Neutral Citation No: [2012] NIQB 87

Ref: **WEA 8612**

Judgment: approved by the Court for handing down

Delivered:05/11/12

Subject to editorial correction

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN

JOHN BANKS AND LYNN BANKS

Plaintiffs

V

MARTIN GEDDIS AND GILL GEDDIS

Defendants

COSTS

WEATHERUP J

[1] Judgment in this action was delivered on 28 June 2012 and is reported under neutral citation [2012] NIQB 57. The solicitors on record for the plaintiffs and for the defendants have been afforded an opportunity to show cause why they should not bear personal responsibility for the costs of the action. Ms Angela Matthews appeared for the plaintiffs' solicitors and Mr David Dunlop appeared for the defendants' solicitors to show cause.

[2] The plaintiffs as vendor of premises sued the defendants as purchasers of the premises for the recovery of £40,000, being part of the purchase monies retained by the defendants by agreement pending certain steps being taken by the plaintiffs. In essence the defendants purchased the premises intending to construct an additional dwelling on the site and in order for the defendants to be able to do so it was necessary to clear a restrictive covenant against the construction of another dwelling. £45,000 was retained by the defendants pending the plaintiffs securing the removal of the restrictive covenant. Eventually it was the defendants who bought out the

restrictive covenant for £5,000. Judgment was obtained by the plaintiffs for the remaining £40,000.

[3] The special conditions of contract for the purchase of the premises allowed the plaintiffs 6 months from completion to clear the restrictive covenant or the £45,000 would be repaid. An additional 6 months was allowed if the plaintiffs had applied to the Lands Tribunal. However from the date of completion the plaintiffs' solicitors and the defendants' solicitors exchanged correspondence in connection with an application to the Land Registry that involved redeeming the ground rent and securing the freehold but did not serve to achieve the purpose of removing the restrictive covenant. In 2009, some eighteen months after completion, the plaintiffs' solicitors had completed the Land Registry process and claimed payment of the balance purchase price, believing they had secured removal of the restrictive covenant. The defendants' solicitors thought the failure to remove the restrictive covenant may have been a mistake by the Land Registry. Both solicitors failed to understand what was required to achieve the objective of the special conditions. Had they understood what was required I am satisfied that the restrictive covenant would have been removed within the time specified in the special conditions and the balance purchase price would have been paid.

[4] The solicitors who had carriage of the transaction for the purchase and sale of the premises were the solicitors on record for the plaintiffs and defendants in the proceedings for the recovery of the balance purchase monies. At the conclusion of the judgment it was proposed to make an order under Order 62 Rule 11 of the Rules of the Court of Judicature imposing personal liability for costs on the respective solicitors, subject to their opportunity to appear and show cause why an order should not be made.

[5] Order 62 Rule 11 provides for the personal liability of solicitors for costs as follows.

> " (1) Subject to the following provisions of this rule, where it appears to the Court that *costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition*, the Court may-
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> (a) order-
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> (i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or
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> (ii) the solicitor personally to indemnify such other parties against costs payable by them; and

(iii) the costs as between the solicitor and his client to be disallowed; or

(b) direct the Taxing Master to enquire into the matter and report to the Court, and upon receiving such a report the Court may make such order under sub-paragraph (a) as it thinks fit.

(4) Subject to paragraph (5), before an order may be made under paragraph (1)(a) of this rule the Court shall give the solicitor a reasonable opportunity to appear and show cause why an order should not be made."

[6] The operation of Order 62 Rule 11 was considered by the Court of Appeal in England and Wales in Gupta v Comer [1991] 2 WLR 494. The plaintiff applied for an Order that certain costs be paid personally by the defendant's solicitors on the basis that the solicitors had incurred such costs unreasonably and had failed to conduct the proceedings with reasonable competence and expedition. The solicitors objected to an Order being made on the grounds that the Court had no jurisdiction to make such an Order unless serious dereliction of duty by the solicitor could be established. The Court of Appeal upheld the Order that certain costs be paid personally by the defendant's solicitors and held that the Order had been properly made even though the solicitors had not been guilty of serious dereliction of duty or gross negligence or neglect.

[7] The history of the Rule appears from the judgment of Lord Donaldson MR. A Rule providing for the personal liability of solicitors for costs was to be found in the Rules of the Supreme Court 1883. In 1940 the House of Lords held that the exercise of the power to require solicitors to pay costs was under the inherent or common law jurisdiction over solicitors as officers of the Court and only arose when the conduct which gave rise to the costs being incurred could properly be described as a serious dereliction of duty or gross negligence or gross neglect. Order 62 Rule 11 was treated as being intended to provide machinery for the exercise of this inherent or common law jurisdiction over solicitors (Myers v Ilman [1940] AC 282).

