Neutral Citation No. [2016] NICA 6 | *Ref:* **GIL9862**

Judgment: approved by the Court for handing down | *Delivered:* **11/02/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

H

Petitioner/Respondent;

-and-

H

Respondent/Appellant.

Before: Gillen LJ, Sir Paul Girvan and Sir Patrick Coghlin

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This court has already handed down a judgment in this matter affirming the decisions of O'Hara J and Maguire J arising out of applications for ancillary relief between the parties (see H v H [2015] NICA 77).

[2] The question now arises as to the costs of the hearing before O'Hara J and the two appeals which have been determined against the appellant by virtue of the orders of the court affirming the decisions of O'Hara J and Maguire J.

Principles governing costs

[3] Order 62 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides for costs.

[4] Order 62 Rule 3(3) provides:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the

court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[5] Order 62 Rule 3(4) provides:

> "(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where -
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> (a) the order is made that the costs of one party to proceedings be paid by another party to those proceedings, or
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> (b) an order is made for the payment of costs out of any fund (including the legal aid fund), or
>
> (c) no order for costs is required
>
> unless it appears to the court to be appropriate to order costs to be taxed on the indemnity basis."

Order 62 Rule 12,dealing with the basis of taxation, provides as follows:

> "12.-(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules the term 'the standard basis' in relation to the taxation of costs shall be construed accordingly.
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> (2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party, and in these rules the term 'the indemnity basis' in relation to the taxation of costs shall be construed accordingly."

[6] In Northern Ireland in H v W [2006] NI Fam 16 the High Court dealt with costs in cases of ancillary relief as follows:

> "[3] I have already set out the law that I consider governs applications for costs in cases of ancillary relief in Graham v Graham and Another [2004] NI 174. In essence Northern Ireland costs are governed by the Family Proceedings Rules (Northern Ireland) 1996, SR 1996/322. In particular rule 1.4. provides as follows:
>
> > '(1) Subject to the provisions of these Rules and of any statutory provision, the Rules of the Supreme Court (Northern Ireland) 1980 and the County Court Rules (Northern Ireland) 1981 …….shall apply with the necessary modifications to the commencement of family proceedings in…….the High Court and County Court respectively'.
>
> ……
>
> [4] In Graham's case I determined that in light of the decisions of the House of Lords in White v White [2001] 1 AC 596, there is now much to be said for looking upon the division of matrimonial assets following divorces in big money cases as being something akin to the division of partnership assets on the dissolution of a partnership where costs are seen as a necessary expense of the dissolution with each party bearing their own costs.
>
> [5] I emphasised however in Graham's case that whereas the starting point in big money cases, where the assets exceed the aggregate of the parties' needs, is that there should be no order as to costs, that shift in approach must not in any way be seen as diluting the positive duty on the parties to negotiate.
> ……."

The court went on to add at paragraph [9] of Graham:

> "Accordingly the courts will be wary to ensure that no encouragement is given to a party to misbehave in litigation safe in the knowledge that the starting point

> will be no order as to costs. The courts will be watchful in order to discern those cases where exorbitant demands for disclosure, inordinate demands in correspondence, disproportionate attention to the minutiae of the case and tactical posturing have all contributed unreasonably to the costs of the case. Such an approach will be characterised as unreasonable and the guilty party will be penalised."

[7] The award of indemnity costs in this jurisdiction has been considered in a number of authorities including Craven and Others v Giambrone and Others [2013] NIQB 61, CG v Facebook Ireland Limited and Joseph McCloskey (No. 2) [2015] NIQB 28 and Monaghan v Graham [2013] NIQB 53.The principles adopted were in effect those cited in the English authorities and followed in England and Wales notwithstanding the different legislation and statutory rules.

[8] In England and Wales, the Civil Procedure Rules (CPR) Part 44 set out the general rules about costs and the starting point is that the unsuccessful party will be ordered to pay the costs of the successful party. Having set out the general rule that costs follow the event, the balance of the rules adumbrates the issues to be taken into account and the forms of order available to the court in the exercise of its discretion to make orders for costs. Thus CPR Rule 44.3(5) sets out the type of conduct to be considered, including whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and the manner in which the party has pursued or responded to the application or a particular allegation or issue.

