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

Delivered:	**23/11/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DANIEL McATEER

Plaintiff/Respondent;

-and-

(1) SEAN DEVINE
(2) MARY DEVINE

Defendants;

(3) BRENDAN FOX, PARTNER,
CLEAVER FULTON RANKIN

Defendant/Appellant;

(4) JOHN LOVE, PARTNER,
MOORE STEPHENS BRADLEY McDAID

Defendant.

-and-

BETWEEN:

DANIEL McATEER

Plaintiff/Respondent;

and

(1) SEAN DEVINE
(2) STEPHEN McCARRON

Defendants;

(3) BRENDAN FOX, PARTNER,
CLEAVER FULTON RANKIN

Defendant/Appellant;

(4) JOHN LOVE, PARTNER,
MOORE STEPHENS BRADLEY McDAID

Defendant;

Before: Gillen LJ and Madam Justice McBride

GILLEN LJ (giving the judgment of the Court)

[1] This is an appeal against a costs order made by Weatherup LJ on 10 December 2015 in this matter arising out of the litigation between the plaintiff/respondent Daniel McAteer and the defendant/appellant Brendan Fox, Partner, Cleaver Fulton Rankin. Leave to appeal the costs order was granted by the Judge. The appeal raises a short but important point relating to the powers of the court to order a fixed sum in costs in lieu of taxed costs under Order 62 rule 7 of the Rules of the Court of Judicature 1980 ("the rules"). Mr Hanna QC appeared on behalf of the appellant with Mr Dunlop. The respondent represented himself.

Background

[2] The respondent in this matter is an accountant. He commenced two sets of proceedings against all the defendants mentioned in the title. All the claims were consolidated.

[3] Sean and Mary Devine were Property Developers, Brendan Fox, a Solicitor, John Love an Accountant and Stephen McCarron, an Estate Agent.

[4] The claim against the appellant Brendan Fox was originally grounded on breach of contract, conspiracy, unlawful interference with trade, malicious falsehood, negligence and/or negligent misstatement.

[5] The defendants applied to strike out the plaintiff's claim as disclosing no reasonable cause of action. In the event the case against Stephen McCarron was struck out and the claims against the other four defendants were, in each case, struck out in part. The allegations of unlawful interference with trade, malicious falsehood and negligence and/or negligent misstatement against Brendan Fox had been struck out. Some of the allegations of breach of contract were struck out as were some of the allegations of conspiracy.

[6] The claims against the remaining four defendants came on for hearing in 2012. The respondent agreed to a stay in the proceedings against Sean and Mary Devine and John Love. There remained a case against the appellant Brendan Fox based on breach of contract and conspiracy.

[7] The proceedings against Mr Fox arose out of the fact that the respondent, an accountant, company director and businessman based in Derry, had been the accountant and tax advisor for the Devines and the Director of Roe Developments Ltd in which the respondent and the Devines were shareholders.

[8] The appellant was a solicitor and partner in the firm of Cleaver Fulton Rankin and acted for the plaintiff from June 2000 to July 2001 and for Roe Developments Ltd from 1998 to 2003. The appellant subsequently became the solicitor for the Devines.

[9] The respondent's case was that the appellant therefore had an intimate knowledge of the respondent's business affairs and those of Roe Developments Ltd. He later acted as solicitor for the Devines and other former clients and business partners of the respondent in proceedings against the respondent.

[10] This has all been a very long running matter and, as Weatherup LJ recorded in his judgment on the costs, "has taken up an inordinate amount of court time and over a considerable period of time".

[11] The proceedings undertaken against the respondent over the years have related to a variety of matters. These include:

- Accounting actions by the Devines requiring the respondent to account for money provided by the Devines and similarly by members of the Guram family.

- Actions concerning property development related to what were known as the Henderson lands and also the Ballymoney lands.

- Tax cases related to Mary Devine and another related to Sean Devine known as the EIS case.

- Proceedings about legal fees.

[12] The breach of contract alleged in the instant proceedings against the appellant included the appellant acting for Sean Devine Ltd, having previously acted on behalf of the respondent and on behalf of Roe Developments Ltd in relation to an action concerning Hennessey's Bar.

