Neutral Citation: [2015] NIQB 112

Ref:	**STE9836**

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

Delivered:	**20/11/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

DECLAN GORDON

Plaintiff:

v

VERA BEST

Defendant:

STEPHENS J

[1] The plaintiff, Declan Gordon, who is a Hiab operator employed by Thompson Civil Engineering, was involved in a road traffic collision on 25 April 2014 at Rushmere Shopping Centre car park, Central Way, Craigavon. The defendant has admitted liability. After the collision the plaintiff entered into an agreement with Crash Services Limited ("Crash") under which he hired a Mercedes C220 CDI Executive S motor vehicle, whilst his own vehicle a BMW 5 Series was being repaired. Crash not only hired to him the Mercedes but also organised the repair of the BMW. The Mercedes was hired between 1 May 2014 and 23 May 2014 at a daily charge of some £200 plus VAT. The total hire charge is £5,877.92 inclusive of VAT. The cost of the repairs to the BMW amounts to £4,173.36. The plaintiff claims those amounts in these proceedings.

[2] The case was listed for hearing in the County Court on 15 September 2015. In advance of the hearing and in June and July 2015 the plaintiff's solicitors corresponded with the plaintiff informing him of the trial date and requesting his attendance. They also left a voicemail message for the plaintiff. On 22 July 2015 there was then a telephone conversation between the plaintiff's solicitors and the plaintiff in which the plaintiff made it clear that he was not going to be able to obtain time off work from his employers and therefore would not be attending court on 15 September 2015. It is a matter of regret that this information was not made available to the defendant's solicitors or to the County Court Judge. Rather a decision was made to allow the matter to come on for hearing knowing that the plaintiff, who was an essential witness, could not attend. On 15 September 2015 the defendant

attended with solicitor, with counsel and with an expert witness completely unaware that the case could not proceed. Furthermore the court was not informed at the first call over of the position but rather, at about lunchtime, when the case was just about to be called on for hearing, counsel on behalf of the plaintiff made an application to uplift the lodgement. The defendant's legal representatives were only informed that this application would be made some fifteen minutes earlier. The result of that application was straightforward, it was refused. However it had the effect that the Learned Deputy County Court Judge could not hear the proceedings because he now knew about the lodgement. The case was adjourned with both the plaintiff's and the defendant's costs being reserved. When the case was adjourned and when costs were reserved the Learned Deputy County Court Judge was unaware that from 22 July 2015 onwards the plaintiff's solicitors knew that the plaintiff would not be attending and knew that the case could not be heard on 15 September 2015. The potential impact of reserving the costs was that the defendant, who had incurred substantial costs unnecessarily, might potentially have had to pay the plaintiff's costs which had been incurred on 15 September 2015. There are obvious concerns as to what occurred prior to and on 15 September 2015.

[3] On 15 September 2015 it was decided by the Learned Deputy County Court Judge that the case would be heard on 1 December 2015. A letter confirming the listing of the case was sent by the County Court Office on 15 September 2015 to both of the solicitors involved stating that the case was listed on 1 December 2015. The plaintiff was informed by his solicitors by telephone call on 23 September 2015. Again the plaintiff said "I cannot attend because of work". There were then attempts by the plaintiff's solicitors to persuade him to attend. Between 23 September and 16 October the plaintiff provided flight schedules which demonstrated that on a fairly regular basis he came back for the weekends to Northern Ireland but arriving late on a Friday evening and leaving early on a Monday morning. There was no attempt made by the plaintiff's solicitors during that period to find out exactly why it was that he was unable to attend because of his work commitments, there was no analysis of how many Hiab operators his employers had and there was no direct contact with the employers to find out whether he could be released rather than relying on the plaintiff giving an account that he was unable to be released.

[4] On this occasion the plaintiff's solicitors decided to inform the defendant's solicitors of the problem in relation to securing the attendance of the plaintiff. On 22 October 2015 a little over 5 weeks after the date for the hearing had been fixed the plaintiff's solicitors notified the defendant's solicitors that the plaintiff was unable to attend because he could not take time off from his employment in England. The plaintiff's solicitors stated that they would be making an application to adjourn the hearing, which application would be made on 3 November 2015. On 23 October 2015 the defendant's solicitors wrote asking a number of questions including, for instance, enquiring as to the date when the plaintiff was notified that the case was listed. There was no substantive response to any of those questions all of which were apposite and all of which should have been answered. On 3 November 2015

the adjournment application was heard by the Learned Deputy County Court Judge who refused it. The plaintiff has appealed against that refusal to this court.

[5] The position still remains that there is a substantial question mark as to whether or not the plaintiff will or will not attend the substantive hearing. However I have been informed that in a telephone call on 21 October 2015 he said that he will come to court in February 2016 though he did not specify any particular date in February 2016. I assume that he means that he is available on any date in February 2016 and I will proceed on that basis. I accept for the purposes of this appeal that there is a substantial chance that this action can be heard and determined in February 2016. On that basis I consider that it is appropriate to allow the appeal to enable the real issues which are between the parties to be heard and determined.

[6] That deals with this appeal insofar as I allow it but it also leaves open the question of costs including the costs of the hearing on 15 September 2015 in the County Court.

[7] The costs of 15 September 2015 were reserved to the County Court Judge hearing the substantive claim. During the course of the hearing of this appeal I have explored whether I have jurisdiction to deal with those costs. I indicated that one course which could be followed by the defendant was to appeal the decision of the Learned County Court Judge made on 15 September 2015 to reserve the costs rather than to award them against the plaintiff. There has been no objection on behalf of the plaintiffs to that course being followed. I consider that I have jurisdiction on that basis. There is another way in which I perceive that I have jurisdiction. I can make it a condition of allowing the appeal and securing the adjournment of the substantive hearing to February 2016 that those costs be paid by the plaintiff to the defendant. In either event, whether I am exercising an appellate jurisdiction from the order of 15 September 2015 or whether I am dealing with it by way of a condition attached to allowing the appeal and adjourning the substantive hearing I consider it appropriate that all of the costs incurred by the defendant on 15 September 2015 be paid by the plaintiff. I also order that those costs be assessed on an indemnity basis giving my concerns about what occurred on that date.

[8] That leads to the costs of the adjournment application made on 3 November 2015 and the costs of this appeal.

[9] I consider that I should make no order as to the costs of the adjournment application made on 3 November 2015

[10] I consider that I should order the plaintiff to pay the costs of this appeal. Far more information has been provided to me than was provided to the Learned County Court Judge on 3 November 2015. Crucially I was informed that there was an assurance that this case would be heard during February 2016 if a date was fixed for hearing during that month. In effect this appeal has been brought about by a lack of information being made available at an appropriate stage to the Learned Deputy

County Court Judge. I award the costs of this appeal to be agreed or taxed in default against the plaintiff.