

Neutral Citation No.: [2009] NIQB 46

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

Delivered: 13-05-09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

CHRISTOPHER GILHEANEY

Plaintiff/Appellant:

-and-

ADRIAN McGOVERN  
and  
EDWARD McGOVERN

Defendants/Respondents:

No 2

STEPHENS J

[1] On 23 April 2009 I gave judgment in this County Court appeal ([2009] NIQB 38) and also in the County Court appeal of *Kelly v. Mackle* [2009] NIQB 39. Each appeal involved credit hire issues. On 11 May 2009 I heard submissions in relation to the appropriate order for costs in respect of each appeal.

[2] In *Gilheaney v. McGovern and Another* the award in favour of the plaintiff in the County Court was for £3,999.40. That was made up of three agreed items being:-

- (a) The cost of repair of the plaintiff's motor vehicle at £2,633.11.
- (b) The cost of recovery of the plaintiff's motor vehicle at £105.00.
- (c) Damages in respect of depreciation in value of the plaintiff's motor vehicle by reason of having been involved in a road traffic accident at £250.00.

[3] The agreed damages amounted to £2,988.11. In the County Court the plaintiff sought £1,283.10 inclusive of VAT in respect of the hire of a

replacement vehicle. The plaintiff recovered £935.00 inclusive of VAT in respect of that item. The plaintiff, being dissatisfied with that part of the award, appealed to the High Court “from the whole decree made by the County Court in this matter”.

[4] In the event the appeal was successful in that I increased the amount in respect of the hire of a replacement vehicle from £935.00 inclusive of VAT to the amount claimed of £1,283.10 inclusive of VAT. Accordingly in the event the plaintiff was entitled to recover an additional £348.10. The County Court award of £3,999.40 being increased by that amount to an award of £4,347.50.

[5] The plaintiff sought an order for costs against the defendant in respect of both the hearing in the High Court and in the County Court. It was accepted that the plaintiff was entitled to an order for costs “here and below”. It was also accepted that the costs in the County Court should be on the County Court scale with the appropriate level of scale costs being selected by reference to the amount awarded in the High Court. I wished to hear submissions as to:-

- (a) Whether the amount of costs in the High Court should be on a County Court scale.
- (b) If so, whether an award of costs in the High Court should be on:-
  - (i) a scale to reflect the total award made in the High Court of £4,347.50; or
  - (ii) a scale to reflect that the issue on appeal related to a claim for £1,283.10; or
  - (iii) a scale to reflect that the additional award amounted to £348.10.
- (c) What, if any, costs order I should make to reflect the involvement of Senior Counsel in this case for both the plaintiff/appellant and the defendant/respondent.

[6] I also heard submissions in relation to the question of costs in the case of *Kelly v. Mackle*. The principles to be applied should inform both cases. I will therefore set out in this judgment the issues as to costs in the related case. I will also record in this judgment the decision that I will make in that case.

[7] In *Kelly v. Mackle* the award in favour of the plaintiff in the County Court was £9,161.05. That was made up of:-

- (a) £4,767.05, the costs of repairs to the plaintiff’s eight seater Volkswagen caravel taxi; and
- (b) £4,394.00 the cost of hire of a replacement eight seater taxi.

[8] In the County Court the plaintiff had sought £9,303.65 in respect of the hire of a replacement eight seater taxi. The plaintiff being dissatisfied with the award of £4,394.00 in respect of hire appealed "from the whole of the decree made by the County Court". That appeal was by way of rehearing. In the event the appeal was unsuccessful. Not only was there no increase in the award but also I reduced the award in respect of the cost of hire by £2,524.00 to the figure of £1,870.00. The County Court award of £9,161.05 being decreased to an award of £6,637.05.

[9] In that case the parties accepted that the plaintiff/appellant was entitled to an order of costs in the County Court and the defendant/respondent was entitled to an order for the costs on appeal in the High Court. It was also accepted that the costs in the County Court should be on the County Court scale with the appropriate level of scale costs being selected by reference to the amount awarded in the High Court. I wished to hear submissions as to:-

- (a) Whether the costs in the High Court should be on a County Court scale.
- (b) If so, whether the award of costs in the High Court should be on:-
  - (i) a scale to reflect the total amount claimed by the plaintiff of £15,000.00 in the civil bill; or
  - (ii) a scale to reflect that the issue on appeal related to a claim for £9,303.65; or
  - (iii) a scale to reflect the total amount awarded in the High Court of £6,637.05; or
  - (iv) a scale to reflect the reduction in the award of £2,524.00.
- (c) What, if any, costs order I should make to reflect the involvement of Senior Counsel in this case for both the plaintiff/appellant and the defendant/respondent.

### **Legal principles**

[10] In *Costley v. Caughey* [1998] NIJB 256, Sheil J reviewed the relevant statutory provisions and the Rules of the Supreme Court (Northern Ireland) 1980 in relation to the question of costs on an appeal from the County Court to the High Court. In that case the plaintiff's claim had been dismissed both in the County Court and on appeal. Sheil J ordered that the defendant/respondent should have an order for "costs here and below". The defendant/respondent submitted that this meant an order for costs on the County Court scale "here and below". The plaintiff/appellant submitted that

