party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to as aforesaid or with the amount thereof, may within twenty-one days from the date of the determination of the hearing of the objections or such other time as the Court or the Taxing Master may allow, apply to the court for an order to review the taxation as to the same items and the Court may thereupon make such order as may seem just. The Taxing Master may if he thinks fit on the application of the party entitled to the costs pending the determination of the review by the Court issue a certificate of taxation or a second interim certificate of taxation concerning any items no longer in dispute other than those specified in the notice of motion to review. All interim certificates of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid and save as provided by this rule, the Taxing Master shall not be at liberty, after a certificate is signed, to review his taxation or amend his certificate, except to correct a clerical or manifest error before process for recovery or payment of the costs."

Again, a comparison of rule 38(3) with rule 66(3) of Order LXV, while disclosing some textual differences, does not disclose any material difference, save that rule 66(3) does not provide for the possibility of a second interim certificate being

issued in the event of an application for review by the Court. The feature of rule 38(3) which stands out and which was the subject of discussion on the appeal is that a dissatisfied party does not have the option of pursuing the review process in the High Court unless he has brought in objections and availed of the review procedure before the Taxing Master. As will be recalled, however, under s. 27(3) of the Act of 1995 a separate and distinct statutory power to review was conferred on the High Court.

26. In rule 38(4), (5), (6) and (7), the procedure on review by the Court and remittal to the Taxing Master is dealt with in more detail than in rule 66 of Order LXV, which contains only one further sub-rule, rule 66(4), which is, in substance, in similar terms to rule 38(4).

27. Taking an overview of rules 37 and 38, in *Gannon v. Flynn* it was recognised in the judgment of Geoghegan J. in the Supreme Court (at p. 534) that potentially there are three stages in the taxation of costs:

> (a) the initial taxation in accordance with rule 37;
>
> (b) the review by the Taxing Master of the objections of a dissatisfied party in accordance with rule 38(1) and (2); and
>
> (c) in the event of a review by the High Court in accordance with rule 38(3), which review it was held is not part of the taxation process, the final procedure under rule 38(6) whereby, after the determination of the High Court, the matter has to be remitted to the Taxing Master to complete the taxation in accordance with the decision of the High Court and to issue a final certificate of taxation.

It is undoubtedly the case that liability for costs taxed on a party and party basis may arise at the end of the first stage or at the end of either of the later stages. If it arises after the first stage, when a certificate of taxation is signed by the Taxing Master, neither the party liable for, nor the party claiming, costs will have been given any reasons by the adjudicator, the Taxing Master, as to the basis of the adjudication of the quantum of the costs. From the perspective of a dissatisfied party, whether the party liable for, or the party claiming, costs who has been through the first stage of the cumbersome and expensive process of taxation, that is patently unsatisfactory. If the dissatisfied party is the party liable for costs, he is in a position of having to decide whether to accept the decision of the Taxing Master, which imposes monetary liability on him or, alternatively, to proceed to the second stage, without having reasons for the decision or material by which he could assess which is the proper course for him to take. Whether that situation constitutes an infringement of the dissatisfied party's right to fair procedures and natural justice will be considered later.

Decision of High Court and grounds of appeal

28. The trial judge identified three issues which arose on the application before him, having regard to the arguments made on behalf of the appellant. First, an issue arose as to whether, in making Order 99, rule 38(1) to (3), the Rules Committee had acted *ultra vires*. On that issue he held that the Rules Committee "was not acting *ultra vires*". Secondly, an issue arose as to whether the Taxing Master erred in law in failing to give reasons for his decision of 8th July, 2004, on a request having been made on behalf of the appellant for reasons. On that issue he

held that the Taxing Master did not err in law in failing to give reasons for his decision of 8th July, 2004, stating:

> "He is not required to do so on his initial assessment of the costs issue but it is clear that if a party brings in objections and is so required by any party ' . . . he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto'. Therefore, if objection is taken by a party to his taxation that party can require reasons from the Taxing Master for his decision. That provision seems to me to accord with fair procedures."

Finally, the trial judge addressed an argument on behalf of the appellant that, even if the rules in issue (rules 38(1), (2) and (3)), are *intra vires*, they violate the principles of fair procedures, in that the existence of an internal right of appeal would violate the rule against pre-judgment. On that point, the trial judge held that the procedures in the 1986 Rules for a review of taxation are not contrary to fair procedures. The trial judge refused all the reliefs sought by the appellant.

