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Judgment: approved by the Court for handing down | *Delivered:* **11/10/2013**
*(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:

N & R DEVINE LIMITED

Plaintiff;

-and-

DANIEL McATEER PRACTISING AS DUDDY McATEER AND COMPANY ACCOUNTANTS

Defendant.

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GILLEN J

[1] This is an application by the plaintiff for a review of the taxation on 7 May 2013 by the Deputy Master (Taxing Office) (hereinafter called "the Deputy Taxing Master") of such part of the defendant's costs as related to the rate of charge allowable to the defendant as a litigant in person ("LIP") as set out in Objection No. 1 of the plaintiff's Grounds of Objection dated 11 November 2011 and to the time allowed to the defendant for preparation as set out in Objections Nos. 3 and 4.

The legislation and statutory rules governing this application

[2] Section 1 of the Litigants in Person (Costs and Expenses) Act 1975 provides, where relevant, as follows:

> "1.-(1) Where, in any proceedings to which this sub-section applies, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by

> the litigant in or in connection with the proceedings to which the order relates."

[3] Order 62 rule 18 provides as follows:

> "18.-(1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person, there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by a solicitor on the litigant's behalf.
>
> (2) The amount allowed in respect of any item shall be such sum as the Taxing Master thinks fit but not exceeding, except in the case of a disbursement, two thirds of the sum which in the opinion of the Taxing Master would have been allowed in respect of that item if the litigant had been represented by a solicitor.
>
> (3) Where it appears to the Taxing Master that the litigant has not suffered any pecuniary loss in doing any item of work to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that item not more than £9.25 an hour.
>
> (4) A litigant who is allowed costs in respect of attending court to conduct his case shall not be entitled to a witness allowance in addition."

[4] The effect of the Order 18 therefore can be summarised as follows:

- £9.25 per hour is the maximum allowable rate unless the Taxing Master is satisfied that the litigant in person suffered pecuniary loss.
- The assessed loss must arise from doing any item of work and the rate allowed is the rate on that item.
- The amount allowed in respect of any particular item is capped at two thirds of that allowed to a solicitor in respect of that particular item.
- A litigant in person is limited to the time reasonably spent by a solicitor (see Greville v Sprake [2001] EWCA Civ. 234 at [38].
- The law assumes a general understanding of the law and procedure. Accordingly, a personal litigant who spends time accumulating such general understanding of law cannot claim for this period (Perry and Another v Lord Chancellor The Times 26 May 1994). However, it is different in a case where time is spent researching a new or changing field of law (see R v Legal Aid Board ex parte Bruce [1992] 1 All ER 133.)

- Whether a LIP has suffered significant loss of earnings is a matter peculiarly within his or her own knowledge. Accordingly, the burden of proof is on the defendant in this instance to establish its pecuniary loss. This should be done by affidavit evidence which will include matters such as the training and qualifications of the litigant, what paid employment would have been available but for the litigation, and at what remuneration, or, if he or she followed a trade or profession, the likely customer or client base and what prospects of profit were present etc. (See Mainwaring and Another v Goldtech Investments Limited [1997] 1 All ER 467 and Mealing- McLeod v The Common Professional Examination Board [2000] 2 Costs LR 223). I remind myself of what Walker J said at 477-478 in Mainwaring:

> "Whether a litigant in person has suffered significant loss of earnings is a matter peculiarly within his or her own knowledge. Sometimes the position will be obvious and each side will accept it without the need for any affidavit evidence: at one extreme, for instance, a self-employed tradesman in a small but profitable way of business, who has more customers than he can cope with and can fill every working hour to advantage; at the other, a retired civil servant with an index-linked pension who finds the conduct of litigation a more interesting pastime than bowls or crossword puzzles."

- In short, financial loss has to be quantified with a degree of specificity. Otherwise the litigant fails to discharge the burden of proof and is confined to recovering for the amount of time reasonably spent by him in doing the work at the rate of £9.25 per hour (see also Knight and Anor v Maggioni and Others [2006] EWHC 90056 (Costs) 10 April 2006 per Master Simmons, Costs Judge.)

