

Neutral Citation No [2011] NIQB 126

Ref: **WEA8378**

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

Delivered: **2/12/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERICAL)

BETWEEN:

DREW KING

Plaintiff;

-v-

SUNDAY NEWSPAPERS LIMITED

Defendant.

COSTS

WEATHERUP J

[1] This application concerns the plaintiff's costs of this action against the defendant. Ms Quinlivan QC appears for the plaintiff and Mr D Dunlop for the defendant.

[2] The Writ of Summons claimed an injunction restraining the defendant from publishing certain material about the plaintiff and damages for misuse of private information and for harassment. Judgment on liability is reported at [2010] NIQB 107 where I found for the plaintiff in respect of some of the aspects of the claim for misuse of private information and rejected the claim of harassment. The issue of liability went to the Court of Appeal and the judgment is reported at [2011] NICA 8 where the findings on the misuse of private information were varied and the rejection of the plaintiff's claim for harassment was confirmed. The matter then returned for the assessment of damages and the judgment on damages is reported at [2011] NIQB 101. Damages were assessed at £1,000.

[3] The plaintiff claims High Court costs to be taxed in default of agreement. The defendant contends for County Court costs on the Equity scale at a band to be fixed by the Court.

[4] The starting point is section 59(2) of the Judicature (Northern Ireland) Act 1978 which provides –

“Save as otherwise provided by any statutory provision passed after this Act or by rules of court, if damages or other relief awarded could have been obtained in proceedings commenced in the County Court, the plaintiff shall not except for special cause shown and mentioned in the judgment making the award, recover more costs than would have been recoverable had the same relief been awarded by the County Court.”

The Rules of the Court of Judicature provide at Order 62 rule 17(4) to the same effect. Thus, if the relief obtained in the High Court could have been obtained in the County Court, the costs will be at the County Court level unless there is “special cause” stated in the judgment.

[5] In the present case the damages awarded were £1,000 and are clearly within the County Court limit. In addition the plaintiff obtained injunctive relief and that relief could also have been obtained in the County Court. Article 13 of the County Courts (Northern Ireland) Order 1980 provides –

“Without prejudice to Article 14, a County Court shall have the like jurisdiction as the High Court to grant an injunction with respect to or in relation to any property (whether real or personal) or right with respect or in relation to which any proceedings might be brought in a County Court.”

[6] As both the damages awarded and the injunctive relief obtained by the plaintiff could have been obtained in the County Court the costs to be awarded will be at the County Court level unless there is “special cause”.

[7] The matter of special cause was considered by the Court of Appeal in Birch v Harland and Wolff [1991] NI 90. The trial Judge had awarded the plaintiff £4,000 in respect of personal injuries that had been sustained in the shipyard as a result of debris affecting the plaintiff’s eyesight. This level of damages was within the County Court limit but the trial Judge awarded the plaintiff four-fifths of High Court costs, although no special cause was stated.

[8] On appeal the award was reduced to £2,000. The Court of Appeal considered section 59(2) of the 1978 Act and noted that no special cause had been mentioned by the trial Judge. However the Court of Appeal confirmed the award of costs of four-

fifths of the High Court scale for special cause relating to the complexity of the claim. The complexity was stated to concern the questions raised by the case in relation to the Factories Act (Northern Ireland) 1965 and the Factories (Protection of Eyes) Regulations (Northern Ireland) 1978.

[9] Recently the Court of Appeal decided McGaughey v. Sunday Newspapers Limited [2011] NICA 51. This was an appeal against a decision of McCloskey J remitting to the County Court the action arising as a result of the plaintiff and his house having been photographed without his consent and the publication of the photographs and an article which suggested that Johnny Adair, a loyalist of some repute, had been residing at the plaintiff's home. The claim was for damages for misuse of private information, breach of the right to respect for private and family life and home and breach of statutory duty under the Data Protection Act 1998. The Court of Appeal concluded that the claim should be remitted to the County Court and stated -

“[19] We consider, however, that the thrust of the decisions of misuse of private information demonstrates that modest damages are appropriate unless there are particular circumstances not associated with reputation which are properly to be taken into account. We do not consider that this is such a case and we are satisfied that the learned judge was correct in his assessment that the appellant's damages can be compensated within the county court limit.

