Neutral Citation No. [2012] NIQB 21 | *Ref:* **GIL8445**

Judgment: approved by the Court for handing down | *Delivered:* **02/04/12**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

KEVIN McLAUGHLIN

Plaintiff;

-and-

GARY HUTCHINSON

-and-

MOTOR INSURERS BUREAU

Defendants.

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GILLEN J

[1] In this summons brought under the Rules of the Court of Judicature (NI) 1980 ("the Rules") Ord. 62 r. 35, the plaintiff seeks a review of the decision of the Taxing Master given on taxation of the plaintiff's costs of this action. The court, by a judgment given on 17 November 2008, ordered certain costs to be paid by the plaintiff and to be taxed in default of agreement. The plaintiff's solicitor applied for a review of the inter partes taxation on three issues namely counsels' fees, solicitor's fees and engineer's fees. A Taxing Master carried out a review under RCJ (NI) 1980 Ord. 62, r. 33 in the course of which he heard the parties. He gave his decision on 26 September 2011 declining a review on the issue of the engineer's fees (which he had refused as being unnecessary) and counsels' fees. He did review and made an upwards adjustment to the solicitor's profit costs.

[2] The plaintiff issued a summons on 6 October 2011 seeking an order to review the taxation. At the hearing before me the challenge to the Taxing Master's Certificate was confined to the three items.

[3] I am indebted to Mr Mercer on behalf of the defendant and Mr McMullan on behalf of the plaintiff for their well-structured skeleton arguments before me augmented with commendable economy in the course of oral submissions.

[4] The action contained a claim for damages for personal injuries sustained by the plaintiff on 5 July 2005. On that date the plaintiff was driving a tractor along the Hillhall Road towards the junction of the Fort Road, Lisburn. It was the plaintiff's case that, having seen the defendant's vehicle approach from behind him, he had indicated that he had intended to turn right into Fort Road and, seeing that the road ahead was clear, made his turn into that road. On completion of his turn he was shunted from the right side by the defendant's vehicle. The action was settled for £20000.

[5] The defendant, in the course of an interview to the police, admitted that he had been overtaking the plaintiff's vehicle when the crash occurred. He went on to admit that due to the poor weather conditions he had been travelling too close to the plaintiff's vehicle and conceded that his driving on that occasion was careless. However he did make the case that he had anticipated that the plaintiff was intending to turn left and that the plaintiff had given no indication of his intention to turn right. The police report not only recorded these comments but also the fact that the defendant was administered an adult caution "re driving without due care and attention" on 19 December 2005.

[6] It was the plaintiff's contention that:

- it was reasonable to retain an engineer because senior counsel had directed that one be retained and the solicitor felt duty bound to follow that direction. He contended it was conventional to instruct an engineer in such cases where liability was contested notwithstanding that the defendant had been cautioned by the police. The defendant had pleaded contributory negligence in the defence on the basis that the plaintiff had failed to give any indication of his intention to turn right and thus an element of liability was in issue;

- counsels' fees were based on a compromise pursuant to the allegation of contributory negligence. Accordingly counsel were entitled to mark a fee based on the Comerton scale of £30,000 and not the settlement figure of £20,000; and

- the solicitor's profit costs should not have been subject to deductions made by the Taxing Master given the nature of the work carried out.

[7] The defendant contended that:

- given the contents and detail of the police report with the admissions therein it was unnecessary for an engineer to be employed;

- counsels' fees should have been on the Comerton scale of £20,000 given that this case was neither one of exceptional complexity nor involving a substantial compromise; and

- the solicitor's costs assessed by the Master were appropriate given that much of the work done should not have been charged at a full solicitor's rate where a proportion of it had been carried out by an apprentice solicitor. In any event no uplift should have been applicable given the modest nature of the compromise settlement.

Principles governing such applications

[8] Order 62 r. 12 provides:

> "12.-(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of paying parties; and in these rules the term 'the standard basis' in relation to the taxation of costs shall be construed accordingly."

[9] The test to be applied on a taxation of costs, is thus that of reasonableness. The correct viewpoint to be taken by a Taxing Master in considering whether any step was reasonable is that of a sensible solicitor considering what, in the light of his knowledge, was reasonable in the interests of his client (see Francis v Francis and Dickerson (1956) P87.)

[10] Ord. 62, r. 17 of Rules directs that the provisions of Appendix 2 should apply to the taxation of all costs. Appendix 2, para 1(1) provides that all costs shall be in the discretion of the Taxing Master. Paragraph 1(2) goes on to provide:

> "In exercising his discretion the Taxing Master shall have regard to all the relevant circumstances and in particular to –
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> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and importance of the documents (however brief) prepared or pursued;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount of value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work, which would otherwise have been necessary in relation to the item in question."

