

Neutral Citation No. [2010] NIQB 114

Ref: **GIL7975**

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

Delivered: **22/10/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**ON APPEAL FROM THE RECORDER'S COURT FOR THE
DIVISION OF LONDONDERRY**

BETWEEN:

STEPHEN CHARLES LOVE

Plaintiff/Appellant

and

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

and

BETWEEN:

KEVIN ANTHONY McKEEVER

Plaintiff/Appellant

and

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

GILLEN J

Applications

[1] These are two appeals from the decisions of the County Court Judge for the Division of Londonderry ("the Judge") made on 13 April 2010 in relation to a determination by him that the defendants in neither case were obliged to pay the viaticums on a party/party cost basis where both cases had settled in favour of the plaintiff prior to the respective trial dates. The County Court Judge had dismissed summonses brought by the plaintiffs for an order for such costs.

Background

[2] These appeals were conducted by way of skeleton arguments submitted to the court for adjudication. The factual background had been agreed as follows.

[3] Both cases were employer's liability matters. The Love case was listed for trial on 1 April 2009 and the McKeever case was listed for trial on 26 November 2009.

[4] Both cases settled in favour of the plaintiffs in the days leading up to the respective trial dates. It was agreed that costs would follow the event. Thus witnesses and plaintiffs were cancelled prior to the trial dates. Bills of costs were submitted to the Departmental Solicitor's Office in each instance.

[5] All the costs in the cases were agreed and paid with the exception of the viaticums which had been paid by the plaintiffs' solicitors to the witnesses. The defendant in each case objected to the paying of the viaticums on the basis that the cases settled prior to the hearing date and that the obligation was on the plaintiffs' solicitors to recover same from the witnesses who had not attended.

[6] Accordingly summonses were issued by the plaintiff in each of these cases for a ruling on this discrete costs issue. The County Court Judge had found that the defendant was not obliged to pay for the viaticums on a party/party cost basis in all the circumstances and dismissed the summonses.

[7] Accordingly the matter now comes before this court by way of appeal from the Judge's decisions.

The Plaintiffs' Case

[8] It was the contention of the plaintiffs that viaticums are "witness expenses" and are recoverable by the successful party from the unsuccessful party. It was contended that witness expenses (including a viaticum) were part of the hazards of litigation to be weighed by each party in advance and to be borne by the unsuccessful party. To require a successful solicitor to pursue witnesses for viaticums would be to place an undue and wholly unreasonable strain on her. It would be undesirable from the public policy point of view that any threat of sanction be placed upon a potential witness.

[9] The defendants' case was that viaticums were not expenses but rather were payments toward the expenses in advance of the trial. It was their case that the plaintiffs ought to recover the viaticums from witnesses who did not have to attend court by virtue of an early settlement.

The County Court Rules (NI) 1981

[10] The relevant extract from the County Court Rules (NI) 1981 (“the relevant rules”) are as follows:

“Witness Summons

9.-(1) ... Where any party to any action or other proceedings desires a person to be summoned as a witness to give oral evidence at the hearing in court or to produce at the hearing in court a document in his possession or control, a chief clerk for any county court division, or other officer of the court authorised by him for the purpose, shall on the application of the party, issue a summons in form 110 together with a copy thereof.

...

(7)(a) Subject to sub paragraph (b) there shall be paid or tendered to the witness at the time of service of the summons £12.65 for a police officer or £17.82 for any other person and, in addition a sum reasonably sufficient to cover his expenses in travelling to and from the court.”

[11] Order 55 r 2 of the relevant rules sets out the costs and expenses which are payable between parties states as follows:

“2.-(1) Subject to rule 7(2) in all actions suits and matters and other proceedings there shall be payable –

(a) To counsel and solicitors, costs according to the scales set out in Appendix 2 and subject to the provisions hereinafter in this Order specified;

(b) To or in respect of witnesses, fees and expenses subject to the provisions hereinafter in Rule 6 specified.”

[12] Order 55 r 6 where relevant provides as follows:

“6. Without prejudice to any discretion exercisable by the Taxing Master of the Court of Judicature under the Solicitors (Northern Ireland) 1976 there may be allowed to or in respect of witnesses such fees and expenses as the judge shall in his discretion think just.”

