Neutral Citation No. [2014] NIQB 125 | *Ref:* **STE9452**

Judgment: approved by the Court for handing down | *Delivered:* **21/11/2014**
*(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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EDDIE RITCHIE

Plaintiff/Appellant:

-v-

DAVID W McCOMB

Defendant/Respondent:

_____

STEPHENS J

Introduction

[1] This is an application by the plaintiff for leave to appeal to the Court of Appeal against an order of this Court made on 7 November 2014 dismissing the plaintiff's appeal against an order for costs made against him by Master Bell on 16 June 2014. The plaintiff, a litigant in person, seeks leave to appeal on the basis that the order dated 7 November 2014 was an order as to costs only and accordingly an appeal to the Court of Appeal against an order or judgment of the High Court requires the permission of this Court. In the alternative the plaintiff seeks leave to appeal on the basis that the order dated 7 November 2014 was an interlocutory order and accordingly an appeal to the Court of Appeal against an interlocutory order or judgment of the High Court requires the permission of either this Court or the Court of Appeal.

Factual Background

[2] The action which was commenced by Writ of Summons issued on 26 October 2004 was listed for trial on 18 March 2014. The plaintiff applied on that date for an adjournment on foot of a sickness certificate that he submitted to the Court. Gillen J adjourned the action generally and gave directions about the scheduling of procedural applications which were to be heard by the Master and specifically an application to strike out the plaintiff's action for failing to set it down. Master Bell heard the defendant's summons to strike out on 16 June 2014. He declined to strike

out the action but made a series of unless orders against the plaintiff. He also awarded costs of the application to the defendant assessing them summarily in the amount of £2,000.

[3] On 13 August 2014 the plaintiff issued a Notice of Appeal in relation to the decision of the Master which restricted the appeal solely to an appeal against the award of costs. The Notice of Appeal ought to have been issued within 5 days of the order dated 16 June 2014, see Order 58 rule 1 (3). The Notice of Appeal was substantially out of time.

[4] On 7 November 2014 I heard and determined the plaintiff's application for an extension of time which also involved hearing in effect the substantive appeal. I declined to extend the time within which the Notice of Appeal could be issued and dismissed the appeal on that basis. In the alternative I also considered the substantive appeal deciding that there was no substance in the appeal. I dismissed the appeal on that alternative basis. Accordingly I affirmed the order of the Master that the plaintiff pay to the defendant costs in the amount of £2,000 and I also ordered the plaintiff to pay the defendant's costs of the appeal.

[5] By a summons dated 11 November 2014 the plaintiff has sought leave to appeal to the Court of Appeal on the basis that this Court had failed to take into account the medical letters and medical certificates of his General Practitioner.

Whether leave to appeal is required on the basis that the order dated 7 November 2014 was an order of the High Court or a judge thereof … as to costs only

[6] Section 35(2)(f) of the Judicature (Northern Ireland) Act 1978 provides that no appeal to the Court of Appeal shall lie without the leave of the Court or judge making the order from an order of the High Court or a judge thereof … as to costs only. It is only this Court that can grant leave to appeal if the appeal to the Court of Appeal is from an order as to costs only. By way of contrast section 35(2)(g) provides that no appeal to the Court of Appeal shall lie without the leave of the judge *or of the Court of Appeal*, from any interlocutory order or judgment made or given by a judge of the High Court. Accordingly in relation to interlocutory orders, which are not orders as to costs only, both this Court and the Court of Appeal can grant leave to appeal.

[7] The wording of Section 35(2)(f) differs from Section 18(1)(f) of the English Senior Courts Act 1981 which refers to an order "relating only to costs which are by law left to the discretion of the Court." Section 35(2)(f) refers to "an order as to costs only". Accordingly, the decided cases in England and Wales are in relation to different statutory wording. In *Wilkinson v Kenny* [1993] 1 WLR 963 Sir Thomas Bingham MR considered the wording in Section 18(1)(f). The following propositions can be taken from his judgment in relation to that section, namely:

(a) An appeal against an order that a solicitor pay the entire costs of a possession action was not an appeal that related only or primarily to costs. The appeal related to the conduct of the solicitor and therefore Section 18(1)(f) had no application, see *Thompson v Fraser (Practice Note)* [1986] 1 WLR 17.

(b) Section 18(1)(f) is to be understood and read as applying only to orders for costs made against persons who are parties to the proceedings in which the costs in question were incurred. Costs orders against persons who were not parties to the relevant proceedings are not orders which relate only to costs within the meaning of that expression in section 18(1)(f). Such orders necessarily relate to matters other than merely the outcome of the proceedings. There has to be something more, some conduct by the non-party which makes it just that he should bear the cost of the litigation to which he was not a party.

(c) An appeal as to costs will be entertained by the Court of Appeal, despite leave not being granted, if it can be shown that there has been no exercise of discretion or that the discretion has been exercised un-judicially, in particular if it has been exercised on extraneous grounds.

The Order for costs made by the Master and affirmed by this Court was as between the parties. It was an Order for costs in the discretion of the Master and of this Court. The discretion was exercised judicially taking into account that ordinarily costs follow the event and also other relevant consideration such as the plaintiff's health together with his explanations for the delays which have occurred. It falls within both the wording of Section 18(1)(f) and Section 35(2)(f).

