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Judgment: approved by the Court for handing down | *Delivered:* **26/04/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

DANIEL McATEER

Plaintiff/Respondent;

and

BRENDAN FOX
(Partner, Cleaver Fulton Rankin, Solicitors)

Defendant/Appellant.

Ruling on costs

WEATHERUP J

[1] On 15 July 2015 judgment was given for the defendant against the plaintiff dismissing the plaintiff's claim for damages for loss and damage alleged to have arisen from the conspiracy and breach of contract of the defendant. The decision is reported as [2015] NIQB 81.

[2] On 10 December 2015 judgment was given in respect of the costs of the above proceedings. It was ordered that the plaintiff pay to the defendant the sum of £40,000 plus VAT as a lump sum payment under Order 62 Rule 7 in lieu of taxation of costs.

[3] On 23 November 2016, the defendant having appealed against the judgment on costs, the Court of Appeal allowed the defendant's appeal. The decision is reported as [2016] NICA 46. At paragraph [45] Gillen LJ, delivering the judgment of the Court of Appeal, stated:

> "In the circumstances we consider that the most effective way to dispose of this case is to revert to an order under Order 62 rule 3 and order that the costs be taxed by the Master in the conventional manner in default of agreement. In order to assist the Master in this process, we refer the matter back to the learned trial judge to indicate what percentage reduction he considers appropriate to make to the taxed costs in light of his adverse comments on the appellant's approach to this case. This will afford an opportunity for the Taxing Master to arrive at a properly taxed assessment and then to make the appropriate percentage reduction in light of the judge's conclusion."

[4] Accordingly, the matter was relisted before me to make a determination in accordance with paragraph [45] of the judgment of the Court of Appeal, namely to indicate what percentage reduction was considered appropriate to make to the taxed costs. It was ordered that a Bill of Costs be sent to the plaintiff. Submissions in writing were made on behalf of the defendant by Mr Hanna QC. Submissions in writing were made by the plaintiff in person.

[5] In my original ruling on costs on 10 December 2015 five stages to the proceedings were identified. Stage 1 was the commencement of the action in March 2009 to the initial hearing of the substantive proceedings in September 2012. The second stage was in September 2012 when there was an attempted settlement of the proceedings and the hearing was adjourned for a referral of the plaintiff's complaints to the Solicitors Disciplinary Tribunal. The third stage was from September 2012 to October 2013 when the plaintiff's complaint was considered by the Solicitors' Disciplinary Tribunal. Stage 4 was from October 2013 to March 2014 when there were further attempts at settlement of the proceedings. The fifth stage was from 27 March 2014 when the substantive hearing resumed to the conclusion of the hearing.

[6] In September 2012 there was an unsuccessful attempt by the parties to settle the proceedings. The parties agreed that the defendant would give an undertaking as to future conduct, the terms of which undertaking were agreed. The position as to the costs of the action was not agreed. The defendant's proposal was that there would be no order as to costs and the plaintiff would not agree. The plaintiff's proposal was that the issue of costs should be referred to me as the trial judge for a ruling on costs and the defendant would not agree. The nature of the discussions were disclosed to me at the time but I was unable to deal with the issue of the costs of the action without the agreement of the parties that I should do so.

[7] I adopt Mr Hanna's approach at paragraph 8 of his Skeleton Argument as follows. The only remaining issues for the court are -

(i) identifying those relevant factors, if any, justifying a percentage reduction in the entitlement to costs of the successful defendant.

(ii) assessing that percentage reduction.

(iii) giving reasons for making that percentage reduction.

[8] First of all, the relevant facts justifying reduction. On 10 December 2015 the ruling on costs begins at page 20 of the transcript where I set out the stages of the proceedings. From page 22 I set out a summary of the plaintiff's position followed by a summary of the defendant's position. From page 24 I referred to Order 62 on costs and stated that an order for costs should be made and that the defendant had been successful in the action. Two circumstances were then mentioned, namely the defendant's shortcomings on discovery and the settlement discussions of September 2012. At that point from page 25 Mr Hanna sought to clarify the events of September 2012 and this resulted in all concerned listening to the recording of the disclosures to the Court on 26 September 2012. The ruling resumed at page 30 and I announced the result that was the subject matter of the appeal. Immediately prior to announcing the ruling on costs I referred to the need for there to have been "a more energetic engagement by the defendant in respect of costs".

[9] In September 2012 the parties were not in agreement as to the costs. While the plaintiff proposed that I should make a ruling on costs, I could not intervene on the costs issue except with the agreement of the parties. However, I am satisfied that there was at that time the opportunity to resolve all issues, including costs, had there been agreement to refer the costs issue. The party rejecting that basis for resolution was the defendant.

[10] The defendant points to the plaintiff, having rejected the offer of concluding the proceedings with no order as to costs, thereafter being unsuccessful in the proceedings. The plaintiff points to the defendant's rejection of the offer to refer the issue of costs to the Court, thereby occasioning significant costs to be incurred thereafter.

[11] The defendant states his objections to agreeing to the plaintiff's proposal. First of all he asks what more could the defendant have done as more energetic engagement could only have involved the defendant paying costs. This objection is not accepted. A more energetic engagement would have been to agree to refer the costs issue to the Judge. Whatever the outcome of the referral the costs subsequently incurred would not have arisen.

