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Judgment: approved by the Court for handing down | *Delivered:* **08/04/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

MARK LUNNY and DANLOR UTILITIES LIMITED

Plaintiffs:

v

BRENDAN McGIVERN

Defendant:

STEPHENS J

[1] This is a commercial action in which shortly after proceedings were issued the defendant conceded that the property the subject matter of the action belongs to the second named plaintiff. The various items of property have been collected by the second named plaintiff. The only outstanding issue is costs. I received short submissions in relation to the factual background. No authorities were cited. I gave an ex tempore ruling a transcript of which was prepared. I have corrected that transcript and also added some further matters.

[2] At the outset I emphasise the importance of

a) the pre-action protocol for commercial actions dated 21 December 2012 which came into effect on 1 January 2013,

b) the commercial practice note dated 21 December 2012 which is effective from 1 January 2013, and

c) the commercial action Scot Schedule note.

All of these are going to be part of the warp and weft of practice and procedure in relation to future commercial actions. There is to be compliance not only with their provisions but also with the basic underlying concepts informing those provisions and with the overriding objectives in Order 1 rule 1A of the Rules of the Court of

Judicature (NI) 1980. A fundamental aspect of fairness is that there should be a proper opportunity for individuals who have the misfortune potentially to be involved in commercial proceedings and in advance of those proceedings being commenced, to know what the issues are, to obtain legal advice about those issues and to form a view. The primary objective of the protocol is to assist potential litigants and it should be operated in such a way as to achieve that objective. The potential litigants should be provided with an opportunity (ordinarily in practice with the benefit of legal advice) to minimise their exposure to costs. For instance a potential plaintiff or a potential defendant can concede issues or concede liability or negotiate settlement or agree to mediation. The method by which the pre-action protocol achieves this objective is by bringing definition to the obligation which already exists on the plaintiff prior to commencing proceedings to send to each proposed defendant a letter of claim. The pre action protocol specifies that the letter of claim is to contain the various matters set out at paragraph 6. Those matters are extensive so that a properly drafted letter of claim will be comprehensive. There is then an obligation on the defendant to respond within 21 days. The objective of that response is to identify what the real issues are between the parties. The response should contain the various matters set out at paragraph 7. There is then provision for a pre-action meeting between the parties. The pre action protocol specifies that within 21 days of the defendant's letter of response the parties should meet and discuss. Again the aim is to try to identify the real issues between the parties so that before proceedings are issued the individuals concerned can receive clear advice and form a view.

[3] These proceedings were commenced after 1 January 2013. However the pre-action protocol does not apply to this particular action because it is one in which there was a claim for interim injunctive relief albeit by summons rather than by an ex parte application. It is understandable that the pre action protocol should not apply in circumstances where sending a letter of claim and thereby notifying the defendant of the claim might result in the very damage occurring that the plaintiff wishes to prevent. However in the circumstances of this case there was no reason why a detailed letter of claim could not have been sent. There was plenty of time within which it could have been sent as there was two to three months between the cause of action accruing and the proceedings being issued. The application for an interim injunction when it was launched was by way of summons rather than being an ex parte application. It was anticipated by the plaintiff's legal advisers that notifying the defendant of the claim and of the application for an interim injunction would not lead to any adverse consequences for the plaintiff and this transpired to be correct.

[4] The letter of claim dated 29 January 2013 from the plaintiff's solicitors did not identify the correct plaintiff. It named an individual as the owner of the items of property who was not subsequently included as a plaintiff in the proceedings and was different from either the individual or the company who previously had been in contact with the defendant. The writ of summons when it was issued included two plaintiffs. The first was a director of the second named plaintiff company. The first

named plaintiff, the company director, should not have been included in the proceedings. He did not nor could he have claimed to own the various items of property. The plaintiffs included in the proceedings were referred to in the heading of the letter of claim but in the body of the letter of claim there was no assertion that either of them owned the various items of property. The document which led the defendant to concede that the items of property belonged to the second plaintiff was not made available to the defendant in advance of the proceedings being issued. There were two companies one of which is the second plaintiff. The share capital in the second plaintiff had been transferred from the previous owner to the first plaintiff. Details as to this and the occupation of the premises in which the second plaintiff carried on business and stored the items of property together with some detailed account of or proof of ownership of the various items of property should have been included in the letter of claim. The letter of claim should have gone beyond bald and in the event incorrect assertion.