[20] We consider that this judgment indicates the proper approach to the assessment of damages in such cases and do not consider that any issue of complexity arises.”

[10] In the present case the plaintiff contends that there is special cause for the following reasons -

- (1) The claim for an injunction was contested.
- (2) The claim involved the Article 2 right to life.
- (3) All claims for misuse of private information have traditionally been dealt with in the High Court - at least until the decision in McGaughey on 16 September this year.
- (4) There was no application by the defendant for remittal.
- (5) The defendant briefed two Counsel.

[11] The claim for injunctive relief was contested by the defendant but the matter could equally have been contested in the County Court. The claim involved an issue about the right to life under Article 2 of the European Convention, an issue which gave added weight to the claim when the right to life aspects are also put in the balance that has to be struck with the right to respect for private and family life and

home and the right to freedom of expression. Traditionally, claims for misuse of private information have been dealt with in the High Court but whether that was appropriate and whether costs should be determined on that basis is perhaps reflected in the decision in McGaughey v Sunday Newspapers Ltd where it is clear that some of these cases fall within the jurisdiction of the County Court and should be dealt with in that court. There was no application for remittal but there would have been no application or no remittal in every case which proceeded in the High Court but had obtained relief available within the County Court jurisdiction. That one or other party elected to engage two Counsel is really beside the point. I am not satisfied that there is any special cause in this case that would warrant departure from the costs being recovered within the level that would have applied had the matter been dealt with in the County Court.

[12] The defendant referred to the County Court Rules in relation to costs and to Order 55 rule 18 which provides –

“In proceedings where an injunction is claimed under Article 13 of the Order, not being proceedings within the equity jurisdiction, the costs in relation to the hearing of the claim for an injunction shall be at the discretion of the Judge, both as to incidence and amount.”

Reference was made to the Tables of solicitor’s costs and Counsel’s fees for Equity and Title suits where paragraph 1 states that, subject to the Judge’s discretion, the rules set out the applicable costs of equity and title suits and proceedings under Article 13 (injunctions) and 14 of the Order. The Tables provide 7 bands in respect of the values of personalty and/or lands and set out solicitor’s costs and Counsel’s fees in respect of each of the 7 bands.

[13] Damages were assessed at £1,000 and that is clearly within the small claims limit. The injunctive relief is not quantifiable and the costs are within the discretion of the Judge, both as to incidence and amount. I propose to assess the costs by reference to the degree of difficulty that I attach to the plaintiff’s successful claim. The nature of the case was such that there was not only an issue about privacy and the misuse of private information but also an issue about the right to life under Article 2. Although I have not accepted this aspect as a sufficient ingredient to warrant this case being treated as a special cause it is nevertheless an added ingredient that I do take into account in relation to costs. The other matter that was not accepted as a special cause was that this type of claim was traditionally brought in the High Court and although McGaughey v Sunday Newspapers Ltd establishes that that should not be the position I accept that the traditional approach does reflect the additional preparatory work I believe would have been undertaken on the basis that the case would proceed in the High Court and I further accept that this is a matter that should be reflected in the award of costs.

[14] To reflect those considerations I propose to award costs to the plaintiff on the County Court Equity and Title suits scale at band 5. Table 1 sets out the solicitor's fee at band 5 at £2,299. Table 2 sets out Counsel's fees for preparation at band 5 at £221 and a hearing fee at band 5 of £588.

[15] There are two additional paragraphs to which reference should be made. Paragraph 6 provides that where, having regard to the work actually performed, the amounts provided under the relevant scale are in the opinion of the Judge inadequate, he may for any particular case make a special order allowing such costs and expenses as he may think just. Further, paragraph 12 provides that for every day or part of a day on which a trial or hearing is continued after the first day, Counsel and a solicitor in attendance are each entitled to an additional sum equivalent to one-third of Counsel's scale fee.

[16] This case proceeded beyond the first day. For the added days the Tables would allow one-third of Counsel's hearing fee at band 5 for the solicitor in attendance and for Counsel. As I consider that most of the heavy lifting that might have had to be done during the added days would have been done by Counsel I accept that the scale fee for Counsel is not adequate for the added days and I propose to make a special order under paragraph 6 allowing Counsel two-thirds of Counsel's hearing fee at band 5 for each added day.