29. In effect, in the notice of appeal the appellant seeks all of the reliefs for which he was given leave to apply in the order of 3rd November, 2004. Moreover, with one apparent exception, the grounds of appeal reflect the various grounds on which the appellant was given leave to seek judicial review in the order of 3rd November, 2004, in that the contention of the appellant is that the trial judge erred in failing to uphold each of those grounds. The apparent exception is an additional ground that the trial judge erred in concluding that the objections procedure in rule 38 did not constitute a form of appeal and that it was part of an ongoing process, whereas, it was contended, the true position is that:

> (a) the objections procedure is a form of appeal from the Taxing Master to himself when he would otherwise be *functus officio*; and
>
> (b) even if it is not an appeal and the objections procedure is part of an ongoing process, the procedure is nonetheless one for which there is no statutory authority and could not be prescribed by the Rules Committee as a mere matter of practice and procedure.

The only observation I consider it necessary to make in relation to that ground is that I consider that the objections procedure is not a form of appeal. Rather, in line with what was held by the Supreme Court in *Gannon v. Flynn*, it is the second stage of an ongoing taxation process.

Summary of the issues on the appeal

30. The issues which arise for consideration on the appeal, as identified by the appellant's counsel, are as follows:

> (a) whether rules 38(1), (2) and (3) of Order 99 of the 1986 Rules are *ultra vires* and void because they –
>
> > (i) lack statutory authorisation which would provide for such a procedure;
> >
> > (ii) are made in the absence of principles and policies set forth in the Courts Acts enabling such a procedure to be prescribed by rules;

(iii) involve a breach of natural and constitutional justice, and/or

(iv) involve a disproportionate and unnecessary interference with the right of access to the courts.

(b) whether the impugned rules are incompatible with the Convention pursuant to s. 5(1) of the Act of 2003; and

(c) whether the Taxing Master erred in failing to give any, or any sufficient, reasons for his decision dated 8th July, 2004, either in terms of the requirements of natural justice or the Convention.

It is convenient to use that summary as the framework for the remainder of this judgment.

Lack of statutory authorisation for rule 38(1) and (2) review?

31. Having outlined the relevant statutory provisions and the relevant provisions of the 1986 Rules, it is necessary now to consider whether the appellant is correct in contending that there is no statutory authorisation for permitting review by the Taxing Master of his own decision, as is provided for in rule 38(1), in particular, whether the Rules Committee had statutory authority to create a jurisdiction that enabled the Taxing Master to embark on a review of his own decision, which counsel for the appellant referred to as the linchpin of his argument.

32. Having referred to s. 36 of the Act of the 1924, s. 68 of the Act of 1936 and s. 14(3) of the Act of 1961, it was submitted on behalf of the appellant that what is most striking is that there is no provision which explicitly authorises the Superior Court Rules Committee to confer a power on the Taxing Master in relation to the taxation of costs. In this connection, counsel adverted to the fact that in *State (Gallagher Shatter & Co.) v. de Valera* [1986] I.L.R.M. 3, delivering judgment in the Supreme Court, McCarthy J. rejected the contention of the respondent Taxing Master in that case that he was accorded jurisdiction by Order 99 and/or paragraph 19 of the Eighth Schedule of the Act of 1961 to conduct the taxation in issue there. McCarthy J. stated (at p. 7):

> "In my view, paragraph 19 did no more than allocate to the Taxing Masters, as distinct from any other of the officers referred to in that Schedule, the various powers and authorities, duties and functions as detailed in the sub-paragraphs. Those powers, authorities, duties and functions may, of course, be changed or extended by statute and, perhaps, by rule of court. The authority to do so by rule of court must derive from the statute which creates the rule making authority itself. I find no such enabling provision in section 36 of the Act of 1924."

33. What counsel for the appellant has clearly overlooked is that in that case the issue related to taxation of solicitor and client costs, not to taxation on a party and party basis. It was held that the jurisdiction of the Taxing Master regulated by the provisions in the 1962 Rules which correspond to rule 14(e) and rule 15 of Order 99 in the 1986 Rules, which, in any event, it was held had been inappropriately invoked in that case, are derived from the Attorneys and Solicitors (Ireland) Act 1849, which governs taxation of solicitor and client bills, and not from rules made by the Rules Committee acting under s. 36 of the Act of 1924 or from any provision of the Act of 1961.