[13] The alleged breach of confidentiality had included the disclosure of details of the sale of Hennessey's Bar, namely the purchase price and the misstatement of the time for completion of the purchase. The respondent complained that the appellant acted in the Henderson action, the Beechtree Bar action, the Devines' failure to account action, the Gurams' failure to account action and the EIS action the Roe Developments liquidation. More generally the appellant was said to have misused his professional relationship with the respondent to encourage proceedings that were undertaken against the respondent.

[14] The conspiracy alleged in these proceedings included the allegation that the appellant had agreed with others to harm the respondent by means that included unwarranted legal proceedings and the disclosure of information designed to harm the respondent's interests such as that in relation to the purchase of Hennessey's Bar, the disclosure by Michaela Brunton, later Michaela Diver, a solicitor working with the appellant, of various documents on 25 March 2009 to others including a Mr Pierse, the disclosure of accountants' reports and details of other litigation, contacts with the Legal Services Commission and the respondent's professional

body to perpetuate rumours about the respondent and to occasion damage to his business interests. These matters were dealt with in the judgment in this action on the substantial issue handed down on 15 July 2015 by Weatherup LJ.

[15] In addition it was alleged in the Statement of Claim that the appellant interfered with the respondent's entitlement to legal aid by communicating with the Legal Services Commission and that included providing false and misleading information that caused legal aid to be withdrawn for a time. The respondent also contended that the appellant undermined the confidence of the respondent's co-shareholders in Roe Developments Ltd.

[16] In short the respondent placed the appellant as the orchestrator of actions that were taken against the respondent.

[17] Weatherup J meticulously explored the history of all the relationships and in particular the relationship between the appellant and the respondent. Having done this at paragraph 60 of his judgment in the substantive matter he concluded as follows:

> "[60] I have not been satisfied that the defendant (*ie Brendan Fox*) was orchestrating events or that he was responsible for a raft of unnecessary litigation against the plaintiff *(i.e. Daniel McAteer*). I am not satisfied of any conspiracy by the defendant against the plaintiff nor am I satisfied of any breach of contract by the defendant against the plaintiff. Certainly the defendant acted unwisely on occasions in relation to the taking of instructions against the plaintiff, and going to the plaintiff's office with the statutory demand and when writing to KPMG to seek to influence the opinions expressed in the report. While these were matters that were unwise they did not amount to conspiracy or breach of contract.
>
> [61] In any event I am not satisfied that losses have been sustained by the plaintiff as the result of the actions of the defendant. There are extensive claims for financial loss but no evidence of loss attributable to the actions of the defendant. Accordingly I am not satisfied that the plaintiff has made out the case against the defendant. In 2014 the plaintiff informed the court that he was proposing that the proceedings should be concluded and that the defendant would not agree to do so. That is a matter that is clearly relevant to the costs incurred. I will return to the issue of costs at a later date. I have not been satisfied as to the plaintiff's claim against the defendant.

> Accordingly there will be judgment for the third defendant against the plaintiff".

[18] It is pertinent to note the occasions when the judge found the appellant had acted unwisely. These are as follows:

(i) At paragraph 30 the learned Judge said:

> "… While it did not constitute a breach of his duty as a solicitor, I consider it to have been unwise of the defendant to have become involved in proceedings against the plaintiff after the less than amicable nature of the solicitor/client relationship. That less than amicable conclusion was based on a dispute that had arisen about fees, although a payment was eventually made, and a complaint that had been made about the manner in which the process server had presented himself in the plaintiff's office".

(ii) Reports had been prepared for the purposes of litigation, on the instructions of Cleaver Fulton Rankin on behalf of Mr Devine, from KPMG. These reports were not prepared for the purposes of the instant proceedings but for other proceedings and were critical of the plaintiff. Ms Brunton, a junior solicitor in the appellant's firm, and the defendant had corresponded concerning the reports. As a result of comments emanating from Ms Brunton to Mr Brown, the author of the reports, it appears the report was changed. Although the learned trial Judge concluded that he was not satisfied that any changes made altered the import of the reports, he concluded at paragraph 50:

> "It was unwise of Ms Brunton and the defendant to write to the expert witness in the manner they did seeking to influence the opinion expressed by the expert".

(iii) A statutory demand was issued by the appellant who had attended the respondent's office for service. Of this the learned trial Judge said at paragraph 51:

> "The process server against whom a complaint had earlier been made by the plaintiff was also present (with the defendant). The defendant's explanation for his presence at the plaintiff's office was that he happened to be in Derry at the time. It was unnecessary for the defendant to be present for the service of the statutory demand. It was unwise of the defendant to attend the plaintiff's office for this purpose. It was unwise to send the process server who had drawn the previous

> complaint. It was unwise to accompany the process server to the office".