[5] I also bear in mind that under Order 1 rule 1A I am bidden to exercise my powers in such a way that the case is dealt with in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party so as to ensure that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the court's resources whilst taking into account the need to allot resources to other cases. Such considerations will lead a Taxing Master to reach a just solution in the hope that both parties should be able to live with it. (See Wolfsohn v Legal Services Commission [2002] EWCA Civ. 250 at [18].

Background

[6] The background to this case is well summarised by Master Bailie who was dealing with a preliminary ruling in the context of the pending taxation of three bills of costs submitted by Mr McAteer in the current proceedings (2004 No. 2440) and

two other pieces of litigation involving the same individuals. In all three cases costs had been awarded to Mr McAteer. In respect of all three actions Mr McAteer had defended himself successfully and was awarded his costs. In the preliminary ruling Master Bailie had made it clear that Mr McAteer had failed to establish a pecuniary loss thus far adding "in order to do so, he will need to be able to demonstrate the actual nature of the financial arrangements between the accountancy practice and its clients during the relevant period. I can see no reason why this kind of information and evidence should not be available as it would for the "busy tradesmen". The hourly rate charged to clients as of 2007, 2008 and 2009 must be capable of being established as a matter of fact". He therefore afforded Mr McAteer the opportunity to address further the issue of pecuniary loss associated with the carrying out of particular items of work.

[7] Thereafter this current matter came before Deputy Master Wells who considered all the evidence now presented by Mr McAteer. Having arrived at a taxation, that then elicited the plaintiff's solicitors bringing objections to the party taxation of the defendant's costs.

[8] Deputy Master Wells described the litigation in question as follows:

> "Suffice to say that there has been a long, venomous and bitter legal battle between the parties and (some of) their companies. There have been countless actions and hearings and appeals; each party has had numerous successes and each has had several setbacks. These skirmishes are still continuing. Some of the parties may have approached insolvency (even this was an issue). I heard these matters (with others) and determined costs in October 2011. The appeals, after some adjournments, were heard on 12 May 2012. There were appeals, but the parties decided that, as there were common issues, I ought to postpone the delivery of this decision in this matter. In the events and on 3 May 2013, I was asked by the respondent to the appeal to formally deliver this decision. Accordingly I did so."

[9] Action 2004 No. 2440 in essence arose out of the plaintiff suing the defendant for professional negligence for failing to provide adequate tax advice to the plaintiff and failing to understand and advise on the plaintiff's purchase of shares in a company called "Hartford Properties Limited". The particulars of loss and damage pleaded by the plaintiff included an alleged loss of the sum of £1m and an alleged loss of the sum of £25,000 which the plaintiff was allegedly required to pay to Hartford in respect of interest in relation to delay in completing the purchase of the shares.

[10] In the event the defendant defended the action successfully and it was ordered that he be granted 90% of High Court costs.

The Decision of Deputy Master Wells

[11] Deputy Master Wells allowed Mr McAteer £125 per hour for his time. He distinguished Mr McAteer in this case from the position of the plaintiff in the Mainwaring case in the following terms:

> "He had (perhaps still has) a successful professional practice. During a period of some considerable economic growth he was an accountant in a very busy and wide-ranging practice. I accept that as a successful LIP he has suffered much more than simply out of pocket expenses. He is the 'tradesman' rather than the 'retired civil servant' in Mainwaring. I am satisfied that Mr McAteer has discharged the overall burden of proof of establishing a general pecuniary loss."

[13] Addressing the issue of a requirement on the LIP to establish the pecuniary loss for each item Deputy Master Wells said:

> "The litigation between these parties ran for several years (and perhaps still does). I do not think that, on the provisional taxation of the claim for costs, it was reasonable, practicable or proportionate to impose on this LIP the duty of evidence that he must establish the work forgone as a result of the litigation. That is just not a working proposition. The pecuniary loss does not have to be substantial. It may have been that work colleagues or employees could have taken the strain of his practice business, but I am satisfied that this LIP did suffer general pecuniary loss generally working on the litigation, while he could and would have been applying himself to fee earning work."

