Neutral Citation No. [2015] NIQB 14 | *Ref:* **STE9554**

Judgment: approved by the Court for handing down | *Delivered:* **19/02/2015**
*(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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JUNE CUNNINGHAM

Plaintiff/Appellant:

v

SEANNA FEGAN and
IRENE FEGAN

Defendants/Respondents:

_____

STEPHENS J

[1] The plaintiff applied in the county court for two orders. The first was an order for discovery by the defendants of documents containing the fee arrangements entered into between the defendants' solicitor and the defendants' insurance company. The second was for an order that the defendants' notice of intention to defend should be struck out on the basis that the fee arrangement entered into between Campbell Fitzpatrick now BLM Solicitors and the defendants' insurance company, Axa, was contrary to public policy. The learned county court judge refused to strike out the defendants' notice of intention to defend and considered that any order for discovery was not necessary and accordingly refused to deal with that application. The plaintiff appeals to this court against those orders in the county court. Since the decision in the county court in this case I have given judgment in another case which raised similar issues, see *Baranowski v Rice* [2014] NIQB 122. In that other case I held that the fee arrangement between Campbell Fitzpatrick/BLM Solicitors and Axa was contrary to public policy. Subsequently Campbell Fitzpatrick/BLM Solicitors has entered into a new fee arrangement with the defendant's insurance company and redacted documents in relation to that new fee arrangement have been made available to the plaintiff's solicitors in this case. There is no suggestion that the new fee arrangement is contrary to public policy. The plaintiff's solicitors have had access to the documents in relation to the new fee arrangements. There is no need for an order for discovery. The new fee

arrangement is not contrary to public policy. The parties have agreed that in those circumstances the plaintiff's appeal should be dismissed and I dismiss it.

[2] The issue for my determination is as to the costs of the appeal and as to the costs of the applications in the county court. The plaintiff submits that applying the principles in *Baranowski* the plaintiff would have been successful on appeal and that costs should follow that anticipated event. The defendants now accept, though there was no acceptance in the county court that the initial fee arrangement was contrary to public policy. However the defendants contend that discovery of the documents was not appropriate and that in any event the plaintiff could never have succeeded in establishing that there should have been some prohibition by the court on the choice of solicitor by striking out the defendants' notice of intention to defend. In relation to the question of costs I was invited to and did consider the respective merits of the two grounds of appeal, not in a definitive way but as best I could in relation to a short issue as to costs.

[3] In relation to the issue as to whether the defendants' notice of intention to defend should be struck out no authority was advanced for the proposition that such an order should be made. In effect such an order would have deprived a litigant of their own choice of solicitor. The ordinary remedy in a situation where a fee arrangement is contrary to public policy is that the solicitor does the work and does not get paid. No justification was advanced for suggesting that the ordinary remedy was an inadequate or an inappropriate remedy in this case. On the facts of this case I could not conceive of any other outcome in relation to this part of the appeal other than the outcome at which the Learned County Court Judge arrived. I have considerable difficulties in seeing how there could have been any sustainable appeal in relation to that point.

[4] I turn to the issue of discovery. In essence what the Learned County Court Judge was being asked to do was to consider what would have been the effect if the fee arrangement was contrary to public policy. So he had two questions to address:

(i) was it contrary to public policy; and

(ii) if it was, would that lead to the defendants' notice of intention to defend being struck out.

The defendants did not concede that the fee arrangement was contrary to public policy but submitted that even if it was that the defendants' notice of intention to defend should not be struck out. However I consider that in order to properly address the issues the Learned County Court Judge should have been given the opportunity of seeing the documents so that he could make a decision, not on some theoretical basis, but on an actual factual basis. I also consider that the question as to whether the fee arrangement was contrary to public policy might have had an effect in relation to any order for costs at a later stage of the proceedings. I consider that there is an obligation on a solicitor to assist the court by providing documentation so

that the court can form a view in relation to the suggestion that the fee arrangement was contrary to public policy. Within reason it does not matter how tenuous the argument. The consequence if a litigant puts forward a tenuous argument which in the event is held to be without merit is that the litigant will have to pay all the costs incurred by it. I consider that there were grounds for an appeal in relation to the failure to deal with discovery at an earlier and more appropriate stage and I note that since the appeal was launched documents have been made available.

[5] There were arguments available that Campbell Fitzpatrick did not deploy namely, that these documents are not in the possession, custody or power of the defendants but rather were the documents of the solicitors. I note the provisions of Article 71C of the Solicitors (Northern Ireland) Order and I also consider that there is an obligation on solicitors to assist the court. As I stated in the *Baranowski* case I consider that the approach taken by Campbell Fitzpatrick/BLM Solicitors was appropriate. I repeat those observations again here in this short ex tempore judgment in so far as on this appeal they made available the documents relating to the new fee arrangements on a redacted basis.

[6] The effect is that I consider that there was very little chance, if any, of the plaintiff succeeding in relation to the ground of appeal that the defendants' notice of intention to defend should be struck out. In relation to the ground of appeal in relation to discovery I consider that there was a prospect of success in relation to the proposition that the discovery order should have been made. That leads me to the conclusion that the overall appropriate order as to costs is that there should be no order as to the costs of the appeal but the order in the county court in favour of the defendants should remain.

[7] The question then arises as to whether I should interfere with the order for costs made in the County Court in favour of the defendants against the plaintiff on the grounds of public policy. The plaintiff contends that there should be no order for costs given that the fee arrangement that was then applicable between Campbell Fitzpatrick/BLM Solicitors and Axa was contrary to public policy. There is a public policy which exists in Northern Ireland but which does not exist in Ireland or in Scotland or in England and Wales which prevents conditional fee arrangements of the nature and type entered into by Campbell Fitzpatrick. I also note that reforms were to be introduced in Northern Ireland by legislation but the legislation has not been brought into force.

[8] I proceed on the basis that the fee arrangement at the time that the Learned County Court Judge made his order and unbeknownst to him was contrary to public policy, a public policy unique now to Northern Ireland. Accordingly, if the Learned County Court Judge had been aware of that fact he would have been obligated only to have awarded the costs of counsel as opposed to solicitors and counsel's costs, see the *Baranowski* case.

[9] The question then arises as to whether a subsequent agreement which retrospectively puts in place a different fee arrangement can cure that defect. I consider that there may be an argument to that affect. On a costs application I am not going to bring definition and resolution to all the legal authorities as that would be contrary to the obligation to deal with matters in proportion and appropriately as far as time is concerned. I am content that the order of the County Court Judge as to costs should remain in force and I affirm that part of his order. I do so without deciding that an agreement has the retrospective affect alleged by the defendants. If that is a substantive issue in some other case then it will have to be determined but I consider that there is sufficient for me in the arena of a decision in relation to costs to affirm the order of the Learned County Court Judge that costs should be paid below.