[12] The second objection is that the plaintiff's proposal was impracticable. It is asked how the Judge could have decided the costs issue without hearing the action. This objection is not accepted. It is a perfectly feasible exercise for a Judge to decide an issue of costs without conducting a hearing as to all the matters arising in the remainder of an action.

[13] In M v London Borough of Croydon [2012] EWCA Civ 595 at paragraph 47 the Master of the Rolls considered costs after settlement before trial in ordinary civil litigation. The case illustrates that it is open to parties in almost any civil proceedings to compromise all their differences save for the costs and to invite the court to determine how the costs should be dealt with.

[14] The court has jurisdiction in such a case to determine who is to pay costs but it is not obliged to resolve such a freestanding dispute about costs. Various alternatives were discussed -

> Given the normal principles applicable to costs where litigation goes to a trial, it is hard to see why a claimant, who, after complying with any relevant protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary (paragraph 49).
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> The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief that he has claimed. In such cases, the court will often decide to make no order for costs, unless it can without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in his favour (paragraph 50).
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> In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable to decide who has won, and therefore will not make any order for costs. However, in some cases, the court may be able to form a tolerably clear view without much effort. In a number of such cases, the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial. If, for instance, it is clear that the claimant would have won, that would lend considerable support to his argument that the terms of settlement represents success such that he should be awarded his costs (paragraph 51).

[15] To this I would add that it would be contrary to public policy in relation to the use of court time and resources if issues of costs required the completion of litigation rather than its earlier resolution. Indeed, when all matters except costs are resolved it is imperative that a concerted effort be made to identify a mechanism for resolution of that issue for the avoidance of unnecessary time and effort and expense.

[16] Whatever mechanism had been found in the present case and whatever order as to costs would have been made it would have avoided the subsequent prolonged proceedings, demands on court time and substantial expense. In the present case I had by 12 September 2012 been engaged in various aspects of the proceedings. The defendant may have recovered the costs of proceedings to that date.

[17] The third objection is that the defendant's proposal was more favourable to the plaintiff because, the defendant states, we now know the plaintiff has to pay the defendant's costs. This objection is not accepted. It is not known what would have been the outcome in 2012 but it may have been that the plaintiff would have had to pay the costs to that date. However, the later costs incurred as a result of the matter not being resolved in 2012 need not have been incurred.

[18] The defendant's approach is that the plaintiff failed to accept the defendant's offer in September 2012 and having thereafter failed in the action should be liable for costs. However there was what I consider to have been a reasonable alternative available in September 2012. It was not a direct offer on costs but a direct offer on a mechanism for resolving costs. In the absence of agreement on costs between the parties it was entirely reasonable to propose a mechanism for the resolution on costs that involved a referral to the Judge. I reject the defendant's reasons for refusing the plaintiff's offer. It was apparent in September 2012 that the continuation of the proceedings would involve considerable time and resources and that with agreement having been reached between the parties on a form of undertaking the expenditure of that time and resources should have been unnecessary.

[19] Had there been agreement to refer the issue of costs to me I am satisfied that, given previous involvement in the proceedings, I would have felt able to deal with the issue of costs and would have wished to do so to bring the proceedings to a conclusion.

[20] The defendant objects that the plaintiff did not take the same approach to the other defendants in relation to the costs of the proceedings. This objection is not accepted. This is not a reason for the absence of agreement on costs between this plaintiff and this defendant. Different settlement schemes applying to different parties are commonplace. The plaintiff reached agreement with the other parties. The terms of agreement with other parties need not be the same as between this plaintiff and this defendant.

[21] Had there been the required engagement by the defendant in September 2012 the proceedings would have ended with the ruling on costs. The subsequent costs would not have been incurred. The defendant would not have produced a Bill of Costs of some £550,000.

[22] The second and third issues are the percentage reduction and the reasons.

[23] In stage one of the proceedings between March 2009 and September 2012 there were a number of interlocutory hearings. There are two outstanding costs Orders. By Order of 17 January 2012 costs were reserved and I propose to make no order as to costs. By Order of 18 June 2009 the costs were costs in the cause and should fall into the defendant's Bill of Costs.

[24] The case proceeded for 35 days of hearings. In June 2012 after two days of hearings the matter was adjourned to 10 September 2012. In September 2012 after 5 days of hearings the matter was adjourned for referral to the Law Society. It was at this time in September 2012 that the proposal for settlement arose. From September 2012 to October 2013 the plaintiff's complaint was processed by the Law Society.

[25] From March 2014 to March 2015 there were hearings as follows: March 2014 - 5 days, April 2014 – 2 days, June 2014 – 2 days, November 2014 – 12 days, December 2014 – 6 days and March 2015 – 1 day of submissions. Of the 35 days of hearings 28 of those days were unnecessary as the case should have been resolved in September 2012.

[26] Responsibility for the costs of the proceedings could be measured by a requirement that the plaintiff pay £40,000 plus VAT in lieu of taxed costs. Responsibility for the costs could be measured by the award of costs to the defendant to September 2012 and the award of costs to the plaintiff thereafter, such costs to be taxed in default of agreement. This court is directed to state the percentage reduction considered appropriate to the taxed costs. The percentage will reflect the balance of an assessment of costs incurred in the first place to September 2012 less an assessment of costs incurred in the period thereafter.

[27] I would express the percentage of the taxed bill payable to the defendant at 10%. The amount so determined shall be paid within one year of this date. There will be no order as to costs on this further determination of the costs of the action.