[9] In that jurisdiction the Family Proceedings Rules 2010 Part 28.2(1) and 28.3(2) state that CPR 44.3(1) to (5) shall not apply to financial family proceedings. The general rule therefore that the costs follow the event has no place in financial remedy proceedings in England. Nonetheless, the court has discretion to make an order for costs "because of the conduct of a party in relation to the proceedings".

[10] The Court of Appeal in England has declined to define the circumstances in which a court could or should make an order for costs on the indemnity basis. In Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden and Johnson [2002] EWCA Civ 879 Lord Woolf at paragraph [30] cited with approval a judgment of Simon Brown LJ in Kiam v MGN Limited (No. 2) [2002] 2 All ER 242 who, at [12] had said:

> "I for my part understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would

> need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 …. does I think carry at least some stigma. It is of its nature penal rather than exhortatory."

[11] Lord Woolf at paragraph [34] said, in addition, as follows:

> "There is an infinite variety of situations that can come before the courts and which justify the making of an indemnity order …. I do not respond to Mr Davison's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances where they should not … This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

[12] In Fitzpatrick Contractors v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391 (TCC) (cited with approval in Siegel v Pummell [2015] EWHC 195 (QB)) Coulson J said at Paragraph 3 sub-paragraph (iv):

> "Examples of conduct that have led to such an order for indemnity costs include the use of litigation for ulterior commercial purposes … and the making of an unjustified personal attack on one party by the other …"

The submissions of the parties

[13] The appellant, undeterred by a characterisation of his appeals in this court as being wholly misconceived, has produced a written litany of similar allegations largely against the professional lawyers retained on behalf of the respondent and the judges/Masters who have heard the various stages of this financial matter. Allegations of lack of diligence, failure to comply with rules, breaches of protocol, misconduct, neglect and collusion in the conduct of the proceedings, all of which he has voiced before this court and in the earlier proceedings and for none of which he has produced a scintilla of sustainable evidence, yet again surfaced in the further lengthy written submissions he has made on the issue of costs.

[14] Mr Fee QC, who appeared on behalf of the respondent with Ms Pauley, contended that not only should the appellant be condemned in the costs of the present appeal, but that it should be further ordered that they are to be taxed on an indemnity basis together with interest on the basis of the conduct in the circumstances of the case. He further contended that the orders in the courts below in respect of ancillary relief before the Master and before Maguire J and O'Hara J should be confirmed against the appellant and provision made for them to be taxed on the indemnity basis together with interest.

Conclusion

[15] We have come to the conclusion that Maguire J was correct in ordering that the costs of the appeal to him from the Master and the costs before the Master should be awarded against the appellant. Given that neither the Master nor the learned judge made an order of indemnity costs in that instance and indeed we have no reason to understand the matter was even raised as an issue, we are prepared to order that those costs should remain as standard costs.

[16] O'Hara J concluded that the costs of the hearing before him should be determined by this court. Since he did not specifically invoke the question of indemnity costs and we do not understand the issue of indemnity costs to have been raised before him, the costs of the original hearing before O'Hara J will be left at the standard costs. We award the costs of those hearings against the appellant

[17] We turn now to the costs of the appeals before this court. We are satisfied that the conduct of the appellant in continuing to relentlessly pursue the respondent in what amounts to almost an obsessive fashion on what we considered to be unmeritorious grounds and the manner in which he conducted this appeal with serious unfounded allegations against counsel, solicitors and members of the judiciary, are such as to take this case out of the norm and constituted misconduct of an unreasonably high degree. This conduct has not been merely wrong or misguided but has been so wide-ranging and insulting as to be deserving of moral condemnation. The manner in which the appellant has conducted these proceedings throughout has not only served to inflate the costs above anything that was reasonable or necessary but has caused those costs to rise to a level disproportionate to the essential issues that had to be decided. The extent to which he has pursued unreasonable applications and hopeless appeals is already indicated by the large number of occasions on which he has already been condemned in costs. We therefore award the costs of the appeals before this court to the respondent, the same to be taxed on an indemnity basis.

[18] For the removal of doubt we consider that all cost orders made against the appellant to date in these ancillary relief proceedings, including the costs of these appeals, should be taken from the appellant's share of the proceeds of the sale of the Ipswich property in similar terms to the order of the Master in this regard.

[19] Finally, the costs which the Master had condemned the appellant to pay will include those in respect of his stay application during the course of the first appeal, the costs of applying to the Master under the slip rule to vary the timing recorded of the original ancillary relief hearing and the amendment of the timing recorded for the original ancillary hearing.