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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**01/02/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

Between:

DANIEL McATEER

Plaintiff/Respondent

and

BRENDAN FOX, PARTNER, CLEAVER FULTON RANKIN

Defendant/Appellant

Before: Treacy LJ, Sir Malachy Higgins and Sir Anthony Hart

TREACY LJ and SIR MALACHY HIGGINS

Introduction

[1] Pursuant to leave granted by the trial judge, Weatherup LJ, the appellant appeals against his Order that Daniel McAteer ("the respondent") should pay to the appellant 10% of the appellant's costs of the action as taxed in default of agreement. The appellant challenges the lawfulness of the exercise of the trial judge's discretion in relation to costs namely his disallowance of 90% of the taxed costs. This is the sole issue in the present appeal.

[2] In exercising his discretion in relation to costs the judge took into account the appellant's failure to avail of the opportunity in September 2012 to resolve all issues, including costs, rendering the remainder of the trial unnecessary. Had there been the required engagement by the appellant in September the proceedings would have ended with the judge's ruling on costs, the subsequent costs would not have occurred and the appellant could not have generated a Bill of Costs in excess of half a million pounds.

Background

[3] On 15 July 2015, after a lengthy trial (which occupied approximately 35½ days of court time extending over a period of just over two years), judgment was given for the appellant dismissing the respondent's claim for damages alleged to have been sustained by reason of various acts of conspiracy and/or breach of contract on the part of the appellant.

[4] Mr McAteer unsuccessfully appealed against the substantive judgment.

[5] In the meantime on 10 December 2015 Weatherup LJ awarded the appellant a lump sum of £40,000 plus VAT for costs against the respondent pursuant to Order 62 Rule 7 in lieu of taxation.

[6] The appellant appealed the decision in respect of costs. The Court of Appeal allowed his appeal [see [2016] NICA 46]. At paragraph 45 of its decision the Court of Appeal referred the matter back to Weatherup LJ to indicate what percentage reduction he considered appropriate to make to the taxed costs in light of his adverse comments on the appellant's approach to the case.

[7] At paragraph 44 of its decision the Court of Appeal recognised that it was invidious to refer the matter back to the trial judge to explain the figures further particularly where he had not seen the proposed Bill of Costs. They acknowledged that the trial judge intended to reduce the plaintiff's costs to some extent but queried the extent to which he intended to reduce the successful party's costs. At paragraph 45 the Court of Appeal explained that they considered that the most effective way to dispose of the case was to refer the matter back to the trial judge. The Court of Appeal noted that that would afford an opportunity for the Taxing Master to arrive at a properly taxed assessment and then to make the appropriate percentage reduction in light of the judge's conclusion.

[8] The matter was relisted before the trial judge to make a determination in accordance with paragraph 45 of the judgment of the Court of Appeal, namely to indicate what percentage reduction was considered appropriate. It was ordered that a Bill of Costs be sent to Mr McAteer. Further submissions were made on behalf of the parties and the trial judge delivered a reserved ruling.

[9] In his original ruling on costs on 10 December 2015 the judge identified five stages to the proceedings:

(i) Stage 1 – the commencement of the action in March 2009 to the initial hearing of the substantive proceedings in September 2012.

(ii) Stage 2 – September 2012 when there was an attempted settlement of the proceedings and the hearing was adjourned for a referral of the plaintiff's complaints to the Solicitors' Disciplinary Tribunal.

(iii) Stage 3 – From September 2012-October 2013 when the plaintiff's complaint was considered by the Tribunal.

(iv) Stage 4 – October 2013-March 2014 when there were further attempts at settlement of the proceedings.

(v) Stage 5 – From 27 March 2014 when the substantive hearing resumed to the conclusion of the hearing.

[10] As appears from paragraph 6 of the trial judge's impugned ruling there was in September 2012 an unsuccessful attempt by the parties to settle the proceedings. The parties agreed that the appellant would give an undertaking as to future conduct, the terms of which undertaking were agreed. The position as to the costs of the action was not agreed. The appellant's proposal was that there would be no order as to costs and the respondent would not agree. The respondent's proposal was that the issue of costs should be referred to the trial judge for a ruling on costs. Mr Hanna QC on behalf of the appellant would not agree to the mechanism suggested. The net effect of the position adopted by the parties was that the trial judge was unable to deal with the issue of the costs of the action without the agreement of the parties that he should do so.

[11] Adopting the approach suggested by Mr Hanna, Weatherup LJ in his impugned ruling identified the remaining issues for him as being:

(i) Identifying those relevant factors, if any, justifying a percentage reduction in the entitlement of costs of the successful defendant.

(ii) Assessing that percentage reduction.

(iii) Giving reasons for making the percentage reduction.