[5] The confusion created by the letter of claim as to whom it is alleged owned the various items of property was the context in which the defendant's solicitors then advised the defendant not to reply to the letter of claim but to "leave it a short time to see what happened." That deliberate decision did not lead to any clarification of the issues. The aim of identifying the issues in advance and of exposing and working through any ambiguities so that potential litigants could form a view was not achieved either by the letter of claim or by the failure to respond to the letter of claim. A correct response to the letter of claim would have been an unequivocal acknowledgement that the defendant did not own the various items of property, that he was quite prepared to deliver the various items of property to whoever did own them, that he had now received competing claims from different persons that they owned the items of property, giving details of those competing claims and asking for proof of ownership by the individual named as the owner in the letter of claim.

[6] The letter of claim and the lack of any response from the defendant's solicitors meant that the pre action correspondence did not assist the individuals involved to avoid unnecessary proceedings and from incurring unnecessary costs. I consider that there were deficiencies on both sides. I also consider that the matter could have been resolved by correspondence.

[7] Ordinarily parties to litigation must comply with the requirements of the protocol and the basic underlying concepts informing the protocol. It is not the purpose of the protocol that ultimate detail is to be given at the pre action stage. What are to be given are critical details sufficient to allow a view to be formed. Non-compliance should be looked at in a pragmatic and commercially realistic way. For instance if a limitation period is about to expire proceedings must be issued despite a failure to comply with the protocol. Furthermore it is not every breach of the protocol that will have serious consequences. The question of compliance is to be looked at as a matter of substance rather than as a matter of semantics or technical non-compliance. In addition if a case goes to trial, it will be difficult for one of the parties to argue that the failure to follow the pre-action protocol increased costs

because all the information that would have been acquired at the pre-action stage and more has been exchanged and if the case still has not resolved, it is unlikely that the position would have been any different at the outset. However if there has been non-compliance, if it is serious and if there is a finding that there is a good chance that the matter would have settled if there had been compliance then consequences will follow. A defendant sued in such circumstances should expect to be able to recover costs from the plaintiff (or from the plaintiff's solicitor under Order 62 rule 11 of the Rules of the Court of Judicature (NI) 1980) to reflect the increased costs incurred because the exchange of information had taken place at greater expense with court proceedings rather than at less expense by following the protocol. It may also be that the plaintiff should not have to pay the additional costs that he has incurred and that those costs should not be recovered from him by his own solicitor.

[8] In this case the protocol does not apply though for the reasons I have set out consideration should be given to an amendment so that in future it does apply. There was a degree of confusion as to the ownership of these various items of property. The aim of the protocol is to assist their clients to sort out such confusion without proceedings. The protocol does not apply but I am still entitled to and do look at the conduct of the parties prior to the proceedings being issued. The usual order is that costs follow the event. I do not consider it appropriate to make an order for full costs in favour of the plaintiff against the defendant. The protocol brings definition to an existing obligation essentially of fairness. I consider that there was some fault on both sides in the attempts to sort out the confusion as to ownership of these various items of property prior to the proceedings being issued. I have already made it clear that I consider that the confusion could have been sorted out and that proceedings could have been avoided. I do not consider that it would be appropriate for the individual litigants involved to have to pay for all the costs involved in these proceedings given the opportunity for the confusion as to ownership to have been resolved by professionals whom they had engaged. I consider that the fairest course of action to take in the circumstances is if I make an order in favour of the plaintiff against the defendant for half the costs of the applications that were made. I make it clear that that is not half the costs of the action but it is half the costs of the applications, treating them as summonses. So the total amount of costs is to be limited and then the plaintiff is limited to recovering only half of that limited amount. I leave it to counsel to devise the precise form of the order.