the costs in the court below should be on the County Court scale but that the costs on the appeal should be taxed costs which the plaintiff/appellant anticipated, Sheil J observing probably correctly, that taxed costs would be less than the costs on the County Court scale. It is not specifically stated in the judgment but I assume that the plaintiff's anticipation that the taxed costs in the High Court would be less than the costs on the County Court scale was informed by reason of the provision that on a dismissal in the County Court the relevant scale is selected on the basis of the amount claimed by the plaintiff. If for instance the plaintiff had claimed £15,000.00 on the civil bill then an order for costs on the County Court scale "here and below," in so far as it related to the High Court, would most probably bear no relationship to certain aspects of the work necessitated by the appeal nor would it take into account the real value of the plaintiff's claim. Scale costs have the advantage of certainty and speed of resolution. Those advantages were recognised and endorsed by the Civil Justice Reform Group chaired by Lord Justice Campbell which reviewed the civil justice system in Northern Ireland, see paragraphs 8.44 - 8.47 of the *Interim Report* dated April 1999 and paragraphs 79 - 82 of the *Final Report* dated June 2000. The virtues of fixed scales of costs in the County Court was also considered in the Court of Appeal *In the matter of C & H Jefferson, a firm and In the matter of the Solicitors (Northern Ireland) Order 1976 [1998] NI 404*. As well as referring to the virtues of such scales Carswell LCJ stated that the scale fees should

"operate as a salutary incentive not to claim excessive amounts in a court in respect of whose proceedings the costs and fees should be both moderate and ascertainable."

In relation to each *individual* case scale costs do not take into account circumstances such as the particular complexity of the matter, the difficulty or novelty of the questions raised, the time spent on the case, the skill, effort, specialised knowledge or responsibility involved. The Taxing Master is required by paragraph 1(2) of Order 62, Appendix 2, Part I of the Rules of the Supreme Court (Northern Ireland) 1980 to have regard to such circumstances. One of the circumstances to which the Taxing Master is to have regard where money is involved, is its amount. On an appeal to the High Court the money involved is the money involved in the appeal. An important part of the function of the taxing master is to maintain proportionality. That function being particularly significant in relation to appeals from "a court in respect of whose proceedings the costs and fees should be ... moderate" and some of the work undertaken for the hearing in the County Court will ordinarily not have to be repeated for the appeal. It is open to the appellant to make clear in correspondence at the time of serving the notice of appeal or shortly thereafter, the amount involved in the appeal. Similarly the respondent can bring definition to the amount involved. Such correspondence would then be available not only to assist the taxing master but also to assist case management by bringing definition to the issues on appeal.

[11] In *Costley v. Caughey* Sheil J held, and with respect I agree, that the normal order for costs on an appeal from the County Court to the High Court should mean:-

“Costs below on the County Court scale and costs on the appeal in the High Court to be taxed in default of agreement”.

[12] I also agree with his qualification that this should be the normal order made without prejudice to the general discretion vested in the court to make some other order in the particular circumstances of some other case.

[13] The effect of the normal order is that if the plaintiff succeeds on an appeal by having the amount awarded in the County Court increased to the extent that it leads to an increased scale of costs in the County Court then the plaintiff's advisers obtain the benefit of that increase together with the agreed or taxed costs in the High Court. Conversely if the defendant succeeds on an appeal by having the amount awarded in the County Court decreased to the extent that it leads to a decreased scale of costs in the County Court then the defendant obtains the benefit of having to pay less costs in the County Court and obtains agreed or taxed costs in the High Court. There is thus certainty and speed of resolution as to the amount of costs in the County Court on a swings and roundabouts approach together with an ability for the Taxing Master on appeal to tax costs in the ordinary way taking into account factors such as whether there was less in issue on appeal than in the County Court or whether the work involved on the re hearing was less than on the original hearing. Accordingly a plaintiff/appellant could not double the cost of the proceedings by securing scale costs in the County Court with the equivalent again on appeal to the High Court by bringing an appeal to secure a small or modest increase in the amount of the award made in the County Court. Similarly a defendant/appellant could not disproportionately penalise the plaintiff in costs to secure a small or modest decrease in the amount of the award made in the County Court.

[14] I consider that, if the parties do not agree the costs of an appeal, it is for the Taxing Master to determine what weight is to be given to the amount at issue in the appeal, which amounts in these appeals I have identified at paragraphs [5] (b) (ii) and [9] (b) (ii) of this judgment.

[15] In relation to the involvement of Senior Counsel in the appeal of *Kelly v Mackle* I was referred by Mr Cartmill, on behalf of the defendant/respondent, to the decision in respect of costs in *Fryers v Belfast Health & Social Care Trust* [2008] NIQB 136 at paragraph [15]. I have not heard full argument in relation to this issue but I consider that the question as to whether costs of Senior Counsel is to be allowed is a matter for the Taxing Master under paragraph 1(1)

of Order 62, Appendix 2, Part I of the Rules of the Supreme Court (Northern Ireland ) 1980. This is not a case under paragraph 2(2) of Appendix 2, Part I where a judge has to issue a certificate before the costs of more than one Counsel can be allowed. The relevance and applicability in this jurisdiction of the factors set out at 62/A2/12 of the 1999 Supreme Court Practice being for the consideration of the Taxing Master. In the appeal of *Gilheaney v McGovern and Another* it was recognised by the plaintiff/appellant not to be appropriate to recover the costs of Senior Counsel. In that appeal that issue will not arise on any taxation of costs. In contrast in the appeal of *Kelly v Mackle* it was submitted that the costs of Senior Counsel should be recovered despite the factual nature of the issues involved, the requirement for proportionality and the small amount at issue.

### **Conclusion**

[16] In relation to this case of *Gilheaney v. McGovern and Another* I make the normal order as to costs that is that the plaintiff/appellant have costs below on the County Court scale for an award of £4,347.50 and costs on the appeal in the High Court to be taxed in default of agreement.

[17] In the case of *Kelly v. Mackle* the order that I make is that the plaintiff/appellant have costs below on the County Court scale for an award of £6,637.05 and that the defendant/respondent have the costs on the appeal in the High Court to be taxed in default of agreement.