[19] It is convenient at this stage to recite the relevant provisions of the rules relating to costs.

[20] Costs of and incidental to all proceedings in the High Court or Court of Appeal are in the discretion of the Court and as to by whom payable and to what extent, subject to the Judicature Act (Northern Ireland)1980 Act, Rules of Court and express provision of statute.

[21] Costs of Supreme Court Proceedings are dealt with under Order 62 of the Rules.

[22] The basic principle is that costs follow the event. However in its discretion the court may withhold all or some costs from the successful party or, exceptionally, award costs against him, where it is just to do so.

[23] However there must be material relevant to the litigation on which to depart from the rule of costs following the event. (See Scherer v Counting Instruments [1986] 1 WLR 615). Valentine on `Civil Proceedings: The Supreme Court' at 17.05 states:

> "Foolishness or exaggeration, reliance on unappealing grounds are not grounds for withholding costs from the winner, and misfortune, property or sympathy of a court are not grounds for waiving costs against the loser. The judge must decide judicially, and cannot delegate the discretion. Normally he should not hear evidence solely for the purpose of deciding costs, but can do so, whether after trial or settlement, and in every case he must be fully informed about material matters as to costs such as legal aid, a lodgement under Order 22 or a Calderbank offer".

[24] Unless otherwise ordered, where costs are payable by one party to another, payable out of any fund or payable without an order, those costs are an amount allowed on taxation.

[25] This principle however is subject to Order 62 rule 7. Under this provision in awarding costs the Court may order, in lieu of taxed costs:

- A specified proportion of the costs from or to a specified stage in the proceedings or

- A specified gross sum under Order 62 rule 7(4).

[26] In distilling the principles that should govern an award under Order 62 rule 7 we have derived assistance from:

- Valentine at 17.12
- The White Book (1997) 62/7/7
- Silva v Czarnikow Ltd (1960) 104 S.J. 369
- Lloyd's List Law Reports [1960] Vol 1 p319
- Leary v Leary [1987] 1 WLR 72
- Taylor Made Gold Co Inc v Rata & Rata (a firm) [1996] FSR 528
- Sheffick Ltd v JDM Associates & Ors (No 4) 22 Con LR 51.

[27] The principles which we have distilled are as follows:

(i) The purpose of the rule is to avoid expense, delay and aggravation involving a protracted litigation arising out of taxation. Such an aim would be achieved especially, though not exclusively, in complex cases.

(ii) The discretion vested in the judge is not subject to any formal restriction.

(iii) The order does not envisage any process similar to that involving taxation. The approach should be a broad one. A judge is not obliged to receive evidence on oath or anything more than some evidence as to the estimated costs before making such an order.

(iv) Although the discretion is unlimited, it must be exercised in a judicial manner. An example of acting in an unjudicial manner would include for example "clutching a figure out of the air without any indication as to the estimated costs".

(v) The court will only interfere with the exercise of the discretion by the trial judge if he/she has erred or was plainly wrong.

The Costs Judgment of Weatherup LJ

[28] On 10 December 2015 the question of costs arising out of the earlier substantive judgment was heard and determined. Weatherup LJ appears to have given an extempore judgment on the same date. In the course of that judgment the following points emerged.

[29] The learned trial Judge divided the proceedings into four stages:

- Stage 1 was from the commencement of the action from March 2009 up to the initial hearing of substance in September 2012. During that period there were numerous applications in relation to pleadings, discovery, inspection and strike-outs.

- The second stage occurred in September 2012 when a settlement was concluded between Mr McAteer and the other defendants with the exception of Mr Fox. An attempt to settle the matter with Mr Fox involved an adjournment so that the Solicitors Disciplinary Tribunal could review certain matters about which Mr McAteer complained. At that time Mr McAteer sought a contribution to his own costs and outlays. That matter was to be determined by the trial Judge. The appellant wished an arrangement whereby it was back to back on costs. Mr McAteer refused to agree that and wished the issue of costs to be decided by the Judge, a proposal with which Mr Hanna on behalf of the appellant did not agree. The learned trial Judge had said that in the absence of agreement he would not enforce an agreement on the parties.