[8] I consider that the proposed appeal in this case is from an order as to costs only made by the Master and affirmed by this Court with costs of the appeal being awarded against the plaintiff appellant. Accordingly absent leave from this Court there can be no valid appeal to the Court of Appeal.

Whether leave to appeal is required on the basis that the order dated 7 November 2014 was an interlocutory order or judgment made or given by a judge of the High Court.

[9] If the order is not as to costs only then the question arises as to whether it is an interlocutory order requiring leave to appeal from either this Court or the Court of Appeal.

[10] The Judicature Act 1978 does not attempt to define an interlocutory order. The test as to whether an order or judgment is interlocutory was considered in the case of *Salter Rex & Co v Ghosh* [1971] 2 All ER 865. The headnote states that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order which the Court eventually makes. Lord Denning MR stated

> "There is a note in the Supreme Court Practice 1970 under RSC Ord 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In *Standard Discount Co v La Grange and Salaman v Warner* ([1891] 1 QB 734 and 735), Lord Esher MR said that the test was the nature of the application to the Court and not the nature of the order which the Court eventually made. But in *Bozson v Altrincham Urban District Council*, the Court said that the test was the nature of the order as made. Lord Alverstone CJ said that the test is ([1903] 1 KB at 548): 'Does the judgment or order, as made, finally dispose of the rights of the parties?' Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and Notice of Appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable case of action, or dismissing it for want of prosecution—every such order is regarded as interlocutory: see *Hunt v Allied Bakeries Ltd*. So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, *Anglo-Auto Finance (Commercial) Ltd v Robert Dick*, and we should follow it today."

[11] The "application approach" to the distinction between a final and an interlocutory order requires the Court to consider the nature of the application or proceedings giving rise to the order and not the order itself. A final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. That test was adopted in this jurisdiction by the Court of Appeal in *R (Curry) v National Insurance Commissioner* [1974] NI 102. So if the order was not an order as to costs only then on the basis of that test this was clearly an interlocutory order. The nature of the application could not result in the final disposal of the matter regardless of whichever side in whose favour the decision is given. There was no question of this litigation being determined by the plaintiff's appeal to this Court.

The test for the grant of leave to appeal

[12] I respectfully adopt the approach of McCloskey J in *the Matter of an application by McNamee and McDonnell LLP for leave to apply for judicial review* [2010] NIQB 29. That case concerned an application for leave to appeal in relation to the refusal to grant leave to apply for judicial review as to some, but not other, of the applicants grounds. McCloskey J stated

> "[37] … . The decision whether to grant leave to appeal entails the exercise of a judicial discretion and the present context is not unlike that where a discretion is exercised on whether to state a case for the opinion of the Court of Appeal. As noted by McGonigal LJ in ***Woods –v- Armagh County Council*** [1972] NI 89, Palles CB stated in ***McQuade –v- McQuade*** [1881] 15 ILTR 49:
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> > "*I cannot state a case on a point in relation to which I myself have no doubt whatever in my own mind*".

McCloskey J went on to state that

> **"[39]** I would add the following observation. In cases where leave to appeal to any appellate Court is a pre-requisite, the Court below will almost invariably require to be satisfied that the point to be canvassed before the appellate Court is of sufficient importance to justify the grant of permission. The first instance Court acts as a filter and, clearly, the legislative intention is that there is a threshold to be overcome. The grant of leave to appeal will never be a formality."

I also consider as did McCloskey J that one of the factors to be considered is the importance of the issue/s which, it is said, should properly be considered by the Court of Appeal.

Exercise of discretion as to whether to grant leave to appeal

[13] There has been extensive delay in this case since the Writ of Summons was issued on 26 October 2004. The plaintiff's ill health could not account for all the delay and the Master found that there was default on behalf of the plaintiff. The Master made a number of unless orders and the plaintiff did not contend that the Master was incorrect to make such orders. Having made unless orders the Master in the exercise of his discretion made an order for costs to follow the event in favour of the defendant and against the plaintiff. The plaintiff appealed to this Court in relation to the order for costs made by the Master and on the hearing of the appeal I considered that there was no basis for making any other order in this case. I took into account and considered the plaintiff's medical letters and medical certificates and all the points made by the plaintiff. In the exercise of my discretion I considered

that the Master was correct to order the plaintiff to pay costs. For all the reasons given by me on 7 November 2014 including that the appeal was out of time, I dismissed the plaintiff's appeal.

[14] I have no doubt whatsoever in my own mind as to the outcome of the hearing before me on 7 November 2014. I do not consider that there is any point of sufficient importance to justify the grant of leave. I refuse leave to appeal in this case

[15] I also refuse leave to appeal in the 3 other cases with which I dealt on 7 November 2014 for exactly the same reasons with suitable adaptations for instance in relation to dates. Those other cases are:

a) *Eddie Ritchie v Dr S.J. Kyle* 2005 No 42371;

b) *Eddie Ritchie v Dr Henry McKee* 2005 No 1082; and

c) *Eddie Ritchie v Dr Deirde Savage* 2004 No 35931