[11] It is well established that the value of the case is a very material factor in determining the amount of the brief. It is the basis of the scale usually adopted by members of the Bar in marking brief fees commonly known as the Comerton scale. Value is however only one of several factors that must be taken into account when determining what a reasonable brief fee is. In assessing these both the full value figure and the settlement figure should be taken into account but neither should be the main determinate of the amount of the fee. In Northern Ireland the practice is for counsel to mark their brief fees after the conclusion of the case, adopting as their standard the measure of a fair and reasonable fee. This admits of a degree of hindsight in that the parties now know the result of the case. The principle remains unaffected however that the fee is that which the solicitor could have agreed with counsel on delivery of the brief as a reasonable and proper fee for that case (see Carr v Poots (1995)NI 420 at p. 428g). From the Taxing Master's point of view a reasonable figure is that for which a suitably able and experienced member of the Bar would undertake the case knowing its potential but also realising that if the plaintiff wins damages may be substantially reduced for contributory negligence in some instances.

[12] As a general rule a solicitor acting on the advice of properly instructed counsel can rarely be said to be acting unreasonably when commissioning a report directed by counsel save perhaps in a very exceptional circumstance (see Francis v

Francis and Dickerson (1956) p. 87 at 96. The rider has to be added that a solicitor cannot always automatically shelter behind counsel and they must ensure that counsel re-assesses any advice in light of further information. In the final analysis the test is whether it was reasonable to commission a particular report on behalf of the plaintiff and whether that report was likely to make a material contribution to the case thus rendering it reasonable to incur the expense.

[13] These principles, most of which have been garnered from the judgment of Carswell LJ in the leading case of Carr v Poots (1995)NI 420 in Northern Ireland, must however now be read in light of the factors set out in Ord. 1 r. 1A of the Rules. In exercising his wide discretion the Taxing Master shall have regard to the factors therein set out. The overriding objectives in interpreting the rules are now that courts should ensure cases are dealt with expeditiously and fairly, avoiding expense and dealing with cases proportionately bearing in mind the resources available to the court. Accordingly litigants need to be encouraged to be selective as to the points they take and the extent of costs recovered may well be an incentive in that direction. It is the duty of the lawyers involved in the case to further the overriding objective in Order 1 r. 1A.

[14] In modern litigation, with the emphasis on proportionality, it is necessary for a solicitor, aided and directed by counsel if necessary, to make an assessment of and plan in advance the necessary work, the appropriate level of personnel required to carry out the work, the overall time which will be necessary and appropriate to bring on the action for trial efficiently and expeditiously. One reason for seeking to curb the amount of work done and the costs is by reference to this need for proportionality. This does not mean that one simply compares the amounts of the costs with the value of the case recovered because certain low value cases may be extremely complex. Whilst therefore it is too simplistic to focus on the amount of financial compensation involved nonetheless the excessive or inappropriate use of expert evidence is a matter that should be to the fore in current litigation. It is necessary to reduce the incidence of inappropriate use of experts to bolster cases particularly where those experts are being invited to report on issues which are purely factual and where it must be obvious that the court is unlikely to benefit from such expert evidence. Experience in the Queen's Bench Division has revealed to me that in some instances there is an unnecessary rush to invoke for example the assistance of forensic accountants and consulting engineers and the Taxing Masters will be scrutinising the exercise of such options.

[15] Liddell v Middleton (1996) PIQR 36 is a Court of Appeal case in England of some vintage which I believe has not been adequately taken into account by practitioners in Northern Ireland. In this case the reasonableness of retaining a consultant engineer as an expert witness was considered by the court. Smith LJ said at p. 43:

> "There has been a regrettable tendency in recent years in personal injury cases, both road traffic and

> industrial actions, for parties to enlist the services of experts, whether they are necessary or not. When they are not necessary, they simply add to the already high costs of litigation and length of the trial. In industrial accidents an expert may well be needed to explain complicated machinery or to give evidence of practice and safety procedure. But in road traffic accidents it is the exception rather than the rule that expert witnesses are required."

[16] In appropriate cases therefore the Taxing Master has a wide discretion to refuse such unnecessary expenditure even in some cases where it has been directed by counsel.

