Neutral Citation No. [2011] NIQB 6 | *Ref:* **McCL8069**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/01/11**

2007 No. 92787

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WILLIAM JOHN MORROW

Plaintiff;

-and-

CHIEF CONSTABLE JOHN ORR AND OTHERS, STRATHCLYDE POLICE

Defendants.

McCLOSKEY J

Interlocutory Appeal Framework

[1] The Plaintiff, an unrepresented litigant, appeals to the High Court against the order of the Queen's Bench Master dated 29th November 2010. The impugned order, dated 29th November 2010, is twofold:

> "***IT IS ORDERED*** *that the order herein dated 22nd February 2008 be and it is hereby set aside*".

The Plaintiff, presumably, is not seeking to appeal this aspect of the order. The second element is couched in the following terms:

> "***AND IT IS ORDERED*** *that the Plaintiff's action be and it is hereby struck out on the grounds that it discloses no reasonable cause of action*".

By the terms of the earlier order dated 22nd February 2008, the Queen's Bench Master ordered that "*… endorsement of the Writ be struck out on the grounds that it discloses no*

reasonable cause of action". An immediate tension between the two elements of the impugned order is at least superficially evident. Why, simultaneously –

(a) set aside an earlier order striking out the Plaintiff's endorsement on **the Writ** on the ground that it discloses no reasonable cause of action; and, subsequently,

(b) proceed to strike out the Plaintiff's **action** on the same broad ground?

I would observe that the explanation is unclear from the evidence available and arguments addressed to this court. This is the kind of conundrum which, typically, arises in litigation where a party is unrepresented.

The Appeal Hearing

[2] At the appeal hearing, conducted on 14th January 2011, I did my best to explore and comprehend the Plaintiff's case. Unfortunately, much of what emerged from this exercise was somewhat opaque and incoherent. The exercise did, however, establish the Plaintiff's unequivocal statement that his case against the Defendant is based on the following elements:

(a) An alleged oral offer to him by certain Strathclyde police officers of a full written apology arising out of the earlier preferral of some 26 charges against him.

(b) A letter dated 26th September 2000 written by the former Lord Chief Justice's Private Secretary (contained in the booklet of appeal).

(c) A "with compliments" slip relating to Claire Byers, who, it seems, was a complainant/alleged victim in respect of one or more of certain criminal charges preferred against the Plaintiff (apparently some fourteen years ago) in the district of the Strathclyde Police Force in Scotland.

(d) Ms Byers' alleged concession when cross-examined by the Plaintiff at Airdrie Sheriff's Court in May 1996 that she could not remember exactly what happened on the dates/during the events in question.

In response to the court, the Plaintiff confirmed that these were the four "*pillars*" of his case against the Defendant. As this brief outline indicates, these proceedings seem to have their origins in the prosecution of the Plaintiff arising out of the actions of Strathclyde police officers and an ensuing trial or trials. The court's questioning of the Plaintiff also elicited replies which suggested that his claim against the Strathclyde Police has two basic elements:

(i) The Strathclyde Police Force (in the Plaintiff's words) "*were trying to frame me*" by bringing the aforementioned criminal charges against him.

(ii) By virtue of the conduct of the Strathclyde Police Force, the Plaintiff claims to have been detained on various dates for a total period of some six weeks, between September 1996 and December 2000.

This conveys fairly clearly that the basic causes of action pursued by him in these proceedings are malicious prosecution and false imprisonment.

[3] The somewhat vague terms of the order drawn up on 29th November 2010 are difficult to reconcile with the Defendant's summons giving rise thereto. This follows from the terms of the summons, which sought an order striking out (or staying) the Plaintiff's action on three quite separate grounds:

(a) The Writ of Summons was not properly served on the Defendant, who is resident outside the jurisdiction and, in particular, it was purportedly served in contravention of RSC Order 11.

(b) The High Court "*… has no jurisdiction to hear or determine the Plaintiff's claim whether pursuant to the Civil Jurisdiction and Judgments Act 1982 or at all*".

(c) The Plaintiff's action "*discloses no reasonable cause of action or is otherwise scandalous, frivolous or vexatious contrary to Order 18, Rule 19(1) of the* [RSC] *and/or pursuant to the inherent jurisdiction of* [the High Court]".

