Neutral Citation No. [2015] NIQB 43

Ref: **HOR9625**

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

Delivered: **13/03/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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CARL BURGESS

v

DAVID GILMORE T/A GILMORE DEVELOPMENTS

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HORNER J

Introduction

[1] If either side wish to appeal and the rights to appeal appear to be limited, I refer you to 17.37 Valentine, then I reserve the right to provide a more detailed written judgment amplifying and explaining my decision. However, I do not consider it necessary to do so now as given the torturous process that this case has taken the sooner it is put to bed, I am sure both counsel will agree, the better.

[2] Mr Manson was appointed as a court expert. His appointment was, if not at the request of both parties, certainly with the consent of both parties. He enjoys an unparalleled reputation in these courts on account of not just his expertise and professionalism but also on account of his independence. He has exhibited those qualities in too many cases to recount. His appointment was intended to break the log jam between the experts retained on behalf of each party. Although he was primarily expected to resolve one particular issue, it was obvious that the experts on either side seemed incapable of reaching agreement on many issues. Accordingly, he was to provide expert evidence to the court on these technical matters to allow the court to arrive at a fair result as far as both parties were concerned.

[3] At the time of his appointment as court expert either side had ample opportunity to complain or object or to make submissions that his appointment was

inappropriate, unnecessary, unjust, unfair or whatever. On the contrary both counsel welcomed his appointment on the basis that he was a well-recognised expert from a highly reputable engineering firm who came with considerable experience and who had logistical support from others in his firm and who would help break the log jam on what seemed to be an intractable dispute. If points were to be made that the expert should have been self-employed and entitled to only £57.75 per hour, as now seems to be the case made on behalf of the defendant, these should have been made at the outset. Furthermore, the terms and conditions of his retainer were sent to either side who each had the opportunity to make it clear to Mr Manson and to the court that they objected to paying such costs. The defendant accepted those terms and conditions and considers himself bound by the final bill. The plaintiffs and their legal advisers, and this is not a criticism of the legal advisers because they only act on instructions, did nothing.

[4] There may well be a plausible argument that the plaintiff accepted those terms by their conduct especially when a dispute arose as to their half payment of the interim costs when again no objection was made to those terms and conditions. I do not have to decide whether there has been an acceptance by the plaintiff by their conduct or whether an estoppel arises because under Order 40 Rule 5 it is for the court who shall fix the proper level of costs. The fact is that Mr Manson being a member of a large firm has had considerable benefits for both sides. He has been able to call on expertise within that firm such as quantity surveying to help him guide the parties to a final resolution, which without such logistical support, may well have been impossible. It is doubtful whether in the absence of such assistance he would have been able to bring the parties together so that they could resolve their differences.

[5] Mr Manson was instrumental, as I have said, in helping to effect a settlement. If this case had run costs would in all likelihood have been substantially larger than the award of damages. Furthermore, it is likely that one side would have had to bear, if not all, then the majority of the costs. If I had to determine the rights and wrongs of this protracted and unfortunate dispute, I would have to review all the behaviour and conduct of everyone involved. However, I want to make it clear that I make no comment at all on the issue of whose fault it was that the costs of Mr Manson far exceeded his initial estimate. I am in no doubt that his estimate was based on what he anticipated would be a normal course of events. It is clear that matters were far from normal and as I have said it is not for me to lay blame, simply to record that this was and I accept a wholly exceptional case beset with difficulties, complications and complexity. Many of those problems were self-inflicted. The increase in the costs from the estimate of Mr Manson originally was not in any way due to any action or inaction on Mr Manson's part.

[6] Order 40 Rule 5 provides:

> "The remuneration of the court expert shall be fixed by the court and shall include a fee for his report and a

> proper sum for each day during which he is required to be present, either in court or before an examiner."

[7] So the fixing of a fee for the report and for the times he has to attend court is included with the overall sum. I stress the word include. Insofar as I am required to assess a fee for his report into the attendances at court I consider the amounts charged by him to be reasonable and so fix them. In respect of the other charges I have considered these at considerable length and in the context of this dispute I consider them reasonable. Accordingly, I fix his remuneration at the total sum that he has charged. I therefore make an Order that he is entitled to the full amount as invoiced for his services as the court expert to be split as agreed jointly between the parties.