[12] At para [8] the trial judge reviewed the transcript of his original ruling on costs and drew attention to the fact that immediately prior to that ruling he referred to the need for there to have been "a more energetic engagement by the defendant in respect of costs". The trial judge then states:

> "[9] In September 2012 the parties were not in agreement as to costs. While the plaintiff proposed that I should make a ruling on costs, I could not intervene on the costs issue except with the agreement of the parties. However, I am satisfied that there was at that time the opportunity to resolve all issues, including costs, had there been agreement to refer the costs issue. The party rejecting that basis for resolution was the defendant.

> [10] The defendant points to the plaintiff, having rejected the offer of concluding the proceedings with no order as to costs, thereafter being unsuccessful in the proceedings. The plaintiff points to the defendant's rejection of the offer to refer the issue of costs to the Court, thereby occasioning significant costs to be incurred thereafter.
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> [11] The defendant states his objections to agreeing to the plaintiff's proposal. First of all he asks what more could the defendant have done as more energetic engagement could only have involved the defendant paying costs. This objection is not accepted. A more energetic engagement would have been to agree to refer the costs issue to the Judge. Whatever the outcome of the referral the costs subsequently incurred would not have arisen.
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> [12] The second objection is that the plaintiff's proposal was impracticable. It is asked how the Judge could have decided the costs issue without hearing the action. This objection is not accepted. It is a perfectly feasible exercise for a Judge to decide an issue of costs without conducting a hearing as to all the matters arising in the remainder of an action."

Discussion

[13] Lord Neuberger MR in *M v London Borough of Croydon* [2012] EWCA Civ 595 at paragraph 47 considered the issue of costs after settlement before trial in ordinary civil litigation. That case illustrates that it is open to the parties in civil proceedings to compromise all their differences save for costs and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs but it is not obliged to resolve such a freestanding dispute about costs. The trial judge referred to this decision and to the guidance at paras [47]-[51].

[14] We agree with the trial judge that it would be contrary to public policy in relation to the use of court time and resources if issues of costs required the completion of litigation rather than its earlier resolution. As he pointed out when all matters except costs are resolved it is imperative that a concerted effort be made to identify a mechanism for resolution of that issue for the avoidance of unnecessary time and effort and expense. As he observed whatever mechanism had been found in the present case and whatever order as to costs would have been made it would have avoided the subsequent prolonged proceedings, demands on court time and

substantial expense. By 12 September 2012 the trial judge had been engaged in various aspects of the proceedings and the defendant/appellant may, if the matter had been left to the trial judge, have recovered the costs of proceedings to that date.

[15] The trial judge noted that the approach of the appellant was that Mr McAteer having failed to accept the defendant's offer in September 2012 and having thereafter failed in the action that he should be liable to costs. Weatherup LJ considered that there was a reasonable alternative in September 2012. While it was not a direct offer on costs it was a direct offer on a *mechanism* for resolving costs. We agree with the trial judge that in the absence of agreement on costs between the parties that it was entirely reasonable to propose a *mechanism* for the resolution of costs that involved a referral to the judge. The judge rejected the appellant's reasons for refusing Mr McAteer's offer. He was entitled to do so. As he noted it was apparent in September 2012 that the continuation of the proceedings would involve considerable time and resources and that with agreement having been reached between the parties on a form of undertaking the expenditure of that time and resources should have been unnecessary. Had there been agreement to refer the issue of costs to the trial judge he expressed himself satisfied that, given his previous involvement in the proceedings, that he would have felt able to deal with the issue of costs and would have wished to do so to bring the proceedings to a conclusion. This approach chimes readily with the overriding objective enshrined in the RSC.

[16] Had there been the necessary engagement by the appellant in September 2012 the proceedings would, as the trial judge noted, have ended with the ruling on costs. Subsequent costs would not have been incurred and Mr Fox could not have produced a Bill of Costs of some £550,000.

[17] The respondent was prepared in September 2012 to have his case dismissed subject to a ruling by the trial judge on the issue of costs. As Mr Hanna's skeleton argument makes clear the respondent was prepared to accept whatever decision the trial judge made about costs whether that was in his favour or otherwise. It was Mr Hanna's client who rejected that proposal. Had his client agreed to the mechanism of the trial judge dealing with the issue of costs that would have disposed of the entire case at that early stage.

[18] Mr Hanna in his skeleton argument submitted that had the parties agreed with the proposal that the judge should determine the issue of costs in September 2012 that the outcome could only have been one of the following three possibilities:

(i) that Mr Fox pay some costs to Mr McAteer;

(ii) that there be no order as to costs (which is what Mr Fox had been offering and was willing to agree to); or

(iii) that Mr McAteer pay some costs to Mr Fox (which is not what Mr Fox was seeking).