There are obvious and important distinctions among these grounds. However, unfortunately, as appears from the text recited in paragraph [1] above, the ensuing order does not disclose whether it was based on one, two or all three of these grounds. In short, the ultimate order did not engage directly with the summons.

[4] I endeavoured to explore with counsel for the Defendant (Mr. McAteer) the course of the hearing before the Queen's Bench Master and, in particular, *the precise grounds* of the order made. This latter consideration is of some importance, given that the order is couched in relatively bare and anodyne terms and has the appearance of a pro-forma. Unfortunately, there had been a change of defence counsel and little of assistance to the court was elicited. Furthermore, it was confirmed that the Defendant's solicitor was not in attendance at the hearing before the Queen's Bench Master. I acknowledge that, by well established convention, counsel are very often unattended at such hearings. Moreover, the Master's court is not a court of record. This court is also alert to the reality that where interlocutory applications to Masters give rise to appeals to the High Court, a change of counsel occurs with some frequency. One regrettable consequence of these practices is that the appellate court frequently finds itself uninformed and unassisted on certain key

issues. One simple and cost free mechanism to address this would be for counsel to contemporaneously make as full a note as possible of the Master's *ex tempore* ruling. In cases where an appeal eventuates, such notes could potentially be of great value to the High Court judge.

[5] The exercise in which this court engaged established that there are two quite separate bundles in existence. The first is the bundle of exhibits to the affidavit grounding the Defendant's affidavit, sworn by Mr. Ellis. I should say that Mr. Ellis is to be commended for the efforts made in his affidavit to identify and disentangle the facts *apparently* underlying the Plaintiff's case. Taking into account particularly the Plaintiff's unrepresented status, I am satisfied that the exhibiting of evidence to this affidavit did not infringe Order 18, Rule 19(2) [*infra*] in the particular circumstances of these proceedings. The second bundle is a bundle of appeal prepared by the Plaintiff in response to directions given by the presiding senior Queen's Bench judge. This bundle contains an assortment of materials and, importantly, is *not* a replica of the Defendant's bundle. Self evidently, the Plaintiff's bundle of appeal did not exist – and was not, therefore considered – at the time of the hearing at first instance.

RSC Order 18, Rule 19

[6] Order 18, Rule 19 of the Rules of the Court of Judicature empowers the court to strike out any pleading of the indorsement of any writ or anything in any pleading on any of the following grounds:

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court.

Rule 19 further provides that the court may order the action to be stayed or dismissed or that judgment may be entered accordingly, as the case may be. Where the application is moved under ground (a), no evidence shall be admissible: per Rule 19(2). Where an application is made on any of these grounds, the hurdle to be overcome by the moving party is a steep one. The governing principles are conveniently rehearsed in the judgment of Carswell LCJ in ***O'Dwyer and Others –v- Chief Constable of the RUC*** [1997] NI 403, at p. 406:

> "*For the purposes of the applications, all the averments in the statements of claim must be assumed to be true. The statements of claim have been substantially amended and set out the facts of the plaintiffs' case in some detail. In*

> *considering the averments contained in them we must bear in mind the well-settled principle that the summary procedure for striking out pleadings is to be used only in plain and obvious cases (see Lonrho plc v Tebbit [1991] 4 All ER 973 at 979 per Browne-Wilkinson V-C). Various formulations of this principle have been used: it has been said that it 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance' (see Dyson v A-G [1911] 1 KB 410 at 414 per Cozens-Hardy MR), that it should be confined to cases where the cause of action was 'obviously and almost incontestably bad' (see Dyson (at 419) per Fletcher Moulton LJ), and that an order should not be made unless the case is 'unarguable' (see Nagle v Feilden [1966] 2 QB 633 at 651 per Salmon LJ). That said, it is to be recognised that if the claim is bound to fail on the law, the courts should not shrink from striking out*".

The application of the principles to the appeals in ***O'Dwyer*** was in the collective Plaintiffs' favour.

