

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

CG

Plaintiff

-v-

FACEBOOK IRELAND LIMITED and  
JOSEPH McCLOSKEY (No. 2)

Defendants

STEPHENS J

**Introduction**

[1] I gave judgment on 20 February 2015 under citation [2015] NIQB 11. This ruling relates the costs of the proceedings. It is accepted that costs should follow the event so that the plaintiff is entitled to an order for costs against both defendants to be agreed or taxed in default of agreement. The second defendant is legally aided so the order for costs against him should not be enforced without further order of this court.

[2] An issue has arisen as between the plaintiff and the first defendant as to the basis upon which the plaintiff's costs should be taxed. The plaintiff seeks an order that his costs should be taxed on an indemnity basis given the nature of the offer which the plaintiff made in the pre-trial period and given what the plaintiff asserts were aspects of the conduct of the first defendant's defence which were inappropriate.

[3] The first defendant contends that given that the plaintiff was legally aided and applying the indemnity principle, the only order which the court can make is that costs are taxed on the standard basis. In the alternative that, in the exercise of discretion, there is no reason to order taxation on the indemnity basis as opposed to the standard basis.

[4] Mr Girvan appeared on behalf of the plaintiff and Mr Hopkins on behalf of the first defendant. I am grateful to both counsel for their carefully constructed and succinct submissions.

### **Legal principles**

[5] The standard basis and the indemnity basis of taxation have the meanings assigned to them by Order 62 Rule 12(1) and (2) respectively of the Rules of Court of Judicature (Northern Ireland) 1980. On the standard basis there should be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

[6] On the indemnity basis all costs shall be allowed except insofar as they are of unreasonable amount or have been unreasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount should be resolved in favour of the receiving party.

[7] The plaintiff is in receipt of legal aid under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"). Article 11 provides for financial conditions of legal aid and in particular Article 11(1)(b) provides that where a person receives legal aid in connection with any proceedings his solicitor and counsel shall not take any payment in respect of the legal aid except such payment as is directed by this department to be made out of the legal aid fund. Article 11(1) also goes on to provide that where a person receives legal aid in connection with any proceedings any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund.

[8] Article 13 of the 1981 Order provides that subject to this part a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund and any fees paid to counsel for so acting shall also be paid out of the legal aid fund. So the scheme for a person who has the benefit of legal aid is that his solicitor is to be paid out of the legal aid fund and any order for costs made against any other party should be paid into the legal aid fund.

[9] The sums payable to a solicitor or counsel shall not exceed those allowed under Schedule 2 and it is accepted that the sums allowed under Schedule 2 are assessed on the standard basis, see Schedule 2 paragraph 4. In my view that acceptance determines the issue of the standard of taxation in favour of the first defendant because a plaintiff cannot "obtain a sum by way of costs in respect of a liability which he has not incurred" see *Willis v Redbridge Health Authority* [1996] 3 All ER 114. There are other passages in that judgment to which I will refer. Lord Justice Beldam stated that:

“(3) The board's liability to pay the legal advisers is limited to the costs taxed on a standard basis.

(4) If costs were to be awarded to a legally assisted person taxed on an indemnity basis, they cannot be awarded as an indemnity (that is to say, to reimburse either the assisted party, his legal representatives or the board).”

Lord Justice Bedlam concluded that:

“I would therefore hold that it is not a correct exercise of the judge's discretion to direct a defendant to pay costs on an indemnity basis to a plaintiff who has been legally aided throughout the proceedings.”

I also refer to the judgment of Auldous LJ in which he stated:

“A party cannot, in my view, obtain a sum by way of costs in respect of a liability which he has not incurred. Thus, the maximum recovery is that paid or which should be paid by the party.

Under the legal aid system, a solicitor acting for an assisted person receives as payment from the Legal Aid Board that amount which is allowed upon taxation on the standard basis. It is that sum that the assisted person is liable to have to repay out of any property that may be recovered from the litigation. Thus, his maximum liability for the costs of the litigation—including those which are incidental to it—are the costs taxed upon a standard basis. It follows, in my view, that an award to an assisted person of costs upon an indemnity basis would mean that he would recover more than his maximum liability. That is not lawful.”

On the basis of the decision in *Willis v Redbridge Health Authority* I consider that it would be in breach of the indemnity principle to award costs on any other basis than the standard basis.