[19] It is noteworthy that Mr Hanna acknowledged in his skeleton argument that his client was not seeking costs against Mr McAteer and that accordingly the only possible outcome which his client would not have been prepared to agree to was that his client should pay some costs to Mr McAteer. Mr Hanna explicitly acknowledged that while such an outcome was theoretically possible "it was inconceivable" if such an exercise had been carried out that it would have been the outcome in this case. That being so it is impossible to understand why his client did not agree to the mechanism suggested by Mr McAteer.

[20] It is open to parties in civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with – see *M v Croydon Borough of London* at para 47 per Lord Neuberger MR. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a freestanding dispute about costs. Weatherup LJ said at para 19 that had there been agreement to refer the issue of costs to him that he was satisfied that, given his previous involvement in the proceedings, he would have been able to deal with the issue of costs and would have wished to do so to bring the proceedings to a conclusion. He also noted 'had there been the required engagement by the defendant in September 2012 the proceedings *would* have ended with the ruling on costs' (our emphasis). It seems to us that this is an assessment that Weatherup LJ was particularly well placed to make and there is no basis upon which we can go behind that approach. We do not accept that an attempt to resolve the issue of costs would inevitably have involved a disproportionate exercise as submitted by the appellant. On the contrary the appellant's refusal to agree to refer the issue of costs to the trial judge led to an entirely avoidable and hugely disproportionate waste of resources and court time resulting in (i) a lengthy and complex hearing, (ii) a substantive appeal by Mr McAteer, (iii) a ruling on costs by the trial judge which was appealed by Mr Fox (the first costs appeal), (iv) a second ruling on costs which is the subject of this second appeal.

[21] The normal rule under Order 62 Rule 3(3) is that costs 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. The court therefore has a discretion to disallow all or part of a successful party's costs. In the present case the trial judge has given detailed and carefully crafted written reasons for the exercise of his discretion and the extent of the disallowance. We see no proper basis upon which this court should interfere not least because given his previous involvement in the proceedings he was particularly well placed to deal with the issue of costs had Mr Hanna's client agreed to the mechanism that was proposed by the respondent Mr McAteer.

[22] Accordingly, for the above reasons we dismiss the appeal against the trial judge's ruling on costs.

Sir Anthony Hart

[1] The plaintiff/respondent (to whom I shall simply refer as Mr McAteer for convenience) is a chartered accountant and a litigant in person in this litigation. On 30 March 2009 he issued two writs of summons: the first named Sean Devine and Mary Devine, Brendan Fox and John Love, a partner in Moore Stephens Bradley McDaid as defendants; the second writ named Sean Devine, Brendan Fox, John Love and Stephen McCarron as defendants. Separate statements of claim in both actions were delivered on 22 May 2009 but subsequently both actions were consolidated. On 11 November 2011 an Amended Statement of Claim was issued signed by Mr McAteer, but also bearing the names of Mr Ronan Lavery QC and Mr Michael Tierney barrister at law. A consolidated statement of claim prepared by Mr McAteer at the direction of Mr Justice Weatherup (as he then was) was delivered by Mr McAteer dated 1 June 2012. This only bore his name and it appears that Mr Lavery QC and Mr Tierney were no longer acting for Mr McAteer at that stage. I shall refer to them later when I deal with a request made by Mr McAteer in 2014 that Mr Fox make a contribution to the costs of what I presume is the Bar Pro Bono Unit.

[2] There were numerous interlocutory applications and we were informed that Mr McAteer was successful in some of these applications but not in others. The costs of those applications were made costs in the cause.

[3] At the interlocutory stage an application was made by the defendants to strike out Mr McAteer's case as disclosing no reasonable cause of action. It appears from the judgment of the trial judge of 15 July 2015 (the substantive judgment) that as a result of that application the case against Stephen McCarron was struck out and the claims against the other four defendants were struck out in part.

[4] The claims against the remaining four defendants came on for hearing in 2012. In September Mr McAteer agreed to a stay of the proceedings against Sean and Mary Devine and against John Love. That meant that the case remained against Brendan Fox.

[5] Mr McAteer's claim against Mr Fox was for breach of contract and conspiracy to damage Mr McAteer's business as an accountant. During these proceedings Mr Hanna QC and Mr Jonathan Dunlop appeared on behalf of Mr Fox and, apart from the period when he had the assistance of Mr Ronan Lavery QC and Mr Tierney, Mr McAteer conducted his own case as a litigant in person.