[8] After various changes a new Rule was introduced in England and Wales in 1986 adopting the words now found in Order 62 Rule 11 in Northern Ireland. The new Rule was considered by the Court of Appeal in England and Wales in 1989 when it was held that the effect of the new Rule was to widen the Court's powers. The wording of the Rule concerned costs incurred unreasonably or improperly or wasted by the failure to conduct proceedings with reasonable competence and expedition. It was held that the previous requirement for gross misconduct was no longer applicable. Accordingly, the new Order 62 Rule 11 was found to be freestanding and was not intended merely to set out the machinery for the exercise of the Court's inherent jurisdiction (Sinclair Jones v Kay [1989] 1 WLR 114).

[9] However a different rule applied in England and Wales in Crown Court proceedings where the Court required to be satisfied that the conduct of the solicitor constituted a serious dereliction of duty (Holden v Crown Prosecution Service [1992] QB 261).

[10] Accordingly, in Gupta v Comer the Court of Appeal in England and Wales was invited to find that there were conflicting decisions and that Myers v Ilman should apply to civil proceedings. Lord Donaldson found that the decisions were not in conflict. Sinclair Jones v Kay applied in civil proceedings governed by Order 62 Rule 11 and Myers v Ilman applied in Crown Court proceedings.

[11] The form of the Rule considered in Sinclair-Jones v Kay and Gupta v Comer continues to apply in Northern Ireland where the personal liability of solicitors may arise where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition.

[12] Matters have moved on in England and Wales. In 1991 the Supreme Court Act 1981 (now the Senior Courts Act 1981) was amended and section 51 provides –

> "(6) The court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Rules of Court.
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> (7) 'wasted costs' means any costs incurred by a party:-
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> (a) as a result of any *improper, unreasonable or negligent act or omission* on the part of any legal or other representative or any employee of such a representative; or
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> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it *unreasonable to expect that party to pay."*

[13] A new Order 62 Rule 11 was introduced in England and Wales and that has now been updated by the Civil Procedure Rules 48.7 which specifies procedures related to wasted costs orders under Section 51(6). The Practice Direction about Costs Supplementary to CPR Part 48 includes section 53 dealing with a wasted cost order against a legal representative. The different structure of the scheme in England and Wales should be borne in mind when considering the authorities on wasted costs orders from England and Wales. The 1991 amendments extended to barristers in England and Wales, a liability that does not apply to barristers in Northern Ireland.

[14] The present provisions in England and Wales came before the Court of Appeal in Ridehalgh v Horsefield [1994] EWCA Civ 40. The Court of Appeal proceeded to define the meaning of the operative words in Section 51(7) of the Supreme Court Act 1981 as amended –

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
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> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
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> The term "negligent" was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage.
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> Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach :
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> (1) As already noted, the predecessor of the present Order 62 rule 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the

language Parliament intended to make it harder, rather than easier, for courts to make orders.

(2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence : "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well- informed and competent would have given or done or omitted to do"; an error "such as no reasonably well-informed and competent member of that profession could have made" (Saif Ali v Sydney Mitchell & Co, at pages 218 D, 220 D, per Lord Diplock).

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

[16] Counsel for the respective solicitors opposed the making of any order against the solicitors. It was contended that the solicitors' conduct in question occurred

prior to and separate from the proceedings and did not involve conduct in the proceedings such as failure to appear or any delay; that legal professional privilege prevented the Court being fully informed of the circumstances; that the circumstances were not apt for summary determination as it was a complex and lengthy matter and not a straightforward or obvious case; that it was inappropriate to make what in effect was a finding of professional negligence; that additional costs were being incurred in the process of considering the personal liability of solicitors and such costs could not be recovered; that the specific complaints against the solicitors were not stated; that there had been no unreasonable, improper or negligent act or omission and that there was no causal link between the solicitors' conduct and the costs incurred in the proceedings. The plaintiffs' solicitors sought an order that the costs follow the event in the action and be awarded to the plaintiff. The defendants' solicitors contended that there should be no order as to costs.

