Neutral Citation No. [2015] NIFam 11 | *Ref:* **OHA9686**

Judgment: approved by the Court for handing down | *Delivered:* **16/06/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

_____

Between

DAVID McGOWAN

and

CHRISTABEL McGOWAN

_____

O'HARA J

JUDGMENT ON COSTS (2)

Introduction

[1] I gave the substantive judgment in this application for ancillary relief on 8 May 2015. Subsequently I delivered a judgment on the respondent's application for costs against the petitioner, the respondent contending that there had been financial and litigation misconduct on his part. My conclusion was that the petitioner had been responsible for some avoidable and unnecessary prolonging of the proceedings. On that basis I ordered him to pay one third of the respondent's costs.

[2] The petitioner has now applied for the costs of the respondent's expert witnesses to be excluded from my earlier order. In addition he has applied for one third of his costs against the respondent. In reply the respondent has submitted that I should order the petitioner to pay all of her costs.

Ambit of Existing Costs Order

[3] I will deal first with the application to exclude from the award of one-third costs against the petitioner the costs of the respondent's expert witnesses. There are two initial points to note here. The first is that on the submissions there is a factual

dispute about the sequence of events which led to the use of two different actuaries. I do not intend to add to the already substantial costs of this case by convening a hearing in order to resolve this dispute. The second point is that many orders for costs carry with them a degree of imprecision in the sense that one could argue that some aspect or another of them is unfair. I do not accept that it is appropriate for me to revisit the award of costs which I have already made because the petitioner and his advisors have considered my order and have had further thoughts about the respondent's application which they wish to advance now but did not advance during the hearing or during submissions.

[4] The petitioner's submission on the costs of the experts includes the proposition that my ruling on the pension issue was effectively neutral given the starting point of the parties and the Calderbank offer of 47% made by the petitioner on 11 February 2015. I will deal below with that offer but I do not consider this issue relevant to the question of the breadth of the award of costs for misconduct. Accordingly my costs decision against the petitioner for misconduct stands unaltered.

[5] For future reference however, more serious consideration has to be given by parties to containing the costs of matrimonial litigation. This can be done by identifying at an early stage what kind of expert evidence is likely to be required and then trying to agree an expert to give that evidence. This will be easier in some areas of evidence than it is in others but where that option is offered and refused without justification the issue of costs may become live.

Other costs

[6] The petitioner's application for one third costs against the respondent is based on the proposition that from January 2014 there was a serious attempt by him to narrow the issues in the case with which the respondent did not engage. He also contends that apart from the pension issue, the respondent failed to better proposals which were made in Calderbank letters, particularly one dated 11 February 2015.

[7] For the respondent it is submitted that there is a much longer history going back to December 2009 of the petitioner failing to engage in negotiations and that even in January 2014 the petitioner was withholding information which made serious engagement impossible. She also contends that even the Calderbank offer of 11 February 2015 fell well short of the final order in the case.

[8] I do not propose to go through a detailed comparison of each part of the petitioner's offer and the respondent's counter proposal. It is pointless to do so because this is a case in which there were so many assets and issues in play that no straightforward comparison can be drawn. Having considered the submissions together with the Calderbank correspondence in the context of this case, I conclude as follows:

(i) The general and proper approach is that each party bears its own costs for the reasons set out persuasively by Gillen LJ in Graham v Graham and Graham [2003] NI Fam 14.

(ii) It is important that genuine efforts are made by parties to resolve their differences by negotiation to the maximum extent possible, preferably at the earliest stage possible.

(iii) A refusal to engage in negotiations or to engage only on an unreasonable basis leaves a party vulnerable to an order for costs.

(iv) In this case the petitioner failed over a prolonged period to engage fully in the litigation, a fact which I have already reflected in my existing order for one third costs against him.

(v) The petitioner's summary in his latest submission of the outcome of the case does not accurately or fairly reflect my judgment. In a number of areas, but not all, the respondent did considerably better than is acknowledged by the petitioner.

(vi) The respondent's claim, while successful in many areas, failed in a number of respects such as the division of the proceeds of the sale of the matrimonial home. However it failed in particular on an important issue when I made an order for a clean break settlement and did not accept her submission that the door should be left open to further claims against the petitioner in the event that he secured post-retirement employment. That this was an issue advanced with force by the respondent is clear from the running of the case and from her reply to the Calderbank offer of 11 February.

(vii) To the extent that the petitioner relies on his Calderbank offer of 11 February 2015, I note that it was made on or after the last day of evidence so the only further cost incurred by either party was that of closing submissions four days later. While parties are encouraged to resolve cases at all times up to the delivery of judgment it is unrealistic to expect that such a late offer (even if it did match the judgment which is not the position in this case) would lead to the other party being punished in costs.

[9] In all these circumstances I reject the submissions of each party seeking costs against the other.