[7] Given the Draconian nature of the remedy sought in an application of this kind, it is to be expected that the High Court, on appeal, will probe carefully issues such as those identified in paragraphs [1] and [3]–[4] above. Furthermore, it is possible that enquiries of this kind will be of greater intensity in cases where there is an unrepresented litigant. The primary objective of enquiries of this kind is to invest the court with a better understanding of the facts and issues. An exercise of this kind is entirely compatible with judicial impartiality. Having explored a range of matters with both parties, it appears to me that there is a real risk that some of the representations, clarifications, arguments and evidence presented to this court on 14th January 2011 were not available to or ventilated before the Queen's Bench Master during the hearing at first instance. In particular, the organised and paginated booklet did not exist at that earlier stage, with the result that evidence upon which the Plaintiff is apparently relying was not considered. This failure, of course, cannot be attributed to either the Master or the Defendant's legal representatives.

Disposal

[8] I have determined to exercise this court's power under Section 22(b) of the Interpretation Act (NI) 1954 to remit this appeal to the Master. I am impelled to pursue this course, taking into account the Draconian nature of the order sought by the Defendant, for three basic reasons. The first is the matter set out in the immediately preceding paragraph. The second is the uncertainty relating to the ground/s upon which the Master made the impugned order. The third concerns the tension between the earlier order of 22nd February 2008 and the first element of the recent impugned order, highlighted in paragraph [1] above.

[9] Taking into account everything set out above and having regard to the real possibility of a further appeal to this court, it would be extremely helpful if the order drawn up were to make unequivocally clear the ground/s upon which it is made, in the event of essentially the same order materialising. It would also be of great assistance if the Master were to provide the reasons for making such order in summary and compact written form. As regards the first of these suggestions, I would observe that recourse to the pro-forma order which appears to have been deployed in the present case is unhelpful and constitutes a practice which could profitably be reconsidered. Fundamentally, there is a clear and compelling need for orders of this nature to spell out in the clearest terms the grounds upon which they are made, articulating with precision the specific operative provision of the Rules of the Court of Judicature and, where relevant, the inherent jurisdiction of the court (the ingredients whereof were considered recently in ***Ewing –v- Times Newspapers*** [2010] NIQB 65, paragraphs [11]-[12]). Allied to this is a parallel requirement that the summonses generating applications of this kind observe the same discipline. [I would add that I find no fault with the summons in the present case]. As regards the second of these suggestions, the High Court is mindful of the proliferation of interlocutory applications transacted before the Queen's Bench Masters every week. The provision of a written reasoned ruling is very much the exception. In principle, it is likely to be more desirable where, as in the present case, a particularly Draconian order is being made. It is no coincidence that the Queen's Bench Masters not infrequently provide rulings in applications of this *genre* in written form. The second suggestion is intended to be modest: I envisage that something of a focussed and succinct nature will be perfectly adequate in the circumstances.

[10] Finally, I would highlight that, during the appeal hearing, the Plaintiff stated:

(a) The remedy he is pursuing is an award of £40,000,000 damages for him personally.

(b) He is also seeking £1,000,000,000 damages which, if recovered, he will (apparently) hold in trust for (and presumably distribute to?) unidentified members of the PSNI whom, he asserts, suffered unspecified "insults" at the hands of the Strathclyde Police Force. Whether this is in any way related to the events giving rise to his claim is conspicuously unclear.

I would express the view, *obiter* of course, that this latter aspect of the Plaintiff's claim (thus articulated) seems plainly and manifestly unsustainable and is, therefore, embraced by RSC Order 18, Rule 19. However, I emphasize that this will be a matter for decision by the Master upon remittal .

[11] I also make the following direction. Based on (a) all of the documentary materials now assembled and (b) the Plaintiff's representations to this court on 14th January 2011, the Defendant's legal representatives should prepare a chronology of

material dates and events, starting at the beginning of the "story" (which appears to be circa 1996) and extending to the making of this ruling. While I am mindful of the burden this will entail, this service would be enormously beneficial to both the Queen's Bench Master, when considering this remitted matter and, in the event of future appeals and/or any future trial, the High Court. Such chronology should be forwarded to both the Plaintiff and the Queen's Bench Master at least five working days in advance of the scheduled relisting of this remitted matter, coupled with the booklet of appeal. The Plaintiff will, of course, be at liberty to suggest amendments to the Defendant's chronology or provide his own separate chronology.