[17] The solicitors contend that the Court does not have jurisdiction to make the proposed Order against the solicitors because the conduct in question occurred before the issue of proceedings. The initial conduct did indeed occur before the issue of proceedings and occasioned the costs incurred in the conduct of the proceedings. I am satisfied that jurisdiction to make the proposed Order extends to the conduct in question. In Wagstaff v Colls [2003] EWCA Civ 469 conduct before the commencement of proceedings was held to be capable of founding a wasted costs order. Section 51(6) of the 1981 Act applies to the 'legal or other representative', which phrase is defined in section 51(13) as meaning any person exercising a right to conduct litigation. Ward LJ stated that this applied to solicitors who had withheld disclosure of deeds at a time when there was no litigation, although there was a threat of litigation. However the section applied to the solicitors as they had conduct of the litigation when it commenced.

[18] The wording is different in Northern Ireland. Order 62 Rule 11(1) applies in two circumstances, namely where 'costs have been incurred unreasonably or improperly in any proceedings' as well as to 'failure to conduct proceedings with reasonable competence'. The former circumstance is stated without reference to the timing of the conduct that leads to the costs being incurred, the reference to 'in any proceedings' applying to the costs being incurred rather than the conduct causing the costs to be incurred. This is capable of applying to the conduct of a solicitor that predates the commencement of proceedings in which that solicitor comes on record for a party.

[19] The solicitors claimed disadvantage because of legal professional privilege. Legal professional privilege is that of the client and not the lawyer and waiver is for the client. Thus the solicitors may be precluded from giving a full account of the circumstances and be at a grave disadvantage in defending their conduct. Accordingly, "full allowance" must be made for the inability of the solicitor to tell the whole story. A challenge to a wasted costs order reached the House of Lords in Metcalfe v Weatherill (2002). Lord Bingham emphasised two matters in respect of legal professional privilege. First of all, only rarely will the Court be able to make

full allowance for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt for the Court, in a situation in which of necessity the Court is to have access to the full facts on which in the ordinary way any sound judicial decision must be based. Secondly, the Court should not make an order against the practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so.

[20] In relation to the conduct in question, the solicitors should have undertaken the appropriate steps to achieve the objective in the performance of their professional duties and those steps were not a matter for the instruction of the clients. No doubt the clients gave instructions in relation to the proceedings when the solicitors' conduct resulted in proceedings being commenced and defended. Legal professional privilege did not inhibit the solicitors in providing an explanation for their conduct. Indeed they did not dispute that they had proceeded in error, rather relying on the view of Mr Farris, the joint expert witness, that their error might be found among many other solicitors.

[21] I am satisfied that the matter is suitable for summary determination. The removal of the restrictive covenant ought not to have been complex. The essential transaction was commonplace and its implementation ought to have been routine. Any complexity was introduced by the solicitors who did not understand the mechanics of the transaction when any reasonably competent solicitor ought to have done so. That it was a lengthy matter was the entirely avoidable result of the solicitors not dealing with the transaction in an appropriate manner. The Court was well placed to make a determination of the potential personal liability of the solicitors having heard the substantive action. The failings of the solicitors were set out in the written judgment of the Court and are repeated above.

[22] The plaintiffs' solicitors claim that costs should follow the event and refer to correspondence where it is said the defendants rejected an offer of an amicable settlement. When the Land Registry process was completed in 2009 and it was realised that the restrictive covenant was still in place, the defendants' solicitors wrote to the plaintiffs' solicitors on 27 May 2009 pointing out that the time limits had expired and the defendants' solicitors proposed to pay out the balance to the defendants. On 10 July 2009 the defendants' solicitors confirmed that the balance had been paid to the defendants. By letter dated 24 November 2009 the plaintiffs' solicitors made what they describe as the offer of amicable settlement. The letter stated that they were attempting a two track approach, namely seeking to buy the reversionary interest and applying to the Lands Tribunal to remove the restrictive covenant. This is what they should have done from the beginning. The letter indicated that if they were successful in the two track approach they sought release of the balance. By a reply dated 18 December 2009 the defendants' solicitors stated that they had agreed to buy the reversionary interest and would defend proceedings. It was the actions of the solicitors that had prevented the transaction being brought to a conclusion as intended within the time limits specified.

[23] The conduct of the solicitors before the commencement of proceedings was unreasonable in that the solicitors did not act with reasonable competence in the handling of the transaction in relation to the restrictive covenant. The solicitors are officers of the Court and owe a duty to the Court not to incur costs unreasonably. The costs of the proceedings were incurred unreasonably as a result of the conduct of the solicitors. The costs of legal proceedings should never have been incurred. Had the solicitors behaved reasonably and complied with the special conditions the costs would not have been incurred. In the circumstances it is just that the solicitors should bear the unnecessary costs of proceedings.

[24] Neither the plaintiffs nor the defendants should be responsible for any costs of the proceedings. Any costs between solicitors and clients are disallowed. There shall be no order as to costs between the parties.