[6] Mr McAteer subsequently appealed the substantive judgment against him dismissing the action and that appeal, which I shall refer to as the substantive appeal, came on for hearing before a differently constituted division of this court. On 4 December 2017 the substantive judgment of the trial judge was upheld in its entirety. We have had the benefit of being referred to parts of the very detailed substantive judgment delivered by the trial judge and the equally detailed **judgment**

in the substantive appeal delivered by Gillen LJ. In these judgments the circumstances of this complex and tangled litigation have been set out in considerable detail and it is unnecessary to refer to each and every detail of the allegations made by Mr McAteer against Mr Fox, although it will be necessary to refer to some aspects of the claim in greater detail in due course.

[7] At [60] and [61] of his substantive judgment the trial judge stated his conclusions as follows:

> "[60] I have not been satisfied that the defendant was orchestrating events or that he was responsible for a raft of unnecessary litigation against the plaintiff. I am not satisfied of any conspiracy by the defendant against the plaintiff nor am I satisfied of any breach of contract by the defendant against the plaintiff. Certainly the defendant acted unwisely on occasions in relation to the taking of instructions against the plaintiff, and going to the plaintiff's office with the statutory demand and when writing to KPMG to seek to influence the opinions expressed in the report. While these were matters that were unwise they did not amount to conspiracy or breach of contract.
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> [61] In any event I am not satisfied that losses have been sustained by the plaintiff as the result of the actions of the defendant. There are extensive claims for financial loss but no evidence of loss attributable to the actions of the defendant. Accordingly, I am not satisfied that the plaintiff has made out the case against the defendant. In 2014 the plaintiff informed the Court that he was proposing that the proceedings should be concluded and that the defendant would not agree to do so. That is a matter that is clearly relevant to the costs incurred. I will return to the issue of costs at a later date. I have not been satisfied as to the plaintiff's claim against the defendant. Accordingly there will be judgment for the third defendant against the plaintiff".

[8] The effect of this lengthy litigation was therefore that, although the trial judge considered that the defendant had "acted unwisely" in three instances, these "did not amount to conspiracy or breach of contract", and the result was that Mr McAteer completely failed to substantiate very serious allegations against Mr Fox, who is a solicitor in a well-known Belfast firm, of behaving in a fashion that, had any of these grounds of conspiracy or breach of contract been established, would have resulted in

a serious finding against Mr Fox in terms of his professional behaviour. In addition the plaintiff had failed to persuade the judge that he had suffered financial loss. The financial loss which the plaintiff alleged was set out in documents attached to the consolidated statement of claim and amounted to many millions of pounds.

[9] A lengthy hearing took place before the trial judge on the issue of costs and we have been provided with a transcript of that hearing, together with the *ex tempore* judgment which the trial judge delivered immediately afterwards. I shall refer to this as the first costs judgment. Having referred to various discussions during the course of the proceedings in relation to costs he concluded:

> "I am left with the impression that a more energetic engagement by the defendant in respect of costs might have moved the parties towards an agreement as that is what had occurred with the other parties. What I propose to do in the case is to take up the invitation to apply Order 6 to rule 7(4) (sic), that is to fix a gross sum which is specified in lieu of tax (sic) costs, that is to save further time in the matter and save the costs of the taxation process in taking up the court's time … with a taxation process. In looking at that, I take into account the matters that I have noted above and I have referred to a number of matters in Mr McAteer's paper and a number of matters in Mr Hanna's paper and I … take into account of the flirting that there has been in relation to settlement on the three occasions, inconclusive as each has been, I propose to fix the costs payable to the defendant at £40,000 plus VAT which is intended to include costs and outlay and expenses and require a payment to be made within one year".

[10] Mr Hanna QC asked whether the trial judge meant the plaintiff or the defendant and the judge corrected his slip to say that the costs were to be payable to the defendant.

[11] The judge invoked Order 62, Rule 7(4) because although as I understand it no itemised bill of costs had been prepared at that stage, the defendant estimated his costs at £550,000, but Mr Hanna had indicated that in order to avoid taxation the defendant was prepared to accept a proportion of this, namely £360,000. The result of the trial judge's order was therefore that despite the plaintiff having completely failed to establish any of the causes of action upon which he founded his claim, or to establish any financial loss as the result of any action on behalf of the defendant, the defendant was being deprived of much the greater part of his costs.

