

Neutral Citation No: [2021] NICH 19

Ref: McB11628

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

ICOS No: 2014/36054

Delivered: 07/10/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

LAURENCE MOFFAT

Plaintiff

and

DOROTHY MOFFAT

First Named Respondent

DAIRE MOFFAT

Second Named Respondent

CONALL EOIN TOLAND

Third Named Respondent

MEABH EMILY TOLAND

Fourth Named Respondent

Mr McEwan BL (instructed by Holmes Moffitt Solicitors) for the Plaintiff
Mr Gowdy QC (instructed by the Official Solicitor) as Amicus Curiae
First Named Respondent, Mrs Mofatt, appeared as a Litigant in Person

McBRIDE J

Application

[1] The first named respondent (“Mrs Moffat”) seeks an order for costs arising from the dismissal of the plaintiff’s application under Article 367 of the Insolvency (Northern Ireland) Order 1989 whereby he sought to set aside the transfer by Mrs Moffat of her home at 50 Candahar Street, Belfast, to her three children, namely the second, third and fourth named respondents.

[2] Mrs Moffat defended the plaintiff's application as a litigant in person. Mr Gowdy QC was instructed by the Official Solicitor who acted as *amicus curiae*. Mr McEwan of counsel acted on behalf of the plaintiff. The second, third and fourth named defendants did not enter an appearance. The second and third named respondents however appeared at a number of court reviews and also entered into correspondence with the court in respect of the plaintiff's application. The fourth respondent took no part in the proceedings.

[3] I am grateful to all parties for their helpful written submissions in respect of the question of costs.

Background

[4] The plaintiff is a brother of Mrs Moffat. The parties have been engaged in extensive litigation for a number of years in respect of their late mother and fathers' estates.

[5] Arising from this litigation Mrs Moffat was condemned in costs in respect of the following hearings:

- (a) Construction summons dated 12 October 2011. Costs were taxed in the sum of £11,749.98.
- (b) Order for costs dated 24 October 2012 which have been taxed in the sum of £10,951.45.
- (c) Cost Order dated 17 September 2015. These costs have not yet been taxed.
- (d) Cost Order dated 23 November 2016. These costs have not yet been taxed.

General principles in respect of costs

[6] Under Section 59(1) of the Judicature Act (Northern Ireland) 1978 the court has a discretion as to the award of costs, such discretion to be exercised in accordance with the rules of court.

[7] Order 62 Rule 3 provides:

“(3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

[8] Order 62 Rule 6 provides:

“6.-(1) The provisions of this rule shall apply in the circumstances mentioned in this rule unless the court orders otherwise.

(2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property, as the case may be, and the court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund.”

[9] Order 1 Rule 1A provides:

“1A.-(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to -
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and

- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[10] Thus, the general rule is that costs follow the event and a successful party to litigation is entitled to have costs paid by the unsuccessful party.

[11] In its discretion, however, the court may withhold all or some costs from the successful party or exceptionally award costs against him where it is just to do so. There must, however, be material relevant to the litigation on which to depart from the rule of costs following the event – see *Scherer v Counting Instruments* [1986] 1 WLR 615.

[12] The grounds for the exercise of the discretion to depart from the general rule may include the following non-exhaustive list:

- (i) Any matter relating to the litigation and the parties' conduct in it for example causing litigation to be unduly protracted – see *Patterson v Walker* [2011] NIQB 50, failing to give discovery, failing to be properly prepared for trial, failing to engage fully in attempts to resolve the dispute – see *McAteer v Devine* [2016] NICA 46.
- (ii) Circumstances leading to the litigation.
- (iii) Where a successful party raises issues or makes allegations improperly or unreasonably the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful parties' costs – see *Re Elgindate Limited* (No.2) [1993] 1 All ER 232 at 237.

Quantum of Costs

[13] Generally the court orders costs to be taxed in default of agreement. This means that the Taxing Master will determine the quantum of costs if the parties are unable to agree same.

[14] Under Order 62 Rule 7 however the court has power to order, in lieu of taxed costs:

“A specified proportion of the costs from or to a specified stage in the proceedings; or

A specified gross sum under Order 62 Rule 7(4).”

[15] The principles governing an award under Order 62 Rule 7 were succinctly set by the Court of Appeal in *McAteer v Devine* [2016] NICA 46 at paragraph 27 as follows:

“[27] The principles which we have distilled are as follows:

- (i) The purpose of the rule is to avoid expense, delay and aggravation involving a protracted litigation arising out of taxation. Such an aim would be achieved especially, though not exclusively, in complex cases.
- (ii) The discretion vested in the judge is not subject to any formal restriction.
- (iii) The order does not envisage any process similar to that involving taxation. The approach should be a broad one. A judge is not obliged to receive evidence on oath or anything more than some evidence as to the estimated costs before making such an order.
- (iv) Although the discretion is unlimited, it must be exercised in a judicial manner. An example of acting in an unjudicial manner would include for example “clutching a figure out of the air without any indication as to the estimated costs.”
- (v) The court will only interfere with the exercise of the discretion by the trial judge if he/she has erred or was plainly wrong.”

[16] As appears from *McAteer*, the trial judge can only exercise the power to order a lump sum Costs Order if the court has material before it as to the successful parties’ estimated costs.