[14] On the issue of the time taken by the LIP, Deputy Master Wells altered his original findings. Mr McAteer had originally claimed 170 hours under the general heading of preparation for the case and legal research into professional negligence on foot of the statement of claim served by the plaintiffs. Finding that the LIP was not an inexperienced litigator and was a professional accountant engaged in the provision of professional services at possibly a sophisticated level, he concluded that a solicitor would never have been allowed the time that he allowed to Mr McAteer for this type of work, albeit that a solicitor may well have reasonably consulted counsel experienced in the work which was an option not readily available to Mr

McAteer. Accordingly, as appears from his judgment, he made a number of reductions in his original findings e.g:

- He reduced from 120 hours to 50 hours the work allowed for preparation and legal research.
- On case preparation including preparation of witness statements, trial bundles, notice for particulars and reviewing statements of witnesses he reduced him from 50 hours to 25 hours.
- He affirmed his allowance of 33 hours 30 minutes for attendance at court.
- He reduced from 36 hours to 20 hours the time allowed for preparation for trial.
- He affirmed his allowance of £850 for attendance at trial on 15 and 16 May 2008.
- For trial preparation he reduced his finding from 28 hours to 15 hours.
- He allowed him four hours for attendance at court on 30 May 2008.
- He affirmed his finding of 10 hours for preparation of his closing submissions.
- He allowed him £50 for an item concerning other cases involving these parties.
- He affirmed that he refused him any figure for the time and effort of an assistant.

[15] Generally on the question of the time expended by Mr McAteer Deputy Master Wells said:

> "Having heard Mr McAteer at the review and Mr Kerr *(the costs drawer who presented the case before him on behalf of the plaintiff*) having pressed him closely at the review, I am satisfied that considerable time and work was expended and done by him. Even allowing for the time that had passed and as a LIP, I am satisfied that Mr McAteer has discharged the burden of proof to satisfy me that the hours allowed were used in connection with this case."

The plaintiff's case

[16] Mr Gowdy, who appeared on behalf of the plaintiff, made the following points in the course of a well-structured skeleton argument and oral submissions:

- The times allowed by the Master on review are vastly in excess of what would be allowed to any solicitor and can be contrasted with the 87 hours work claimed by the plaintiff's solicitors in this matter.
- The evidence adduced by the defendant and the generalised descriptions used by him in his Bill of Costs failed to provide any proper explanation or justification of the work actually done.

- In the absence of a sufficient narrative as to the "legal research" carried out by the defendant the court cannot properly conclude the time spent was properly expended.
- The Deputy Master failed to consider the question of pecuniary loss on an item by item basis and did not require any particular evidence of particular loss suffered but instead merely made a finding of "general pecuniary loss generally".

The defendant's case

[17] In the course of extensive written submissions and oral argument before me, the LIP made the following points.

- The application by the plaintiff was an abuse of process. It is unnecessary for me to go into the details of the grounds for this suggested by Mr McAteer other than to say the plaintiff was perfectly entitled to exercise his right to review the finding of the Deputy Taxing Master with the arguable points mentioned above. Accordingly there is no basis for any claim of abuse of process.
- At the very end of the case Mr McAteer applied to challenge the findings of the Deputy Master on the basis that they were too low. He had not complied with the time limit provisions of Order 62 rule 35 and accordingly, in my discretion, I was not prepared to extend the time for him to make such a late application.
- He had recorded the time he had spent on this case in his recording system.
- As a professional accountant he would be earning more than £125 per hour doing other work. He asserted that for every hour he spent dealing with this matter he was losing income and opportunities. His work involves not only consultancy assignment but also the opportunity to take, for example, an equity stake in a company. In other words his wealth creation prospects had been damaged.