Costs

[12] Both parties will have an opportunity to make such representations to the court on this issue as he wishes. The starting point, in common with every costs issue, is Section 59 of the Judicature (N.I.) Act 1978, which provides:

> *"Award of costs*
> *59. - (1) Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid.*"

Next, Order 62, Rule 3 of the Rules of the Court of Judicature must be considered:

> "*(3) 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.*"

In 'The Business of Judging' (2005) Lord Bingham, having emphasized the breadth of the discretion conferred by Section 51 of the Supreme Court Act 1981 (the equivalent of Section 59 of our Judicature Act) continues (p. 41):

> "*It is nevertheless universally recognised as the primary principle governing courts and arbitrators in the exercise of their discretion that costs should follow the event and to depart from that rule without showing sufficient reason is to raise a rebuttable presumption of error. It is of course necessary to identify the event, which in a tangle of claims and cross claims may not be straightforward, but a party's*

> *entitlement to receive costs or responsibility to pay them is first to be judged by reference to his success or failure in the litigation …*
>
> *A discretion exists, but within a compass which is well understood and has, I think, shrunk over the years*".

I highlight this passage because the disposal of this appeal has elements of a somewhat unusual event and no clearly identifiable victor or vanquished. While the Plaintiff might say that he survives to fight another day, the Defendant can legitimately retort that this is substantially due to the Plaintiff's failure to assemble evidence before the Queen's Bench Master. In sporting terms, this has clear shades of a drawn match .

[13] It has further been observed that the general rule enshrined in Rule 3(3) possesses the virtue of promoting discipline within the litigation system, obliging the parties to assess carefully for themselves the strength of any claim and ensuring that the successful parties' assets are not depleted by reason of having resort to litigation: See ***R –v- Lord Chancellor, ex parte CPAG*** [1999] 1 WLR 347, per Dyson J (at p. 355-356):

> "*What lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the Respondent has acted unlawful, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim. The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases.*"

This passage is especially noteworthy as it makes no distinction between public and private law litigation.

[14] Special provision is made for the costs of personal litigants by Order 62, Rule 18, which provides:

> *"18. – (1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by a solicitor on the litigant's behalf.*
> *(2) The amount allowed in respect of any item shall be such sum as the Taxing Master thinks fit but not exceeding, except in the case of a disbursement, two-thirds of the sum which in the opinion of the Taxing Master would have been allowed in respect of that item if the litigant had been represented by a solicitor.*
> *(3) Where it appears to the Taxing Master that the litigant has not suffered any pecuniary loss in doing any item of work to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that item not more than £9.25 an hour. [rate since 1 Sept 1996]*
> *(4) A litigant who is allowed costs in respect of attending court to conduct his case shall not be entitled to a witness allowance in addition.*
> *(5) Nothing in Order 6 rule 2(b), or in rule 17(3) of, or Appendix 3 to, this Order shall apply to the costs of a litigant in person.*
> *(6) For the purposes of this rule a litigant in person does not include a litigant who is a practising solicitor."*

In England, the relevant provision is Rule 48.6 of the Civil Procedure Rules, which provides:

> *"**48.6 Litigants in person***
> *(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.*
> *(2) The costs allowed under this rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.*
> *(3) The litigant in person shall be allowed-*
> *(a) costs for the same categories of-*
> *(i) work; and*
> *(ii) disbursements,*
> *which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;*
> *(b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and*
> *(c) the costs of obtaining expert assistance in assessing the costs claim.*

(The Costs Practice Direction deals with who may be an expert for the purpose of paragraph (2)(c).)
(4) The amount of costs to be allowed to the litigant in person for any item of work claimed shall be-
(a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or
(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the Costs Practice Direction.
(5) A litigant who is allowed costs for attending at court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs.
(6) For the purposes of this rule, a litigant in person includes-
(a) a company or other corporation which is acting without a legal representative; and
(b) a barrister, solicitor, solicitor's employee, manager of a body recognised under section 9 of the Administration of Justice Act 1985 or a person who, for the purposes of the Legal Services Act 2007 , is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)."