[13] A comparable though not identical provision is made with respect to proceedings in the High Court per section 67(6) of the Judicature (Northern Ireland) 1978 in the following terms:

“(6) No court shall in any case proceed against or punish any person for having made such default as aforesaid unless it is shown to the court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence and of returning from giving evidence was tendered to that person at the time when the writ was served upon him”.

Conclusion

[14] Whilst there is no direct authority bearing on the question now before the court, I consider that the argument of the defendant in this matter is correct and that I must affirm the decision of the Judge with the costs of this appeal to the defendant. My reasons for so doing are as follows.

[15] The rationale behind the rules set out supra is that a witness should be provided with the necessary money to enable him/her to attend court under the terms of a summons. Logically no one should be obliged to attend court unless they are provided with the means of so doing. The nomenclature invoked “viaticum” accurately reflects the definition set out in the Chambers Dictionary 10th Edition as “money, provisions etc, for a journey”.

[16] The defendants helpfully drew my attention to a study entitled “study on the Transparency of Costs of Civil Judicial Proceedings in the European Union” for the European Commission dated 30 September 2007 reporting on Ireland. Section 10 of that report states as follows (setting out the position out the position in Ireland):

“10. Compensation of Witnesses

In principle, the witness compensation is whatever is reasonable in the circumstances.

....

This compensation is an addition to the payment of stamp duty to Courts for the witness summons, and any viaticum attached. The viaticum is not an expense but is a payment towards the expenses in advance of the trial”.

[17] I consider that this accurately summarises the position. It provides an insight into the correct approach to be adopted by the court in the instant case.

[18] Accordingly given my clear view that a viaticum under the County Court Rules is not an expense but is a payment towards an expense in advance of trial, if it is not incurred it is not an expense to be recovered. I see no reason why the viaticum should not be recovered from the witness if he has not expended it on the purpose for which it was given. To hold otherwise is to provide a wholly unjustified windfall to such a witness. This is not one of the hazards of litigation as suggested by the plaintiff. Rather this is a payment for a specific purpose which, if not incurred, must be repaid. An unsuccessful defendant should not be responsible for bearing the cost of such a windfall when the expense has not been incurred.

[19] I do not find convincing the plaintiff's assertion that "an undue and wholly unreasonable strain would be placed on a solicitor who had to recover such a sum". Why should this be so? Repayments are often sought from persons involved in litigation e.g. where a witness has been paid in advance of an expert report but has been unable to perform the task. It seems to me that it is wholly reasonable to expect any legal representative to accompany a viaticum to a witness with a brief note indicating that the sum involved must be repaid if not incurred. Upon informing the witness that the case is settled and his/her attendance will not be required, a brief reminder can be included. The logic of that must be obvious to anyone who has received a viaticum. Common sense dictates that it would be much more difficult for the unsuccessful party who has not been responsible for either the witness being summoned or the furnishing of the viaticum to make contact with that witness out of the blue and attempt to recover the money from someone who would usually be a total stranger.

[20] I believe that most people will readily return the sum when it has not been incurred and those who do not will require to be pursued in the same way that any other person who has been unjustly enriched will be held to account. I therefore reject the suggestion by the plaintiffs' solicitor in this instance that the Small Claims Court will be inundated with disputes. The issue is a simple. Either the expense has been rightfully incurred or it must be returned. No fundamental principle is at stake other than a requirement that a potential witness acts honestly and fairly.

[21] Equally unavailing is the plaintiffs' solicitors' argument that some parties may not have bank accounts. If this is the case, then the money is simply repaid in some other form. Every person at some time has to pay bills or accounts in whatever way they can. This is no different. It would accord ill with the values of society if one could escape payment of a rightful debt

simply because of the absence of a chequebook. Common sense rebels against such a proposition.

[21] In short, the payment of a viaticum before the hearing of a case should be accompanied by some expectation management to ensure that the witness realises that if the expense is not incurred it must be returned. As ever in life simple forms provide the ideal lexicon and I have no doubt that it can be made clear at an early stage that this is not an expense but rather a payment towards an expense and is recoverable if not incurred.

[22] I therefore conclude that the viaticum is recoverable by the party who issued the summons in the first instance and cannot be claimed as an expense against the unsuccessful at the end of the proceedings.

[23] I therefore affirm the decision of the County Court Judge and the costs both above and below must be borne by the solicitors for the plaintiffs.