[12] Mr Fox then appealed to the Court of Appeal, and I shall refer to this as the first costs appeal. A differently constituted division of this court, again presided over by Gillen LJ, pointed out that the discretion of the trial judge had to be exercised in a judicial manner:

> "We have to ask the source of the figure of £40,000 upon which the court settled. It constituted a 93% reduction from the initial figure propounded by [Mr Fox] of £550,000 and approximately 89% of the reduced figure of circa £360,000.
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> [43] Given that [Mr Fox] had succeeded and [Mr McAteer's case] had been completely dismissed, we must question the extraordinary extent of the reduction in such circumstances. We are left with the impression that the figure of £40,000 was, to invoke again Leary's case, 'clutched out of the air without any indication as to the estimated cost'. It smacks of an arbitrary figure that could do an injustice to the winning party after a lengthy trial. Clearly the authorities eschew any need to carry out a full investigation of the costs bill but to deprive the successful party of such a degree of costs, without any evidence of his proposed costs bill or without making any adverse comment upon it, would on the face of it require an explanation together with a positive assertion that this was the degree of reduction intended.
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> [44] We consider it to be invidious to refer the matter back to the learned trial judge to explain the figures further particularly where apparently he has not seen the proposed bill of costs. Clearly the learned trial judge intended to reduce [Mr Fox's] costs to some extent in light of the facts mentioned above but was it intended to reduce it to merely 7%/11% of his costs bill notwithstanding his complete success in the action?"

[13] The Court of Appeal reverted to Order 62 Rule 3 and ordered that costs be taxed by the Taxing Master in the conventional manner in default of agreement. The matter was referred back to the trial judge to indicate what percentage reduction he considered appropriate to make to the taxed costs in the light of his adverse comments on Mr Fox's approach to this case.

[14] The matter therefore came before the trial judge again and on 26 April 2017 he delivered a written judgment (the second costs judgment) in which he explained his reasoning for the conclusion to which he had come and then dealt with the question of costs at paragraphs [23] to [27]. First of all he dealt with an outstanding cost order relating to interlocutory hearings of 17 January 2012 and he made no order as to costs in respect of that matter. So far as the other costs order relating to the interlocutory proceedings of 18 June 2009 was concerned it had been ordered that those costs were to be costs in the cause and the trial judge therefore ruled that they should fall into the defendant's Bill of Costs, thereby being costs which in the normal way would be recoverable by Mr Fox from the unsuccessful party, Mr McAteer.

[15] At [26] he said:

> "This Court is directed to state the percentage reduction considered appropriate to the taxed costs. The percentage will reflect the balance of an assessment of costs incurred in the first place in September 2012 less an assessment of costs incurred in the period thereafter.
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> [27] I would express the percentage of the tax bill payable to the defendant at 10%. The amount so determined shall be paid within one year of this date. There will be no order as to costs on this further determination of the costs of the action."

[16] The trial judge's second cost judgment depriving the successful defendant of 90% of his costs of the trial has given rise to the present appeal which is the second costs appeal in this litigation. Before considering the basis of the trial judge's second costs judgment on costs it is appropriate to refer to the general principles governing the award of costs. These were set out by Buckley LJ in *Scherer v Counting Instruments Limited* [1986] 1 WLR 615 at pages 621 and 622. Having reviewed the relevant law he stated the principles applicable to the award of costs as follows.

> "(1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs; but (2) the judge has under section 50 of the Judicature Act 1925 an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for

it depends upon the exercise of the court's discretion. (4) This discretion is not one to be exercised arbitrarily; it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of discretion, as in *Dutton v Spink and Beeching (Sales) Ltd* [1977] 1 All E.R. 287 and *Ottway v Jones* [19551 1 W.L.R. 706, the opposing party may properly be ordered to pay his costs. But where the party who invokes the court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs. Indeed, in *Ottway v Jones,* Parker L.J. said, at p. 715, that such an order would be judicially impossible, and Sir Raymond Evershed M.R. said, at p. 708, that such an order would not be a proper judicial exercise of the discretion, although later, at p. 711, he expressed himself in more qualified language. (9) If a judge, having relevant grounds upon which to do so, has upon those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit.

> When these principles fall to be applied to an interlocutory step in an action, the circumstances may be such that it is not then possible to see on which side justice requires that the decision who should bear the costs of that step should ultimately fall. This may depend upon how the issues in the action are eventually decided. Consequently costs in interlocutory matters are often made costs in the cause or reserved. In the present case, however, the judge has taken the very strong step of not merely depriving the plaintiffs, who as respondents to the motions were successful in resisting them, of their costs of the motions or of making their right to recover those costs from the defendants dependent on the outcome of the trial, but of ordering them to pay the unsuccessful defendants' costs."
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> At page 622 D he continued:
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> "It was suggested in the course of the argument that, if there was any relevant ground available to the judge to justify his departing from the general rule that costs follow the event, this court could not review his exercise of his discretion, even if he went the length of making the successful party pay the unsuccessful party's costs. We feel unable to accept this. If there is any relevant ground available to the judge and he exercises, or appears to have exercised, his discretion judicially upon it, this court cannot review that exercise of his discretion or interfere with his order because this court disagrees with the weight he appears to have attributed to any particular ground or because this court would have exercised the discretion in some other way; but if, notwithstanding the availability of that ground, the judge has not in the judgment of this court exercised his discretion judicially, that is, if his decision is clearly wrong because the available ground could not in principle support the particular order he has made, it is in our judgment open to this court to correct it."