Applying the principles to this case

Counsels' fees

[17] I endorse entirely the approach adopted by the Taxing Master in this instance. This was never going to be a complex or high valued case. Where there is to be departure from the Comerton scale, counsel ought to provide an explanation when marking the fee. I understand this was not done in the present instance. I note the Taxing Master records that there was no indication on the file from counsel of any indicative value on the case "either in or after the date of the directions and prior to negotiations" to assist him. The Master also records at paragraph 29(d) of his review:

> "There was an initial indication post settlement by e-mail from junior counsel for the plaintiff which appears to have been based on the starting point assumption that the standard Comerton scale figure on £20,000 would apply. There is on file a memorandum by Mr McMullan as to the discussions held with the client just prior to confirmation of the settlement. Within that attendance note (10 November 2008) there appears to be an unambiguous record of the advice by counsel recommending £20,000 as full settlement."

[18] In all the circumstances I do not believe that this case was sufficiently invested with complexity or a value materially different from the settlement figure to justify departure from the Comerton scale. I therefore affirm the Master's decision in this regard.

Solicitor's profit costs

[19] I consider that this is an area where the Taxing Master, a former solicitor, possesses particular expertise and therefore I am very slow to interfere with his findings. He has investigated the work carried out by the solicitor with conspicuous care identifying letters, telephone attendances, hours invested, and work done by staff other than full solicitors. He has properly applied the criteria in O62 r 17 appendix 2 I believe that the recalculation of the sums carried out by the Taxing Master is wholly appropriate and I affirm his decision in that instance.

Engineer's fees

[20] This is the subject of the greatest difficulty for me. The issue is whether the instructed engineer did add materially to the evidence available by way of the police report, sketch plan, photographs and admissions by the defendant contained within that police report. The Taxing Master was not satisfied that senior counsel was appropriately briefed before coming to the conclusion that it was necessary to direct an engineer. In short he found it difficult to be certain that the briefing of the police report and sketch plan to senior counsel (which had not occurred initially) would have made no difference to his view. Any doubts which he had as to the reasonableness of the cost being incurred have to be resolved in favour of the paying party.

[21] This is an area where I do not think that the Taxing Master possesses any greater expertise than me. On the contrary, a judge in the Queen's Bench Division, usually extremely experienced in processing Queen's Bench actions at the Bar and in hearing cases before him, is uniquely positioned to assess a matter such as this.

[22] I reiterate that in modern litigation, with the emphasis on proportionality, a very careful assessment needs to be made by the lawyers in all such cases as to whether or not experts are needed. There will be an increasing tendency for Taxing Masters to give anxious scrutiny to the concept of proportionality in the employment of such experts. Senior and junior counsel as well as solicitors need to have this drawn to their attention so as to ensure that the wind of change blowing through Queen's Bench actions does not proceed unheeded.

[23] In this particular instance however, I have been persuaded that it was a reasonable step to invoke the use of a consulting engineer. I am of this opinion for the following reasons.

[24] Despite the admissions by the defendant and the caution administered by the police, the fact of the matter remains that contributory negligence was a live issue. Defendants' insurers and solicitors are also obliged to consider the possible costs consequences of adopting lines of defence.

[25] Experience tells me that the trial might well not have revolved exclusively around a factual determination based on the credibility of the witnesses whether or not a signal was given by the plaintiff that he was intending to turn. In other words the case may not have been simply a question of one word against another where an engineering report would not be necessary. Cases often do not proceed on that basis alone however. Much more likely would have been the suggestion that the speed of the plaintiff shortly before the impact, his position on the road, the slowing down process prior to the accident etc would all have indicated to a prudent driver in the position of the defendant that the plaintiff was about to make the appropriate turn right. It would therefore have been necessary to have known the accurate width and precise location of the roads into which he might have been turning to ascertain if he could possibly have been doing other than at an indicative crawl immediately prior to the accident if he was intending to make such a turn. Similarly whilst the police sketch map, not drawn to scale, suggests the two roads were immediately opposite each other on either side of the main road, an engineer's report might well reveal this not to be the case and therefore it would have been obvious by the plaintiff's position on the road that it was one side or other into which he must have been turning. Similarly appropriate photographs professionally taken might have illustrated the point. In short, where a defendant elects to contest the case, even on contributory negligence, it opens the door for the plaintiff to take all reasonable steps to ensure that his interests are fully protected and that nothing is left to unreasonable chance.

[26] In all the circumstances I have therefore come to the conclusion that experienced senior counsel who directed that an engineer's report in this case was necessary was justified in so doing and the solicitor was wise to follow that advice. Accordingly to that extent I reverse the order of the Taxing Master and allow the engineer's costs now sought. I make no order as to the costs of this hearing since each side has been successful to some extent.