[8] Finally, I would comment and re-emphasise that without Mr Manson there would have been no resolution, no settlement and the costs that would have been incurred would have been totally disproportionate to what was at stake. I consider that in all the circumstances, and even with his much increased fee, Mr Manson's appointment was very much in accordance with Order 1 Rule 1(1)(A). Finally I would like to thank counsel for their assistance in this unfortunate matter.

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Supplementary Remarks

[1] These remarks are intended to supplement the extemporary judgment which I gave on 13 March 2015. I indicated at the time I gave the initial judgment that I reserved the right to amplify it in the event of an appeal. These remarks should help to explain the basis upon which I reached my decision.

[2] It became clear following my appointment that the experts for the plaintiff or the experts for the defendant, or all the experts, had forgotten that their duty to the court overrode any obligation they owed to their paying clients. There was cogent evidence that either or both sides' experts were serving the exclusive interest of those who retained them. If the action had been allowed to continue without any interference from the court then it is quite clear that from the behaviour of either or both sides' experts that the action, if contested, would have run for many weeks and cost the losing party a sum likely to eclipse any damages awarded. This would have been the total antithesis of the overriding objective of Order 1 Rule 1(A) of the Rules of the Supreme Court (NI) 1980.

[3] I did not have to decide whether the plaintiff's experts or the defendant's experts or all the experts were responsible for the refusal to try and reach agreement on the issues that separated the parties in this case. I must emphasise, as I

repeatedly explained to counsel in court, that it would only be necessary for me to determine where the responsibility lay for the polarised positions adopted by both parties in the absence of a concluded settlement. It was made crystal clear to both parties that costs would be determined by my findings of fact, and my findings only. I also made it clear that if one side was at fault for the case being unnecessarily protracted then that side was likely to bear a heavy burden in respect of costs. That burden may or may not have to be shared between the party and his expert, depending on my findings.

[4] The decision to appoint a court expert was, if not taken on the initiative of counsel, certainly with counsels' agreement. I consider that in the circumstances it made good sense. Mr Manson was appointed and he was acceptable to both sides. He is highly regarded and the court's experience is that he is independently minded and refuses to be cowed by any client. It is disappointing, to put it as neutrally as possible, that the plaintiff now seeks to claim that he never agreed to Mr Manson's terms and conditions. In the circumstances of this case, he had every opportunity to object to those terms which were sent to him, both through his counsel in court or by sending a letter or email either to the court office or Mr Manson. The plaintiff's behaviour on this issue reflects poorly on him.

[5] I have no doubt that the recalcitrant attitude of either or both parties and their experts is directly responsible for substantial costs being unnecessarily incurred. Mr Manson could have no idea when he accepted instructions as the court expert of the complete failure of either or both parties (or their experts) to understand Order 1 Rule 1(A) and the determination on the part of one or all of them to refuse to compromise or to allow the experts to compromise or agree matters on their behalf.

[6] The court cannot ignore that the settlement in this case was at the very least precipitated by the plaintiff's realisation that Mr Manson considered him and his experts responsible for substantial costs being incurred by adopting a wholly obdurate and unreasonable attitude. He obviously felt he was at risk that if the court had to rule on the costs issue at the end of a hearing, as it undoubtedly would, it is likely that the court would have been influenced by Mr Manson's opinion. The court emphasises again that it would have looked at all the facts objectively and independently and reached its view on whether or not one or both of the parties and their experts were responsible for the events that have led to the costs of Mr Manson being very substantially greater than he had originally anticipated. The court did not have to do that because of the settlement which was concluded. The court has not sought to do that and that is why the court does not seek to attribute blame.

[7] In conclusion, a court expert was appointed because of the failure of one or all of the experts to act in accordance with the duty they owed to the court. Mr Manson's bill was substantially greater than he had estimated but this was as a direct consequence of this most lamentable failure.