Neutral Citation No. [2015] NIQB 22 | *Ref:* **GIL9538**

Judgment: approved by the Court for handing down | *Delivered:* **24/02/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MAREK BELKOVIC

Plaintiff;

-and-

DSG INTERNATIONAL PLC

First-named Defendant;

-and-

FIRST CHOICE SELECTION SERVICES

Second-named Defendant.

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GILLEN LJ

[1] I have already delivered judgment on liability and quantum aspect of this case (hereinafter termed "the judgment"). Thereafter I have afforded the parties an opportunity to address me on the issue of costs and both parties have supplied me with lengthy and detailed skeleton arguments.

Principles governing costs

[2] The basic principle governing costs was well set out by Lord Lloyd of Berwick in Bolton Metropolitan District Council v Secretary of State for the Environment (1996) 1 All ER 184 at 186-7 when he said:

> "What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however

> widespread and longstanding, must never be allowed to harden into a rule."

[3] This in many ways reflects the thrust of Section 59(1) of the Judicature Act (Northern Ireland) 1978 which makes provision for costs of and incidental to the proceedings to be "at the discretion of the court and the court shall have the power to determine by whom and to what extent costs are to be paid."

[4] The basic principle is that costs follow the event. Order 62 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980("the Rules") makes provision that costs should "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] Costs are "taxed" (i.e. assessed as to amount) by the Master (Taxing Office) under Section 60(1) of the Judicature Act. There are special provisions for the Master to tax the costs of litigants in person under Order 62 of the Rules.

[6] The "Litigants in Person Costs and Expenses Act 1975" provides for the taxation of costs payable to a litigant in person after a costs order has been made.

[7] Order 62 makes provision for costs in particular cases. Thus under Order 62 Rule 10 where it appears that costs have been improperly or unreasonably incurred, or wasted by lack of competence or expedition, by a solicitor or his agent, the court may order the solicitor to reimburse his client for costs payable to another, reimburse another party for his own costs and disallow his costs against his own client. It can order him to repay costs to the legal aid fund. There is no need to show gross dereliction or misconduct, the purpose is compensatory rather than punitive. The Supreme Court has also inherent power to order restitution, compensation or costs against a solicitor but only in the case of serious misconduct or gross negligence or breach of an undertaking. (See Valentine on "Civil Proceedings in the Supreme Court" at 17.62).In the instant case the plaintiff was not professionally represented but his case was conducted by a McKenzie Friend as appears from the judgment.

[8] Under Order 62 Rule 10A, provision is made as follows:

> "10A. Without prejudice to rule 10, where it appears to the Court in any proceedings that-
>
> (a) any witness has been called to give oral evidence where his evidence could have been put before the Court in some other manner; and
>
> (b) his giving oral evidence was not reasonably necessary,

> the Court may order that the costs occasioned by calling the witness to give oral evidence shall fall upon the party who caused him to be so called, and for this purpose may make such provision in respect of taxation against other parties or the legal aid fund as it thinks fit."

[9] In Hazlett v Robinson & Ors [2014] NIQB 17 this court dealt with the principles touching on costs in cases which contained elements of gross exaggeration and false claims. Many of the authorities cited at paragraph [57] of that judgment are relevant to the issues on costs arising in the instant case.

[10] Hazlett's case made clear that cases are fact specific and courts must be wary of deploying the principles set out in English authorities which are governed by the Civil Proceedings Rules ("CPR") and do not apply in Northern Ireland. Thus the appropriate exercise of the discretion under CPR 44.3(2) requires the court to identify what the real issue between the parties has been and reflect that in the costs order which it would make. Para 44.3(4) makes express provision for an award of costs in light of the conduct of the parties, and whether a party has succeeded in part of the case. Northern Ireland has not introduced the CPR rules and accordingly this is not necessarily the approach that has to be adopted in this jurisdiction.

[11] Nonetheless, certain principles can be distilled from the authorities which are applicable in this jurisdiction and they include the following:

- The inclusion of a false claim with a genuine claim does not of itself turn a genuine claim into a false one or justify the striking out of the genuine claim or claims. To do so would be to deprive the plaintiff of a substantive right as a mark of disapproval which the court should not do unless, as a last resort, the conduct of the litigant has put the fairness of the whole trial in jeopardy (see Lord Clarke in Fairclough Homes v Summers [2012] UKSC 26 at para (30)). Courts should recognise that there is a considerable difference between a concocted claim and an exaggerated claim and the court must be astute to measure how reprehensible the conduct is.

- It is not unusual for plaintiffs to fail to win every point in a case and that should not deflect a court from awarding costs in the overall situation. If it was not unreasonable for the plaintiff to put forward the unsuccessful ground or the plaintiff has not pursued the point unselectively or his unsuccessful ground is closely related to other successful grounds on which he has succeeded, he should be entitled to his full costs (see R (on the application of Cherkley Campaign Ltd v Mole Valley District Council [2013] BWHC 3558 (Admin)).

- On the other hand when deciding what order to make, the court has to have regard to all the circumstances. The fact that a party succeeded overall is not necessarily sufficient to entitle it to recover all the costs and a court is entitled to take an issue based approach in appropriate circumstances.

- When a judge has concluded that a plaintiff has been demonstrably a malingerer, dishonestly exaggerating symptoms the defendant should not bear any of the costs which the plaintiff has expended on that unreasonable pursuit. (See Booth v Britannia Hotels Ltd [2002] EWCA Civ 579).