- The next stage was September 2012 to October 2013 which included the application to the Solicitors Disciplinary Tribunal. This took an inordinate time to progress leading to judicial review proceedings.

- In October 2013 Mr Fox made an offer of settlement on the basis that Mr McAteer withdrew his proceedings and made a contribution of £75,000 to the appellant's costs.

- The next stage was in 2014 with the resumed hearing on 27 March 2014 and thereafter until the conclusion of this case. At that stage the respondent invited the appellant to make a donation to costs to the Bar pro bono unit which was unacceptable to the appellant. The entire trial seems to have occupied 35 days of court sitting time.

[30] The learned trial Judge then set out the terms of the Rules which governed costs including the power under Order 62 Rule 7(4) to order the provision of a gross sum. Mr Hanna on behalf of the appellant suggested to the court that the costs of the appellant amounted to £550,000 and asked the court to award two-thirds of that sum i.e. in the region of £360,000 by way of a gross sum or in the alternative that there be an order for taxation of costs.

[31] The learned trial Judge indicated that he had taken into account all of the submissions made to him and in addition he noted:

- The overriding objective contained in Order 1 rule 1A of the Rules.

- That he was satisfied costs should follow the event.

- That "the event in this case is that one has to look at the overall outcome and the overall outcome is the defendant's success in the action".

[32] The learned trial judge added the following:

> "Now there are blips in that, in that there are issues about discovery. There are issues about inspection. Inspection was a recurring irritant throughout the case. There were concerns about how that would be achieved and it did take up time trying to deal with that. That was two respects in which the lack of discovery was concerning but costs on the defendants side was not forthcoming when it should have been. A further overall circumstance, including the settlement consideration, all of which I think have a bearing in relation to this when one is considering whether there are circumstances to make an order other than simply that costs follow the event. I have referred to September 2012 and the settlement report at that time. There was an undertaking proposed in a form words that was being discussed and I do not believe that undertaking was on the basis on which there was an absence of agreement. There was provision for costs of the plaintiff to dispute at that time. Now I have noted the terms on which the costs arrangement was set out namely that the judge would decide the question of costs. In the terms of the proposal it would assume that the plaintiff would recover some costs I believe in the way it is framed. In the plaintiff's skeleton he sketched it on the basis if `any' costs are to be recovered the judge would determine them and certainly that seems to acknowledge that there may be circumstances in which there may be no costs. Certainly if the parties were to put the issue of costs in the hands of the judge then and had they done so in an open-ended way then any outcome could have been achieved in relation to where the costs may fall, if any. I am certainly of the impression that in September 2012 here was the time to settle the case as the parties were discussing it, moving towards it and the process faltered because of an absence of agreement in relation to how the costs issue might resolve."

[33] Subsequently in his judgment the learned trial Judge again returned to the opportunity for a resolution during the course of the discussions in September 2012:

> "So it does look like a lost opportunity at that point. I think Mr Hanna was recognising that he would forfeit any entitlement he might claim to have for costs. Mr McAteer I think at that time would have recognised

> that had the final order been that there were little or no costs to be recovered then that would have been the outcome. As I say, perhaps the matter required further exploration in order to see whether an agreement was reached or could be reached but that wasn't to be the case. Well, that was one step in the settlement process which was unsuccessful. A further step occurred in October 2013. The plaintiff at that stage had moved the position to requiring £75,000 to be paid in respect of costs. Well, that was the presumption on the hearing and at a time when there was a dispute about the Disciplinary Tribunal but that offer was not accepted and I can understand that the plaintiff would at that point in the proceedings have not been expected to be in a position to make a payment like that in respect of costs. Then in March 2014 the offer was to pay the costs to the pro bono unit, that does look like an indication from the plaintiff not to seek costs he is requiring, the costs to go into the pro bono unit, that is some kind of charitable claim perhaps but this is another opportunity that might have been explored further. I am left with the impression that a more energetic engagement by the defendant in respect of costs might have moved the parties towards an agreement as that is what had occurred with the other parties."

