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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

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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Between:

DANIEL McATEER

Plaintiff/Respondent

and

BRENDAN FOX, PARTNER, CLEAVER FULTON RANKIN

Defendant/Appellant

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

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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.