34. In my view, the observations of McCarthy J. quoted above have no relevance to the taxation process which occurred in this case and gave rise to the outcome which is the subject of these proceedings. Section 14(2) of the Act of 1961 expressly provides that the jurisdiction of the Superior Courts as regards pleading, practice and procedure generally, including liability to costs, is to be exercised in the manner provided by the rules of court, meaning rules made by the Rules Committee in accordance with its statutory authority. In *inter partes* litigation, liability to costs clearly involves the quantification of the costs for which a party against whom an order for costs is made is liable which, in accordance with the 1986 Rules, is determined under the taxation process now provided for in Order 99.

35. While the Rules Committee unquestionably has power to make rules governing the imposition of liability for and the quantification of costs in civil proceedings in the Superior Courts, two fundamental precepts identified by counsel for the appellant undoubtedly apply. First, in making rules the Rules Committee must exercise its powers within the limits conferred by s. 14(2) of the Act of 1961. Secondly, the Rules Committee must not exercise its powers in a manner which is inconsistent with constitutional principles. The application of the first precept will be considered by reference to the appellant's contention that rules 38(1), (2) and (3) of Order 99 are made in the absence of principles and policies set forth in legislation enabling such a procedure to be prescribed. The second precept will be considered by reference to the appellant's contention that the procedure provided for in those rules involves a breach of natural and constitutional justice and is an unnecessary interference with the right of access to the courts.

Absence of legislative principles and policies enabling the procedure prescribed by rules 38(1), (2) and (3)?

36. Although not articulated in this way, the substance of the appellant's argument, as I understand it, is that, if the principles and policies of the parent Act were to authorise the making of rules which empowered what was referred to as the objectionable "self-review procedure" contained in rule 38, the parent Act itself would be inconsistent with the Constitution and, therefore, the parent Act could not have set forth such principles and policies. That is something of a circular argument. In any event, as counsel for the respondents pointed out, the constitutionality of the parent legislation is not in issue. The real question for this Court is whether the so-called "self-review procedure" is *ultra vires* by reason of being in breach of the principles of constitutional justice and fair procedures, as contended by the appellant.

37. Having said that, it is pertinent to record that the Rules Committee, as initially constituted by s. 67 of the Act of 1936, consists of the Chief Justice, the Presidents and members of the Superior Courts, representatives of the Bar and representatives of the solicitors' profession. As such, it is the body which is best equipped to formulate fair, just and effective rules for the operation of the Superior Courts.

"Self-review procedure" in breach of principles of natural and constitutional justice?

38. The appellant's position is that the review procedure before the Taxing Master provided for in rule 38 contravenes the principle *nemo iudex in causa sua* – that a person should not be a judge in his or her own cause. Counsel for the appellant relied principally on the judgment of Kenny J. in*Corrigan v. Irish Land Commission* [1977] I.R. 317, while acknowledging that the observations of Kenny J. were obiter. The issue in that case arose in the context of the compulsory acquisition by the Land Commission of land owned by Mr. Corrigan. In accordance

with the relevant statutory provision, two lay commissioners certified that the lands were required for the relief of congestion in the immediate neighbourhood and the certificate was published in Iris Oifigiúil. Mr. Corrigan, in accordance with the relevant legislation, objected to the acquisition and his objection was listed for hearing before the lay commissioners. In fact, the lay commissioners who heard his application were the lay commissioners who signed the certificate. They disallowed the objection. Mr. Corrigan contended that the order of the lay commissioners was invalid because the principles of natural justice were contravened by the lay commissioners who had signed the certificate hearing the objection. The Supreme Court, Kenny J. dissenting, dismissed the appeal against the decision of the Appeal Tribunal (Butler J.), which had affirmed the decision of the lay commissioners, on the basis that, not having objected at the hearing before the lay commissioners to their competence to adjudicate upon his objection, Mr. Corrigan was estopped from pursuing it on the appeal.