- A plaintiff who pursues a grossly exaggerated and inflated claim for damages must expect to bear the consequences when his costs come to be assessed (see Booth's case at [33]).

- The court should inquire into the causative effect of the plaintiff's lies and gross exaggeration and ascertain if it caused costs to be incurred and wasted. It is appropriate that a plaintiff should pay the costs of any part of the process which is being caused by his fraud or dishonesty.

Conclusions

[12] I have come to the conclusion that since the plaintiff has been successful in this action he should have a general cost of the action but the following items will be disallowed and should be drawn to the attention of the Taxing Master if this matter comes before him.

(1) He should not be allowed the costs of the various medical reports which he abandoned and did not rely on at all.

(2) He should not be allowed the costs of both accountants he retained and the costs in this category should be reserved to one accountant on which he relied.

[13] Although I am satisfied that it was quite unnecessary for the McKenzie Friend to have called the defendant's witnesses Mr Yeates FRCS and Mr Cooke FRCS and that their evidence could have been put before the court in some other manner i.e. their reports, I consider that it probably would have been necessary for the defendants to have called these two witnesses notwithstanding the broadly similar evidence of Dr Levkus. For that reason I will allow the costs of these two doctors being called.

[14] In a different category is Dr Fleming the defendant's psychiatrist. Not only had the McKenzie Friend chosen to abandon his own psychiatrist, but he called the defendant's psychiatrist who added absolutely nothing to his case and on the contrary served to further damage it. This is a witness therefore who was called unnecessarily and his evidence, if the McKenzie Friend had wished to rely on it,

could easily have been put before the court in the form of his written report. The plaintiff should therefore bear responsibility for the payment of the attendance fees of Dr Fleming.

[15] Although the plaintiff quite unnecessarily called the plaintiff's GP Dr Allen and a physiotherapist, in the event I feel it would have been necessary for the defendant to have called such witnesses and accordingly the fees of these witnesses should be borne by the defendant.

[16] In reviewing the cost issue in this case I reminded myself of the comments of the Court in Mikhail v Lloyds Banking Group [2014] NICA 24, case involving a litigant in person who had been firmly directed by a Tribunal in an unfair dismissal case to file witness statements in advance of hearing but who attempted to produce fresh evidence outside any witness statement. Moreover at the hearing he repeatedly attempted to turn the litigation into a form of public inquiry into banking as a whole.

[17] The Court of Appeal cited with approval Girvan LJ's observations in Peifer v Castlederg High School and Western Education and Library Board at paragraphs [3] and [4]:

> "[3] …. Having regard to the imperative nature of the overriding objectives tribunals should strive to avoid time wasting, repetition, the failure of parties to concentrate on relevant issues and the pursuit of irrelevant issues and questions. Our system of justice properly regards cross examination as a valuable tool in the pursuit of justice but that tool must not be abused. Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are of course always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and supervisory courts to give proper and due weight to the tribunals' decisions made in the fulfilment of their duty to ensure the overriding objectives…
>
> [4] When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field

> they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued."

[18] As I have indicated at paragraphs 3, 5, 9 and 60 the judgment, a great deal of time was taken up in this trial by the McKenzie Friend voicing wholly unfounded allegations against the court, counsel, solicitor and medical and non-medical witnesses leading on several occasions to applications by counsel for the defendant to withdraw his right to act as a McKenzie Friend. Whilst it is right to say that the plaintiff's evidence was spread over 3 days, (albeit this also included time wasted for at least one further outburst by the McKenzie Friend) a not insubstantial part of the remaining 9 days of the hearing was taken up dealing with this behaviour and with the McKenzie Friend wastefully spending time unselectively pursuing the issue of the alleged absence of pre-existing degenerative change notwithstanding all the medical evidence to the contrary. In addition to my own overall assessment of the situation, I had the benefit of the time spent in examination and cross examination calculated by the Court Office of several witnesses which I provided to the parties for comment .Reviewing the matter as a whole I have concluded that the plaintiff's recoverable costs in respect of the actual trial shall be abated by 25% overall and the defendant should be entitled to offset against the plaintiff's recoverable costs 25% of its trial costs during which period counsel and solicitor were quite unnecessarily engaged in parts of the trial which did not serve to progress the matter in any meaningful fashion.

[19] Ultimately it may well be a matter for the Taxing Master to fix the final costs of this case, but I draw to his attention the unnecessary proliferation of reports invoked by the plaintiff and the McKenzie Friend in this case and also the voluminous preparation of documentation which was clearly calculated to challenge not only the defendant's medical evidence but the plaintiff's own medical evidence on the issue of pre-existing degenerative change. Much time was therefore spent by the McKenzie Friend and the plaintiff in this case seeking to undermine their own medical evidence. At the end of the day this was a relatively straightforward factory accident with medical sequelae about which there was very little dispute between the experts and in normal circumstances, even allowing for the presence of an interpreter, the action would have been completed comfortably within 5/6 days notwithstanding the obvious leeway which has to be extended to a personal litigant.

[20] Finally, as far as interest on the general damage and special damages concerned, this action has taken over 6 years from the issue of the writ on 26 June 2008 until its completion. At least part of this time was engendered by the plaintiff dispensing with previous solicitors and barristers and the McKenzie Friend elongating the process with a number of unnecessary interlocutories. I confine the

interest in this case to a period of 4 years in the case of general damages and special damage.