[18] Although in *Scherer* the Court of Appeal was dealing with a case where the successful party had been ordered to pay the interlocutory costs of his opponent, the principles set out in that judgment are clearly of general application.

[19] In his second costs judgment the trial judge referred to observations by Lord Neuberger MR in *M v Croydon Borough of London* [2012] EWCA Civ 595, observations which have to be viewed in the context of a longer passage in the judgment from [47] to [51] than the extracts quoted by the trial judge.

> "47. It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs. Accordingly, by settling all issues save costs, the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate.
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> 48. In *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ939, [2004] FSR 9 (*'BCT'*) Chadwick LJ said this at para 24 (which was approved in *Venture Finance plc v Mead* [2005] EWCA Civ 325):
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> > 'In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether - having regard to all the circumstances (including conduct) as CPR 44.3(4) requires – the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial – or no judgment – the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have

> not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge – in a laudable attempt to assist them to resolve their dispute – makes an order about costs which he is not really in a position to make.'

49. However, Chadwick LJ immediately went on to say in the next paragraph:

> 'There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule.'

This would seem to me to be clearly right. Given the normal principles applicable to costs when litigation goes to a trial, it is hard see why a claimant, who, after complying with any relevant Protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. In particular, it seems to me that there is no ground for refusing the claimant his costs simply on the ground that he was accorded such relief by the defendants conceding it in a consent order, rather than by the court ordering it after a contested hearing. In the words of CPR 44.3(2), the claimant in such a case is every bit as much the successful party as he would have been if he had won after a trial.

50. The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief which he has claimed. In such cases, the court will often decide to make no order for costs unless it can, without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify

> some order for costs in its favour. Thus, the fact that the claimant has succeeded in obtaining part of the relief he sought may justify his recovering some of his costs, for instance where the issue on which the claimant succeeded was clearly the most important and/or expensive issue. But in many such cases, the court may consider that it cannot fairly award the claimant any costs because, for instance, it is not easy to assess whether the defendants should have their costs of the issue on which the claimant did not succeed, and whether that would wipe out the costs which the claimant might recover in relation to the issue on which he won.
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> 51. In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable decide who has won, and therefore will not make any order for costs. However, in some cases, the court may be able to form a tolerably clear view without much effort. In a number of such cases, the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial. If, for instance, it is clear that the claimant would have won, that would lend considerable support to his argument that the terms of settlement represent success such that he should be awarded his costs. An example of such a case is *Brawley v Marczinski*, [202] EWCA Civ 756, [2003] 1 WLR 913 where the court could determine, without too much effort, who would have won, and then took that into account when awarding costs."

[20] In his second costs judgment the trial judge referred to the passage [50] in which it was stated that:

> "The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief which he has claimed. In such cases, the court will often decide to make no order for costs, unless it can, without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour."

But this has to be read in conjunction with [51] in which Lord Neuberger MR said:

> "In many cases which are settled on terms which does not accord with the relief which the claimant has sought, the court will normally be unable to decide who has won, and therefore will not make any order for costs."

[21] In his second costs judgment the trial judge stated that:

> "… It would be contrary to public policy in relation to the use of court time and resources if issues of costs required the completion of litigation rather than its earlier resolution. Indeed, when all matters except costs are resolved it is imperative that a concerted effort be made to identify a mechanism for resolution of that issue for the avoidance of unnecessary time and effort and expenses."

[22] Whilst I respectfully agree that a concerted effort to identify a mechanism for resolution of outstanding issues should be made, I do not accept that this can justify a radical departure from the normal rules as to costs where the parties have not been able to reach agreement, nor do I accept that the *Croydon Borough* case is authority for the approach adopted by the trial judge. It is clear from the judgment of Lord Neuberger MR in the *Croydon Borough* case at [47] and [51] that in order for the judge to be in a position to make a ruling as to costs the parties have to agree that he should do so. Here the parties did not agree in September 2012 and I therefore consider that the *Croydon Borough* case has no application to the circumstances of this case, and that in considering the question of costs at the end of the trial the trial judge should have applied the principles enunciated by Buckley LJ in *Scherer's* case.