39. In his judgment, Kenny J., having stated that there had been some discussion as to whether the giving of the certificate was a determination of a semi-judicial type or whether it was an administrative act and having recorded his view that it did not matter, stated (at p. 333):

> "What is important is that the two lay commissioners certify that the lands to which the provisional list relates are required for the relief of congestion in the immediate neighbourhood. Before they can do this, they must have satisfied themselves by written or oral evidence (a) that there is congestion in the immediate neighbourhood and (b) that the owner's lands are required for its relief. The latter involves proof that there are no other lands in the neighbourhood more suitable for acquisition for the relief of congestion. The evidence on which the lay commissioners decide this is not made available to the owner if he objects and so the commissioners who signed the certificate may have knowledge of matters which may not be mentioned during the hearing of the objection. To the intelligent layman they will seem to have decided the matters which they have to determine before they hear the objection made by the owner."

Having given an example to which I will return, Kenny J. stated:

> ". . . the intelligent observer who knew that the two commissioners who had signed the original certificate were hearing the objection to the provisional list would condemn the proceedings as being unfair and as not giving the impression of impartial justice – particularly when he found out that the material upon which the original certificate was made was not made available to the owner.

In my opinion it is altogether wrong that either of the commissioners who signed the original certificate should hear and determine the objection because there is a risk that justice will not be done, and a certainty that justice will not be seen to be done."

Kenny J. stated at the end of his judgment that he would allow the objection, reverse the decision of the Judicial Commissioner and refer the matter back to the lay commissioners to have Mr. Corrigan's objection dealt with by two commissioners who did not sign the certificate.

40. In the High Court it had been submitted on behalf of the respondents, and it was reiterated on the appeal, that the procedure provided for in rule 38 was similar to other statutory procedures that may appear to be akin to appeals, but in fact are reviews or revisions forming an integral part of an overall decision-making procedure, citing the decision of this Court in *Castleisland Cattle Breeding v.*

Minister for Social Welfare [2004] 4 I.R. 150. The issue which gave rise to that appeal was the status of a named individual for the purposes of the Social Welfare code – whether he was an employee of the appellant or an independent contractor. A deciding officer in the Department of Social Welfare had determined that he was an employee. That decision was appealed to an Appeals Officer under the provisions of the Social Welfare (Consolidation) Act 1993 (the Act of 1993) and, following an oral hearing, the decision was overturned. What happened next is outlined in the judgment of Geoghegan J. (with whom the other Judges of the Supreme Court concurred) as follows (at p. 153):

> "Under the provisions of s. 263 of [the Act of 1993] 'the chief appeals officer' may, at any time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts. I would comment in passing that s. 263 does not appear by its terms to be conferring a double appeal. What seems to be envisaged is that the chief appeals officer may go through the materials which were before the appeals officer and check whether there was any error in law or on the facts. If he were to find that the appeals officer did not have enough facts or the facts which were before him or her were ambiguous, there may be circumstances in which the chief appeals officer would require additional evidence, but essentially it is a revising rather than an appellate procedure."

41. In his judgment, McGovern J. considered the submissions which had been made to him by reference to *Corrigan v. Irish Land Commission* and *Castleisland Cattle Breeding v*. *Minister for Social Welfare*. He considered that the latter offered "an example of a revision procedure". He accepted the respondents' contention that the procedure at issue in the former was not analogous to that at issue in these proceedings. He stated that the procedures for review of taxation did not constitute an appeal and that, therefore, the Rules Committee was not precluded from conferring the procedure of review of taxation upon the Taxing Master. He quoted a passage from the judgment of Griffin J. in *Corrigan v. Irish Land Commission* (at p. 327) to the effect that a person in a judicial or quasi-judicial capacity in a matter which is otherwise within his jurisdiction may be disqualified from hearing the matter by reason of actual or presumed bias on his part, but there must be a real likelihood of bias. McGovern J. stated that there was no evidence in this case that the issue of bias arises.