[10] Mr Girvan referred to the decision of the Court of Appeal in England and Wales in *Brawley v Marczynski and another (Nos 1 and 2)* [2003] 1 WLR 813. That was a decision after the Legal Aid Regulations had been amended in England and Wales by the Civil Legal Aid (General) (Amendment) Regulations 1994 which inserted 107(b) in the Civil Legal Aid (General) Regulations 1989. Regulation 170(b)(3)

provides that the assisted person's legal representatives shall not be prevented from recovering from the paying party the sums in respect of costs to which this regulation refers by any rule of law which limits the costs recoverable by a party to proceedings to the amount which he is liable to pay his legal representatives. The indemnity principle expressly does not now apply in England and Wales in relation to legally aided plaintiffs. This obviously impacted on the outcome in *Brawley* but the Court of Appeal recognised that in non-assisted litigation the indemnity principle prohibited a litigant recovering more by way of costs than the costs for which he was liable. There has been no similar provision in Northern Ireland disapplying the indemnity principle in relation to legally aided cases. The indemnity principle means that any different method of taxation than that provided by paragraph 4 of Schedule 2 of the 1981 Order is unlawful.

[11] Mr Girvan also relied on the provisions of Article 13(3) of the 1981 Order and Article 15A. Article 13 is the Article that provides that a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of the legal aid fund and that the sums payable to a solicitor or counsel shall not exceed those allowed under Schedule 2. That Schedule provides in paragraph 4 that costs shall be taxed on the standard basis. However Article 13(3) provides that nothing in this Article shall prejudice Article 15A(b) which provides that the rights conferred by or under this Part on a person receiving legal aid are not to affect the rights or *liabilities* of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised. So it is contended that Article 15A(b) maintains the discretion to award costs on an indemnity basis as that is a potential liability of another party. I accept that such discretion is maintained but the discretion has to be exercised lawfully in accordance with the indemnity principle. In a case in which the plaintiff is legally aided any exercise of discretion that awarded any different taxation than that provided by paragraph 4 of Schedule 2 would be in breach of the indemnity principle. I consider that as the plaintiff is in receipt of legal aid I cannot lawfully award costs on an indemnity basis.

### **In the alternative consideration of discretion**

[12] The conclusion that the court cannot lawfully award costs on an indemnity basis determines the issue as to the basis of taxation. However if I had jurisdiction to award costs on an indemnity basis then in the exercise of discretion I would have declined to do so. In my judgment I referred to the failure of the first defendant to give any adequate discovery. However the plaintiff's advisors at an appropriate stage were at liberty to and ought to have brought applications to compel discovery of relevant documents. I am content that a careful structured analysis of the issues in advance of trial could have resulted in clearly defined categories of documents being ordered in advance of the hearing. The plaintiff also relied on an offer in settlement made in the pre-trial period. I do not consider it necessary to determine the legal impact of making such an offer on the question of costs as I consider that the offer had in any event a number of deficiencies. For instance it specified a fixed

and significant amount in relation to costs which were to be paid by the first defendant without any opportunity for the first defendant to analyse, let alone challenge or subject that amount to independent scrutiny. There was no breakdown of the amount which the plaintiff sought by way of costs; there was no reference as to whether it was on the standard or indemnity basis. Finally the plaintiff contends that the case being a test case then in the exercise of discretion costs should be awarded on an indemnity basis. Again quite apart from the legal question as to the impact, if any, which a case being a test case has on the issue of costs, I do not consider that there has been any identifiable additional expenditure that would not have otherwise been incurred which would justify moving to the indemnity basis of taxation because of what is asserted to be the test nature of this particular case. So accordingly if I had jurisdiction then in the exercise of discretion I would not have awarded costs on indemnity basis.

### **Conclusion**

[13] I make an order for costs in favour of the plaintiff against both defendants such costs to be agreed or taxed on the standard basis in default of agreement. The order for costs as against the second defendant is not to be enforced without further order of this court. I order taxation of the plaintiff's costs and of the second defendant's costs in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

[14] The basis upon which the costs of the plaintiff should be taxed was a discreet issue which was argued before me on 27 February 2015 and 4 March 2015. In respect of those hearings I make an order for costs in favour of the first defendant against the plaintiff such Order not to be enforced against the plaintiff without further order of the Court. I also order that the plaintiff's costs of the hearings on 27 February 2015 and 4 March 2015 be taxed in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.