[23] If I am wrong in this, and *the Croydon Borough* case does apply, then, notwithstanding that the trial judge had the advantage of having conducted the interlocutory hearings, I consider that the trial judge erred in law because he did not correctly apply the approach described in that case. That is because I find it difficult to understand how the trial judge felt that in September 2012 after a total of seven days in June and September (see [24] of the second costs judgment) he would have been able to arrive at a decision on the merits of the case, and hence on the costs, "without much effort" in the words of Lord Neuberger MR in the *Croydon Borough* case, given that it required a further 28 days of evidence and argument to complete the trial, during which, as Gillen LJ put it in the substantive appeal at [28] the trial judge:

> "had heard 28 days of evidence and argument including evidence from many of the main players in this whole saga including [Mr McAteer], Mr Fox,

> Mr Devine (called to give evidence by [Mr Fox]), Mr Pierse, Mr Patrick Good QC (on the Hennessy bar issue) etc."

In those circumstances, had the trial judge done after seven days what he believes the defendant should have agreed to, namely to decide how the costs should be dealt with in this case, he would have engaged in what Chadwick LJ referred to in *BCT* as "a laudable attempt to assist the parties in this action to resolve their dispute by making an order about costs which he was not really in a position to make at that stage."

[24] If, contrary to the view I have formed, the trial judge was justified in reducing Mr Fox's costs to a very significant extent, then I consider that the appropriate reduction should have been 80% and not 90%. The trial judge appears to have taken the view that Mr Fox was wrong to bring about a situation that resulted in a further 28 days being devoted to the trial after the first seven days had elapsed. If that is so, then Mr Fox was responsible for 80% of the trial days and not 90% and the trial judge's order should have reflected that.

[25] In cases where the successful party has been deprived of some or all of his costs one would expect to find the trial judge referring in a critical way to the merits and/or the conduct of the defence case, some of which were referred to by Chadwick LJ in *BCT* in the passage cited with approval by Lord Neuberger MR in the *Croydon Borough* case in the passage quoted above. For example, where the defendant has been unsuccessful on one or more of the substantive issues but succeeds on the greater part of the case; calling unnecessary witnesses; making unjustified aspersions about the plaintiff or some of the plaintiff's witnesses; or engaging in prolix or unnecessary cross-examination. I consider that it is highly significant that nowhere in either of his two costs judgments did the trial judge express any criticism of the conduct of Mr Fox's case in the further 28 days that the trial occupied after the abortive discussions of September 2012. So far as Mr Fox's case as a whole was concerned, whilst the trial judge described three of his actions as "unwise", he found that none of these gave rise to a cause of action. In addition, the trial judge did not rely in either of his costs judgments on the matters in respect of which he considered that the defendant had been unwise to support in whole or in part the reduction in the defendant's costs.

[26] Indeed, during that part of the trial that took place after September 2012 it appears to have been Mr McAteer whose conduct of the case prolonged the proceedings, not least because he persuaded the trial judge to allow him to expand his case, despite the objections at the time by Mr Hanna QC for Mr Fox, as can be seen from the following passage from the trial judge's substantive judgment at [5].

> "Further, I allowed some flexibility in the approach of the formulation of [Mr McAteer's claim against the defendants [this must mean against Mr Fox as all the

> other defendants were no longer parties by **this** stage] because [Mr McAteer] is a personal litigant. Mr Hanna on behalf of [Mr Fox] objected on a number of occasions to the flexibility accorded to the pleading of the claim and to the evidence introduced and the submissions made by [Mr McAteer]."

At paragraph [11] of the substantive judgement the trial judge explained that:

> "The Points of Claim dated 10 November 2014 contained a total of 29 points which [Mr McAteer] believed were included in his allegations against [Mr Fox], of which 15 were allowed as having been included in the claim."

[27] Mr McAteer seeks to persuade this court that he did not wish to obtain any costs from Mr Fox in September 2012. During the hearing before the trial judge judge on 10 December 2015 Mr McAteer is recorded in the transcript as saying that his position in September 2012 was that:

> "I did not ask for my costs and said that I did not want to have an argument with you about costs, because this seems to be the sticking point. Let's let the judge decide it, and whatever the judge says, if I am entitled to nothing, a million or over, I will be paying for it. I left this up in writing to the Court and to all the parties." [Appeal Book, Part 1, Tab 4, p. 39]

I do not accept that was correct because earlier in the transcript the trial judge stated in reference to the abortive discussions of September 2012:

> "What was then set out was that [Mr McAteer] seeks a contribution to his costs and outlays of the dispute so far in an amount to be determined by the trial judge." [p. 33]

[28] That Mr McAteer sought at least some of his costs in September 2012 is confirmed by his statement at paragraph 5.2, page 18 of his skeleton argument dated 3 December 2017 in this appeal where he states:

> "It is my view that it was extremely likely that most of the costs claimed prior to September 2012 would have been awarded to me and that the costs of the hearings post September 2012 would have been awarded to me."