42. Neither of the decisions cited by the parties, in my view, deals with an adjudicative process which is in any way analogous to the process by which party and party costs in legal proceedings are taxed. The taxation process is *sui generis*. Its specialist nature is reflected in the personnel involved in it and in the manner in which they operate. The adjudicators, the Taxing Masters, specialise in the taxation of costs and are not involved in any other form of adjudication. As is pointed out by Flynn and Halpin (*op. cit*. at p. 664), when an order for costs is granted by a court, the solicitor acting for the successful litigant, in whose favour the order for costs is granted, would normally employ a firm of legal cost accountants to draw and prepare a detailed bill of costs. In fact, in this case, the appellant was represented before the Taxing Master by Declan O'Neill, principal of the firm of Cyril O'Neill, Legal Cost Accountants, and the first notice party was represented by Tony McMahon of Behan & Associates, Legal Cost Accountants. A cursory consideration of rules 14 to 37 of Order 99 certainly confirms how specialised the taxation of costs process is. Rule 29(5), for example, requires that bills of costs are to be prepared with seven separate columns, the fifth and the seventh being for certain specified deductions of the Taxing Master. Rule 29(9) sets out the requirements in relation to drafts or other documents "the preparation whereof is charged for by

the folio" and, helpfully, rule 37(9) explains that a folio "comprises 72 words, every figure comprised in a column or authorised to be used being counted as one word". While conscious that giving those examples verges on facetiousness, nonetheless, they do genuinely illustrate the nature of the work involved in taxation of costs.

43. The role of the Taxing Master under rule 38 must be considered against that background. His role is "a second stage of the taxation but part and parcel of the taxation", as Geoghegan J. stated in *Gannon v. Flynn* at p. 534. It is a second stage which only comes into play if the dissatisfied party brings in objections. The objections must be in writing and the grounds and reasons for the objections must be set out. When that is done within the stipulated time limit, the dissatisfied party may apply to the Taxing Master to "review the taxation" in respect of the relevant items. The Taxing Master's task is laid down very precisely in rule 38(2): it is to "reconsider and review his taxation upon such objections". He has the discretion to receive "further evidence" in respect of the objections, the epithet "further" suggesting that what is involved is, as counsel for the respondents submitted, an amplification of the evidence which had hitherto been before him. When he has conducted his review, the Taxing Master must commit his decision and the grounds and reasons therefor to writing.

44. If a taxation goes to the second stage, the Taxing Master is reconsidering and reviewing his decision at the first stage with the benefit of the specific grounds and reasons advanced by the dissatisfied party for his objections and, perhaps, with the benefit of further evidence. One way of looking at that stage is that the dissatisfied party is getting, as the saying goes, a second bite of the cherry. On any view, the Taxing Master's function is to reconsider and to review his earlier decision in the light of the additional arguments before him and, perhaps, additional evidence and, in the performance of that function, he acts independently of both parties involved in the taxation process. From an objective perspective, it is difficult to see why the Taxing Master would be naturally predisposed to support his original decision. The situation of the Taxing Master is not similar to either the example given by Kenny J., or the factual circumstances he was considering, in *Corrigan v. Irish Land Commission*. The example was that before 1877 –

> "An appeal lay from a judge of the Court of Common Pleas and of the Exchequer Division to that court sitting *in banc* (all the judges of that Division), and the judge who heard the case originally was allowed to sit as a member of the court when it sat *in banc*."

In relation to that situation, Kenny J. observed that the judge who gave the original decision would naturally be predisposed to support his original view.

45. One could speculate as to the policy underlying the review procedure provided for in rule 38. It may be that it is regarded as being less costly from the perspective of the litigants than a review directly to the High Court after the first stage, or, as counsel for the respondents submitted, it may be regarded as a filtration system, which avoids unnecessary use of the High Court. Whatever the policy, it is a review process which has been in place for over a century, which, as was disclosed in Flynn and Halpin (*op. cit.* at page 668), was only challenged once up to 1999 as lacking basic fair procedures, which challenge was in proceedings which were disposed of in the High Court by Keane J. on 24th March, 1995 without the challenge being addressed. While counsel for the appellant was correct in stating that, even if the review procedure has been hallowed by tradition, that does not necessarily mean it is above reproach, nonetheless, the fact that it seems to have been operated to the satisfaction of litigants for over a century does suggest that it had not been perceived as giving rise to objective bias. Of course, if the outcome of the bringing in of objections and the review procedure before the

Taxing Master does not satisfy the dissatisfied party, he has his right to seek a review by the High Court in accordance with Order 38(3).