Conclusions

[18] I commence by reminding myself of the words of Lord Hoffman in Biogen v Medeva Plc (1996) 38 BMLR 149 at 165 where he said:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relevant weight, minor qualification

> and nuance (*as Renan said, la verite est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

[19] In this case the Deputy Taxing Master had vast experience as a solicitor in dealing with preparation of such cases but, even more importantly, he had the benefit of hearing the LIP giving evidence as to his business and the hours that he invested in this case. This gave him an important advantage over me and rendered him particularly fit to make a determination.

[20] The lack of algorithm and data mining tools in the process of taxation should not deflect the Taxing Master from carrying out the difficult task based not only on the evidence but on his experience as a practitioner and Taxing Master in other cases. Parliament, particularly in light of Order 1 rule 1A, has not intended this exercise to be turned into a bewildering spectacle where LIPs are required to do the impossible by remembering precisely what they might have been otherwise doing when each item on the bill of costs was being addressed. Taxation is not an exact science. Whilst, therefore, the task of the Master does require an approach of measured engagement and a decision of discerning substance, nonetheless the approach must be practical and in touch with reality.

[21] That is not to say that generalised evidence, no matter how exiguous, will be sufficient. It is axiomatic that the wording of the relevant Order in this instance must be followed. But the system of taxation must reflect legitimate expectations on the part of a LIP and give the prospect of a fair outcome without erecting hurdles that become insurmountable.

[22] I had before me the detailed record of the hours that the LIP had worked during the course of his accountancy practice between 2002 and 2009 outlining total hours records, hours on non-productive litigation, and on new business including new projects. I can well understand the Master coming to the conclusion that for much of the period of the running of this and other cases Mr McAteer was "quite profitable and, more importantly, he was very busy. In addition to his accountancy practice, he takes (took) equity stakes in business, he advises on investment schemes, purchases, sales, tax opportunities." The LIP had given substantial affidavit evidence and I was satisfied that, by providing information about his practice, the work available to him, the remuneration open to him, his customer base and his prospects of profit, he had successfully demonstrated sound financial arguments for the sum awarded per hour by the Master i.e. £125 per hour for the items of work carried out by him on this case.

[23] Accordingly, I have no hesitation in concluding that the Deputy Master was entitled to come to the view that looking at his costs on an item by item basis he was more the 'tradesman' than the 'retired civil servant' in Mainwaring. Whilst the Master could more properly have referred in more detail to the aspect of item by

item analysis, I am persuaded that this was the thrust of his conclusions. In all the circumstances I am satisfied that Mr McAteer had complied with the burden of proof under Order 18 as related to the rate of charge allowed by the Deputy Taxing Master set at £125 per hour.

[24] Turning to the issue of the time allowed, I again reflect on the great experience of the Deputy Taxing Master in assessing the reasonable periods for preparation etc. that a solicitor would invest in cases of this kind. I do not believe that the Master allowed the LIP time for getting up a general understanding of law and procedure. Professional negligence cases are not at all uncommon and I have no doubt that the Deputy Taxing Master had a very wide "hands-on" experience of dealing with such cases. Their complexity varies from case to case. The Deputy Taxing Master has gone through these claims concerning the time allowed in meticulous detail at the original hearing and on the review. He has clearly invested a great deal of thought in the matter on two occasions and I can see no evidence before me that would lend itself to an argument that the time allowed to the LIP has been clearly excessive or that it should be varied below the reductions already applied by the Deputy Taxing Master on review . That the time allowed by the Master is in excess of that allowed to the plaintiff's solicitors is not definitive of the appropriate time that the LIP ought to have invested in this instance. On the contrary, relying on my own experience of cases of this kind, whilst the Deputy Taxing Master may have been marginally generous from time to time, overall I see no reason to take issue with the totality of the hours which he has permitted in the context of time which would have been reasonably spent by a solicitor on the case acting on behalf of the defendant bearing in mind that the LIP would not have the benefit of speaking with a barrister when problems arose. In short, I consider the Deputy Taxing Master approached this matter with characteristic care and cogency applying the correct legal principles to the facts before him.

[25] I therefore affirm the decision of the Deputy Taxing Master.