[29] Given that he claimed in Schedule 1 of his 2012 Statement of Claim that the time he and his staff spent dealing with this litigation between May 2012 and May 2010 amounted to £600,000 the question of costs was obviously a major issue for him throughout this litigation, as it is today to judge by paragraph 6.5 at page 22 of his skeleton argument in this appeal where he states:

> "Mr Fox and his legal team have demonstrated a repugnant disregard for the rights of parties in the administration of justice generally. It is my belief that they should be found guilty of contempt of Court, should be made to pay all of the costs of this litigation and should be brought to account if and when the [Solicitors Disciplinary Tribunal] ever get round to dealing with the complaints."

[30] As the trial judge recorded in his first costs judgment there were two further occasions after September 2012 when there were attempts to agree the issue of costs. In October 2013 Mr Fox offered to accept a contribution of £75,000 towards his costs in six equal bi-monthly costs if Mr McAteer withdrew his proceedings. That offer was not accepted by Mr McAteer. In or around March 2014 Mr McAteer appears to have suggested in open court that that Mr Fox "donate the cost of the pro-bono." This was presumably a request that Mr Fox bear his own costs and make a payment of an apparently unquantified amount to the Bar Pro-Bono Unit, no doubt to reflect the involvement of Mr Ronan Lavery QC and Mr Tierney to which I referred at the beginning of this judgment. This would effectively mean Mr Fox paying an undefined amount to a third party who had assisted Mr McAteer, in return for which Mr McAteer would abandon his case. That proposal underlines Mr McAteer's determination to extract something from Mr Fox in financial terms, even if Mr McAteer abandoned his substantive claims against Mr Fox. That offer was not accepted by Mr Fox. Although the trial judge had referred to Mr McAteer's 2014 offer in the final paragraph of his substantive judgement as "a matter that is clearly relevant to the costs incurred" neither it nor Mr Fox's 2013 offer were relied upon by him as a basis for his decision in his second costs judgment.

[31] I consider the trial judge erred in law in concluding that the responsibility for the 28 days of hearings after the abortive discussions in September 2012 was the responsibility of the defendant because he would not agree to the trial judge deciding the costs. The defendant had offered a settlement on the basis that, amongst other things, both parties would bear their own costs. That would have been a better result for Mr McAteer than the eventual outcome after what proved a further 28 days and two appeals to this court. Mr McAteer clearly wanted a payment towards his costs at that stage and wished to be able to argue that before the trial judge. Mr Fox was entitled to take the view that was unjustified. Mr McAteer could have abandoned his case at that stage by accepting Mr Fox's perfectly reasonable offer that both sides pay their own costs, but he did not do so. In doing so he laid himself open to the risk of losing and having to pay costs.

Thereafter, he continued to pursue this unmeritorious litigation with vigour and determination, both before the trial judge and before another division of this court in the substantive appeal. The defendant was entitled to defend himself against the serious allegations which, had they been established in whole or in part, would have called in question his competence and probity as a solicitor. In these circumstances I am satisfied that the judge was wrong in principle to penalise the defendant by depriving him of 90% of his costs. The litigation continued solely because Mr McAteer persisted in pursuing this unmeritorious case.

[32] I consider that the trial judge was clearly wrong to deprive the successful defendant of 90% of his costs, and that the manner in which the defendant approached the abortive settlement discussions in September 2012 cannot justify such an exceptional and severe order. It is therefore open to this Court to correct the order and I would set aside the order of the trial judge and order that the matter be dealt with by the Taxing Master in the normal way on the basis that the defendant is entitled to 100% of his taxed costs for the 35 days of the trial.

[33] At one stage I was attracted to the proposition that the three instances in which the trial judge considered that the defendant had been unwise would justify this court exercising its discretion at this stage to make some modest reduction in the defendant's costs to recognise that. However, on reflection I do not consider that that would be a proper course for this court to take, not least because the trial judge did not feel that those three instances justified any reduction in the defendant's costs, and it would be wrong of this court to substitute its opinion on that issue. I would therefore order that the order of the judge should be varied to allow the plaintiff to receive 100% of his taxed costs of the 35 days of the trial below.

[34] Before leaving this matter there is one further issue to which I wish to refer. After the hearing of this appeal the parties lodged further documentation in the form of submissions and other documents. That lodged by Mr McAteer sparked a twofold response by the defendant. The first part was confined to an argument on the points of law and essentially made points which should have been made during the substantive hearing. The remainder of Mr Hanna's submissions set out factual matters which had not previously been opened in such detail to the court. It amounted to placing fresh evidence before the court when no application to admit fresh evidence had been made. I have therefore left the contents of that part of his submissions out of account.