46. For the reasons outlined above, I have come to the conclusion that the review procedure conducted by the Taxing Master of his decision does not involve a breach of natural and constitutional justice on the basis argued on behalf of the appellant, or a disproportionate and unnecessary interference with the right of access to the courts.

Incompatibility with the Convention?

47. For the same reasons, I consider that the review procedure conducted by the Taxing Master of his decision does not infringe the right of the dissatisfied party to a fair hearing under Article 6 of the Convention. In support of the appellant's arguments on the invocation of Convention rights, this Court was referred to the decision of the European Court of Human Rights in *De Haan v. The Netherlands* (1998) 26 E.H.R.R. 417. The decision of the Court on that case clearly suggests that, if the pre-1877 practice in Ireland which was decried by Kenny J. in *Corrigan v. Irish Land Commission* still operated, it would be found to be a violation of Article 6(1) of the Convention, unless the Court which sat in banc as an appeal court "was subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of Article 6" (para. 52 of the majority judgment). While, on the basis of the analysis conducted earlier in relation to the rule 38(2) review procedure, I am satisfied that it is not a process in which objective bias is inherent, nonetheless, even if it was, it would seem that, on the basis of the judgment in *De Haan v. The Netherlands*, a violation of Article 6(1) would not arise because of the availability of the review by the High Court under rule 38(3).

48. For completeness, I should record that, having also considered another decision of the European Court of Human Rights referred to by counsel for the appellant, namely, *Werner v. Poland*(2003) 36 E.H.R.R. 28, in which judgment was delivered on 15th November, 2001, I am satisfied that nothing in it points to the review procedure before the Taxing Master provided for in rule 38 being in violation of Article 6 of the Convention. It follows that the appellant has not made a case that the impugned rules are incompatible with the Convention pursuant to s. 5(1) of the Act of 2003 by reason of the appellant being required to make application to the Taxing Master by way of objection to the decision of the Taxing Master prior to making an application for review to the High Court.

Failure by Taxing Master to give reasons an infringement of the appellant's constitutional or Convention rights?

49. In support of the contention that there was an obligation on the Taxing Master on 8th July, 2004 to give the appellant reasons for the decision he announced on that day to meet the appellant's entitlement to procedural fairness and natural and constitutional justice, in this Court the appellant relied primarily on the recent decision of this Court in *Mallak v. Minister for Justice*[2012] 3 I.R. 297. That case involved the refusal by the Minister of an application for a certificate of naturalisation by Mr. Mallak in circumstances where the Minister did not provide any reasons for his decision, insisting that he was not obliged to explain his decision. A feature of the case identified by Fennelly J., with whom the other Judges of this Court concurred, was that there was an effective invitation to Mr. Mallak to "re-apply for the grant of a certificate of naturalisation at any time". Fennelly J., while recognising that the invitation was, to some extent, in ease of Mr. Mallak, stated (at para. 66) that it was impossible for the applicant to address the Minister's concerns and thus to make an effective application when he was in complete ignorance of the Minister's concerns. Fennelly J. also pointed out (at para.

67) that more fundamentally, and for the same reason, it was not possible for Mr. Mallak, without knowing the Minister's reason for refusal, to ascertain whether he had a ground for applying for judicial review and, by extension, it was not possible for the courts effectively to exercise their power of judicial review.

50. In *Mallak v. Minister for Justice*, having considered a number of authorities, starting with *The State (Lynch) v. Cooney* [1982] I.R. 337, Fennelly J. stated (at para. 65):

> "This body of cases demonstrates that, over a period approaching 30 years, our courts have recognised a significant range of circumstances in which a failure or refusal by a decision maker to explain or give reasons for a decision may amount to a ground for quashing it. Costello J. attached importance, quite correctly, to the presence or absence from the statutory scheme of a right of appeal. The absence of a statement of reasons may render such a right nugatory."

Having outlined the difficulties with which Mr. Mallak was faced in the absence of reasons, which I have referred to earlier, Fennelly J. stated (at para. 68):

> "In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

51. Fennelly J. then made the following general observations, which I consider particularly enlightening in the context of the position of a party to taxation at the end of the initial stage of the taxation process. He stated (at para. 69):

> "Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

52. It is convenient at this juncture to recapitulate on what is provided in Order 99 in relation to the Taxing Master giving reasons for his decision. As regards the first stage, while it is expressly provided in rule 37(35) that, if the Taxing Master makes a special allowance, he must specify the grounds for such allowance in writing at taxation, Part IV of Order 99 is otherwise silent on the requirement of giving reasons at the first stage. However, when the second stage has been gone through and the Taxing Master has reconsidered and reviewed his taxation upon the objections brought in by the dissatisfied party, it is expressly provided in rule 38(2) that the Taxing Master must state in writing the grounds and reasons of his decision and any special facts or circumstances relating thereto.