[34] The learned trial Judge then concluded his ruling in the following terms:

> "What I propose to do in the case is to take up the invitation to apply Order 62 rule 7(4), that is to fix a gross sum which is specified in lieu of taxed costs, that is to save further time in the matter and save the costs of the taxation process in taking up the court's time with a taxation process. In looking at that, I take into account the matters that I have noted above and I have referred to a number of matters in Mr McAteer's paper and a number of matters in Mr Hanna's paper and I take account of the flirting that there has been in relation to settlement on the three occasions, inclusive as each has been. I propose to fix the costs payable to the defendant at £40,000 plus VAT which is intended to include costs and outlay, any expenses and require a payment to be made within one year".

Conclusion

[35] We have had the benefit of extensive skeleton arguments from both sides together with oral submissions.

[36] We commence by recognising the strength of the point made by Mr McAteer in his argument that before departing from the learned trial judge's determination on costs this court must be satisfied that the lower court has taken into account wholly extraneous or irrelevant material and in terms not really exercised its discretion. If the learned trial judge had material before him on which he could have exercised that discretion in the way that he did, this court should not interfere. In saying this we also recognise that the learned trial judge has had the benefit of listening to this case over a very extensive period and had a feeling for the case which is probably denied to this court.

[37] Moreover we are not prepared to overturn his factual findings or assessments of the opportunities for settlement that may have presented themselves at the various stages in this hearing. In particular we find no basis to challenge his assertion that a more energetic engagement by the appellant in respect of costs might have moved the parties towards agreement. We also accepted his assessment of the "blips" in the process including the failure on the part of the appellant to deal appropriately with discovery and inspection during the process itself. Similarly we accept the concerns that he had about the role that the appellant played at various stages as set out at paragraph [33] of this judgment.

[38] We recognise that there no need for the learned trial judge to engage in any detailed investigation or process similar to that involved in taxation in considering the figures put forward in this case.

[39] We can also see the logic in his conclusion that the invocation of Order 62 r. 7(4) in lieu of taxed costs would have saved time in this vexed and lengthy matter and in particular would have saved the costs of a taxation process.

[40] However where we must depart from the exercise of his discretion is in the method of arriving at the gross figure of £40,000 plus VAT. As Purchas LJ adumbrated in Leary's case, whilst there is no need for an exacting enquiry, nonetheless there must be some evidence on the estimated costs beyond a mere assertion that the figure put forward was £550,000. It is evident to us that the learned trial judge did not question or challenge this figure of £550,000 put forward by Mr Hanna QC. Mr McAteer contends that this was the fault of the appellant in not making any effort to explain how that figure was arrived at. However we feel that there is strength in Mr Hanna's rejoinder that he had been prepared to act on the silence of the judge in not querying the propriety of that figure either as to the recorded hours or the rates charged. The learned trial judge had not betrayed the slightest indication that the figure was excessive.

[41] Mr Hanna had invited a reduction of one third on these figures and again no analysis of the resulting figure was engaged.

[42] We respectfully invoke the views of Purchas LJ in Leary's case at page 76 where he indicated that the unlimited discretion vested in the English rule (which was comparable to our Order 67 r. 7(4)) must be exercised in a judicial manner. We have to ask the source of the figure of £40,000 upon which the court settled. It constituted a 93% reduction from the initial figure propounded by the appellant of £550,000 and approximately 89% of the reduced figure of circa £360,000.

[43] Given that the appellant had succeeded and the respondent's case had been completely dismissed, we must question the extraordinary extent of the reduction in such circumstances. We are left with the impression that the figure of £40,000 was, to invoke again Leary's case, "clutched out of the air without any indication as to the estimated cost". It smacks of an arbitrary figure that could do an injustice to the winning party after a lengthy trial. Clearly the authorities eschew any need to carry out a full investigation of the costs bill but to deprive the successful party of such a degree of costs, without *any* evidence of his proposed costs bill or without making any adverse comment upon it, would on the face of it require an explanation together with a positive assertion that this was the degree of reduction intended.

[44] We consider it to be invidious to refer the matter back to the learned trial judge to explain the figures further particularly where apparently he has not seen the proposed bill of costs. Clearly the learned trial judge intended to reduce the plaintiff's costs to some extent in light of the facts mentioned above but was it intended to reduce it to merely 7%--11% of his costs bill notwithstanding his complete success in the action?

[45] In the circumstances we consider that the most effective way to dispose of this case is to revert to an order under Order 62 r. 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.

[46] Accordingly we set aside the award of £40000 costs plus vat and allow the appeal. We shall hear the parties on the issue of the costs of this appeal.