[15] It would be unsurprising if a majority of practitioners and courts have little or no familiarity with Order 62, Rule 18. There may well be a perception abroad that personal litigants do not incur – and, therefore, are not entitled to recover - legal costs, for the simple reason that they have no legal representation. They elect, rather, to represent themselves. If such perception exists, it is incorrect. In Northern Ireland, pursuant to RSC Order 62, Rule 18 (*supra*) an unrepresented litigant who is successful can recover up to two-thirds of a notional solicitor's profit charges, but nothing in respect of notional counsel's fee. The English rule it the same: see CPR 48.6(2) above. In Cook on Costs 2010, it is noted that a personal litigant *can* recover, for example, the cost arising out of engaging a properly instructed expert witness (see paragraph 38.7). It may also be possible to recover the costs of solicitors and/or counsel properly instructed at an earlier stage.

[16] The decision in ***Agassi –v- Inspector of Taxes*** [2006] 1 All ER 900, exposed a particular pitfall in the regime of direct professional access, something which can occasionally interact with the phenomenon of personal litigants. There, the Appellant, a household name in the world of tennis, was not represented by solicitors in his litigation against HM Revenue and Customs. However, one of the members of the firm of tax law experts who had been his advisers for many years was, being a member of the Chartered Institute of Taxation, entitled under the Bar's Licensed Access Scheme to instruct counsel to represent the Appellant in both the High Court and the Court of Appeal. While the Appellant was categorised a litigant in person, he was entitled to recover counsel's fees, as a disbursement. However,

giving due effect to the specific provisions of CPR 48.6(3), the Court of Appeal held that the Appellant was not entitled to recover from his unsuccessful opponent (the Revenue) the cost of those services provided by his tax expert which, properly analysed, constituted work which would have been undertaken by a solicitor, if instructed. Such costs were irrecoverable *inter-partes.* Per Dyson LJ:

> "*It follows in our view that the Appellant is not entitled to recover costs as a disbursement in respect of work done by* [the specialist tax consultants] *which would normally have been done by a solicitor who had been instructed to conduct the appeal. This means that the Appellant is not entitled to recover for the cost of* [the tax expert] *providing general assistance to counsel in the conduct of the appeals*".

This was followed by the observation that the tax expert's fees could in principle be recoverable in part, as a disbursement:

> "[76] … *It may be possible to argue that the costs of discussing the issues of counsel, assisting with the preparation of the skeleton argument etc. is allowable as a disbursement, because the provision of this kind of assistance in a specialist esoteric area is not the kind of work that would normally be done by the solicitor instructed to conduct the appeals. Another way of making the same point is that it may be possible to characterise these specialist services as those of an expert and to say for that reason that the fees for the services are in principle recoverable as a disbursement*".

Finally, Dyson LJ emphasized that the rule –

> "*… contemplates allowing as costs only those categories of disbursements which would normally have been made by a legal representative. If the expenditure is for work which a legal representative would normally have done himself, it is not a disbursement within the language of CPR 48.6(3)(a)(ii)".*

[17] In this context, it is appropriate to observe, finally, that *disbursements* are to be distinguished from a solicitor's professional fees. They consist of, typically, the cost of instructing an expert witness or obtaining an engineer's report, a medical report or a police report. They also embrace the fees payable for instructing counsel and court fees. In England and Wales, the rules of court incorporate a specific regime governing disbursements: see CPR Rule 45.10 and the relevant provisions in the corresponding Costs Practice Direction [paragraph 27.40]. While acknowledging that the specific English regulatory regime appears to have no direct equivalent in Northern Ireland, my impression is that there is no fundamental distinction between the two jurisdictions in this respect.

[18] In summary, this brief excursus into the governing principles and rules establishes that a successful personal litigant can, in principle, within the ambit of the governing framework, recover (a) potentially substantial legal costs, and (b) some disbursements, where appropriate. This is a consideration which represented litigants will doubtless wish to bear in mind in an economic climate where the phenomenon of unrepresented litigants is growing. Finally, practitioners should be aware that a new protocol relating to personal litigants is in the pipeline and is expected to be finalised within the very near future. The course of the litigation in the present case reinforces the compelling need for a regime of this nature.