53. The Court was referred by counsel for the respondents to one authority in which the question whether, as a matter of natural justice or fairness of procedures, the Taxing Master should give reasons if requested to do so at the end of the first stage of the taxation process was considered – the decision of McCracken J. in *McEniry v. Flynn* (the High Court, Unreported, 6th May, 1998). The facts in those judicial review proceedings were extremely unusual. The applicant, Mr. McEniry, a solicitor, was seeking a order of *certiorari* quashing a decision of the respondent, the Taxing Master, made in July 1996. It is clear from the judgment

that the capacity in which Mr. McEniry attended the taxation was as solicitor on behalf of the party against whom an order for costs had been made in favour of another firm of solicitors, which were to be taxed on a solicitor and own client basis, in the extremely unusual circumstance that Mr. McEniry was liable for the costs when so taxed. In any event, at the end of the first stage in July 1996, when the Taxing Master announced his decision, Mr. McEniry questioned the basis on which the Taxing Master arrived at his decision and he also sought reasons for the ruling. The Taxing Master refused to give reasons and a certificate of taxation, which was the subject of the application for an order of *certiorari*, issued in the following December. McCracken J. held that, as Mr. McEniry had appeared before the Taxing Master as a solicitor for one of the parties to the taxation, and not in his own right, it was not open to him to set in train the procedures for a review of rule 38. Similarly, he held that Mr. McEniry did not have*locus standi* to bring the judicial review proceedings. He did, however, make some observations which were clearly *obiter.* He observed that there was no provision in the rules for the Taxing Master to give reasons for any decision he makes, except where there is a review of taxation under rule 38, stating that rule 38 makes it quite clear that the Taxing Master is only required to give reasons after a review of taxation, not after his initial decision. Therefore, he concluded that the Taxing Master had "acted in accordance with the Rules in conducting this taxation".

54. Addressing the question whether, as a matter of natural justice or fairness of procedures, the Taxing Master should have given reasons, he acknowledged that there are circumstances in which justice may require the furnishing of reasons, citing *Anheuser Busch Inc. v. Comptroller of Patents, Designs and Trademarks* [1987] I.R. 329. McCracken J. then continued:

> "However, in that case the reasons were required to enable the Applicant to consider whether to appeal the decision of the Respondent to the High Court. That does not arise in the present case. Indeed, the Rules themselves in O. 99 r. 38 provide for the giving of reasons on a review, which would be exactly for that purpose. However, in the present case I cannot see how the Applicant can make the case that natural justice required that reasons be given to him. Even if he had been given reasons, and they were erroneous, it is not at all clear that any other steps would have been open to him. I can only repeat that the Applicant was not a party to taxation, no award was made against him and the Certificate of Taxation is not addressed to him. It is not open to him to allege that there was some breach of natural justice which would entitle him to set aside the Certificate of Taxation."

55. In his judgment in this case, McGovern J., having stated that the Taxing Master was not required to give reasons on his initial assessment of the costs issue, but, if objection was taken by a party to his taxation, that party could require reasons from the Taxing Master for his decision, and that that provision seemed to him to accord with fair procedures, referred to the decision of McCracken J. in *McEniry v. Flynn*, quoting the first three sentences of the passage from the judgment quoted in the next preceding paragraph. Insofar as McGovern J. relied on the obiter observations of McCracken J. in *McEniry v. Flynn*, in support of his finding that the Taxing Master in this case did not err in failing to give reasons for his decision on 8th July, 2004, in my view, his approach was misconceived.