[17] Under the Litigants in Person (Costs and Expenses) Act 1975 in Order 62 Rule 18 a litigant in person is entitled to costs for time spent in preparing for and conducting litigation. Unless the litigant in person can show that she has suffered financial loss as a result of her time spent conducting litigation, such costs are capped at £9.25 per hour.

Submissions of the Parties

[18] Mrs Moffat in her written submissions accepted the legal principles set out above. She submitted that no sum should be deducted as there was no misconduct on her part. Mrs Moffat has not set out any details of sums claimed.

[19] The second named respondent sent correspondence to the court with regard to costs setting out that he was entitled to “a flat rate for full time working throughout a period of 7 years” together with a claim for travel and accommodation costs. None of the other respondents has made any submission in respect of costs.

[20] Mr Gowdy on behalf of the Official Solicitor submitted that although the Official Solicitor could seek costs under Order 110 Rule 2 she did not seek any order for costs against any party to the litigation.

[21] Mr McEwan on behalf of the plaintiff accepted the general principles set out above in respect of costs. He submitted however that the general rule that costs following the event should not apply in this case and that the court should exceptionally make an order for costs against Mrs Moffat and/or the other respondents because of the respondents’ misconduct. In particular, he submitted that Mrs Moffat had unreasonably prolonged the proceedings. In particular, he submitted that she had failed to appear at nine reviews without explanation causing the reviews to be adjourned and unnecessary expenses to be incurred by the plaintiff. Secondly, he submitted that there were three reviews where Mrs Moffat indicated she was entitled to legal aid which necessitated the reviews being adjourned so that she could investigate whether she had such an entitlement and thirdly, he submitted that the matter had been listed for trial on three occasions and had to be vacated on each occasion because, without adequate explanation or notice, none of the respondents appeared at the court. Although they had sent letters to the court, they had not advised the plaintiff’s solicitors about their application to adjourn the trial and this had caused the plaintiff to incur unnecessary expenditure. Finally, Mr McEwan submitted that the case had to be adjourned on at least four occasions because of Mrs Moffat’s disruptive behaviour in court.

[22] Secondly, Mr McEwan submitted that the application was brought by the plaintiff to satisfy the costs owed to him in his capacity as personal representative of his late parents’ estate and therefore Order 62 Rule 6 applied.

[23] The plaintiff further disputed the extent of the claim made by the second named respondent on a factual basis and noted the failure of all the respondents save Mrs Moffat to enter an appearance, swear an affidavit or produce the skeleton argument. Finally, Mr McEwan submitted that any costs awarded to Mrs Moffat should be offset against the costs already awarded to the plaintiff.

Consideration

[24] There was no dispute between the parties regarding the applicable legal principles. Consequently, the general rule applies unless the plaintiff can establish litigation misconduct.

[25] This has been a long running application in which there have been a large number of reviews and a number of aborted hearings.

[26] The court finds that a number of reviews and hearing dates were vacated as Mrs Moffat indicated she was entitled to legal aid. The court therefore adjourned the reviews and the hearing to enable her to check the position. In the event she was not successful in securing legal aid. The court, however, is satisfied that the adjournments which arose to enable Mrs Moffat to explore her entitlement to legal aid did not arise due to litigation misconduct. Mrs Moffat had been entitled to legal aid in the earlier litigation and therefore the court considered that it was fair and necessary to give her time to explore this matter further. I therefore do not consider that costs should either be disallowed or reduced or awarded against her on the basis that she was seeking to explore her entitlement to legal aid.

[27] The court further finds that a number of other adjournments arose as the plaintiff, a litigant in person, was seeking assistance with representation in the case. Initially there was delay as she sought to obtain representation from the Attorney General. Ultimately, the court secured the involvement of the Official Solicitor as *amicus curiae* due to the complex legal issues which arose in the case. I therefore do not consider that adjournments which arose as a result of Mrs Moffat seeking representation amounts to litigation misconduct in the circumstances of this case.

[28] The court however accepts that on a number of occasions some reviews and some hearings could not proceed due to Mrs Moffat's misconduct in court and I consider it is fair to reflect in the costs order a reduction for the extra expense these adjournments caused to the plaintiff. In *McAteer* the Court of Appeal held that if the court is to order a percentage reduction in costs for the costs of litigation misconduct it is for the trial judge rather than the Taxing Master to fix the percentage. In the present case the court finds that there should be an overall reduction of 15% in respect of costs to reflect Mrs Moffat's misconduct in court which led to a number of reviews and one hearing not proceeding.

[29] In respect of quantum Mrs Moffat has not set out any estimate of her costs. In these circumstances the court is not in a position to award a lump sum under Order 62 Rule 74.

[30] In respect of the second respondent there is a dispute about the quantum of costs and on the basis of the information provided to the court it is my view that I am not in a position to make an appropriate estimate of the appropriate lump sum. In keeping with the overriding objective I consider that all costs should be taxed in default of agreement.

[31] Accordingly, I make an order condemning the plaintiff in 85% of the costs of Mrs Moffat, such costs to be taxed in default of agreement. I condemn the plaintiff in the costs of the other respondents. I make no deduction in respect of the costs of the second, third and fourth respondents and order costs to be taxed in default of agreement. Obviously, the Taxing Master will take into account the role played by each respondent and in particular the fact that neither the second, third nor fourth respondent entered an appearance, filed an affidavit or filed any skeleton argument.

[32] I make no order for costs in respect of the Official Solicitor's costs.