56. In assessing whether fairness could be attained in the overall taxation of the costs of the first notice party against the appellant without reasons accompanying the decision of 8th July, 2004, it is useful to consider one of the items against which the appellant brought in an objection, the instruction fee. The evidence

established that the amount claimed by the first notice party was €450,000, the amount proposed by the appellant was €150,000 and the instructions fee allowed was €306,000. Obviously, the appellant could object to the amount allowed on the basis that it was too high, if that was his opinion or he was so advised. However, on bringing in an objection under rule 38(1), the dissatisfied party is required to set out the grounds and reasons for his objection. It is difficult to see how the appellant could effectively meet that requirement, even with the specialist assistance of Mr. O'Neill who had attended the taxation, without knowing the basis on which the Taxing Master arrived at the figure which was roughly halfway between the amount claimed and the amount offered. The fact that an objection was lodged on behalf of the appellant to meet the time limitation, does not mean that the objection would have effectively met the requirements of Order 38, rule 1, if these proceedings had not intervened and the reconsideration and review by the Taxing Master had taken place. In short, in order to decide whether to bring in an objection against the allowance of €306,000 on the instruction fee claim and to effectively prosecute the objection, if he decided to pursue that course, the appellant needed to understand the basis on which the Taxing Master reached that decision. The failure of the Taxing Master to give reasons when requested to do so on behalf of the appellant, in my view, rendered the continuation of the taxation process inherently unfair and unjust.

57. The fact that the second stage of the process would be a reconsideration by the Taxing Master, possibly with additional evidence, and the outcome would be a review of his decision, and that, if the appellant was dissatisfied with the outcome of the review, he could appeal to the High Court with the benefit of the Taxing Master's reasons for that outcome, does not cure the inherent unfairness and injustice of the failure of the Taxing Master to give reasons at the end of the initial stage. The decision any dissatisfied party has to make at the end of the initial stage of the taxation process has serious implications for that party. First, if the review process is not invoked, the determination is a binding judgment requiring a party such as the appellant, for example, to pay €306,000, being in excess of €150,000 more than he submitted was appropriate, without knowing why that decision was reached. Secondly, in deciding whether to bring in objections and seek a review, any dissatisfied party to the taxation process is going to have to factor in against the likely outcome of the review the costs involved in the review, which must be borne by that party under s. 27(6) of the Act of 1995, as well as other possible adverse consequences, such as inconvenience and delay. Once again, taking the example of the instruction fee in this case, it is difficult to see how the appellant, even with specialist assistance from Mr. O'Neill, could assess whether a review of the decision on the instruction fee would justify expenditure of €42,350 on the second stage, in the absence of an understanding of the basis on which the Taxing Master arrived at the allowance of €306,000 for the instruction fee. Thirdly, making further submissions at the review stage, in the vacuum created by the absence of reasons, can only be speculative. It will not be easy, or in most cases possible, to focus any submissions, or make fresh arguments, if the basis of the adverse decision sought to be challenged or the favourable decision sought to be supported, is not known. Such submissions must often only be repetition of what was already submitted, in which case the result cannot be different. If reasons can be given at the end of the review stage, after expenditure of in excess of €40,000 may have been incurred, perhaps by both parties, it is difficult to understand why they could not be given earlier.

58. In summary, whether the decision of the Taxing Master is to make an allowance which the party bearing liability for the costs thinks is too high or a disallowance which the party claiming the costs thinks is excessive, if the dissatisfied party is not in a position, to use the term used by Fennelly J. in

the *Mallak* judgment, to "understand" why the Taxing Master came up with that result because he will not give reasons, the dissatisfied party is put in an impossible situation. Without reasons for, and thus understanding of, the decision of the Taxing Master, the dissatisfied party will have to assess whether to –

> (a) move on to the second stage of the taxation process, having gone through the cumbersome and expensive first stage, in the knowledge that the expenditure he incurs in the second stage will be borne by him, or,
>
> (b) accept that decision as the final determinative decision.

Accordingly, the failure to give reasons at the end of the initial stage at the request of the dissatisfied party in relation to items in dispute must infringe the right of the parties to the taxation process to fair procedures and constitutional justice.

Order

59. Therefore, I would allow the appeal on the ground that, in accordance with the requirement to conduct the taxation process in accordance with fair procedures, there was an obligation on the Taxing Master to give, and he should have given, reasons for his decision dated 8th July, 2004. I propose that a declaration be made to that effect. I also propose that the matter be re-listed for submissions as to the form of the final order to be made, when the parties have had an opportunity to consider this judgment.