Neutral Citation No: [2023] NICA 72 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE11871** *ICOS No:* **2004/24580/A04** *Delivered:* **15/11/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

AND IN THE MATTER OF AN APPEAL FROM THE KING'S BENCH DIVISION (COMMERCIAL HUB)
OF THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

BETWEEN:

DANIEL McATEER AND AINE McATEER

Plaintiffs/Appellants

and

JOSEPH McELHINNEY, PATRICK McDAID AND WALTER HEGARTY
T/A "McELHINNEY, McDAID & HEGARTY" SOLICITORS

Defendants/Respondents

Daniel McAteer appeared as a Personal Litigant
Jonathan L Dunlop (instructed by Carson McDowell, Solicitors) for the Defendants/Respondents

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Before: Keegan LCJ and Treacy LJ

TREACY LJ (*delivering the judgment of the court)*

Introduction

[1] The appellant appeals against the judgment of McFarland J made pursuant to Order 62 Rule 35, whereby on application for a review of the decision of the Taxing Master, he upheld the decision of the Master in relation to her assessment of the level of award of costs to the defendants/respondents in respect of the action McAteer & McAteer v McElhinney, McDaid and Hegarty.

[2] The context of the review before McFarland J is set out at paras [1]–[5] of his judgment reported at [2020] NIQB 72:

"[1] By Summons issued 20 June 2018, an application has been made for a review of the taxation certificate issued by Master McGivern on 22 May 2018 by which she taxed the legal costs and expenses of the respondents in relation to the action under ICOS reference 04/024580 and certified a sum of £47,746.64 as due for legal costs and expenses of the respondents. The Summons has been signed only by Daniel McAteer. It purports to be made on behalf of both applicants, and for the purposes of the application I am treating it as if it has been made by both applicants and that the written and oral representations that have been made by Mr McAteer, have been made on behalf of both of them. Aine McAteer has not lodged any document herself and has not communicated with the court directly. Mr McAteer assured the court that he was representing his wife. I conducted a video live link hearing on 3 December 2020 under the provisions of Schedule 27 to the Coronavirus Act 2020. The court clerk and I were present in the Commercial Court in the Royal Courts of Justice. Mr McAteer, Mr Dunlop and Mr Magee, solicitor, attended by video live link. There were no issues relating to the ability of all parties to participate in the hearing.

[2] As the ICOS reference number suggests, this is a case of some vintage. By Writ of Summons issued on 10 September 2004, the applicants commenced legal proceedings against the respondents alleging breach of contract and negligence in relation to legal services provided by the respondents to the applicants. Due to deficiencies in processing the claim, various orders were made by Master McCorry firstly on 11 October 2007 staying the action for 2 months and compelling replies to a notice for particulars within 21 days from the end of the stay, and then on 25 April 2008 an 'unless order' to compel replies. The terms of the 'unless order' were that unless the replies were received within 28 days of service of the order, the respondents would be at liberty to enter judgment against the applicants. There was a continuing failure to lodge replies after the required date. A hearing had been fixed for the consideration of another interlocutory matter for 19 September 2008. This hearing was before Deputy Master Wells and the conduct before and at this hearing and the order arising from it are the subject of significant relevance to the litigation and this review, and I will deal with this in more detail later. Deputy Master Wells on 19

September 2008 made an order striking out the action for failure to comply with the 'unless order.'

[3] The applicants then issued an application to set aside the Orders of Master McCorry (25 April 2008) and Deputy Master Wells (19 September 2008) under Order 2 Rule 2, and for other relevant relief. Again, I will deal with this application in more detail later. On 27 May 2009, Master McCorry dismissed the summons. This order was then appealed to the High Court and on 28 October 2009, Mr Justice Hart dismissed the appeal.

[4] On 21 November 2011, the Court of Appeal dismissed the applicants' appeal against the order of Mr Justice Hart. In the context of costs, Deputy Master Wells ordered that the applicants pay the respondents' costs of the main action, Mr Justice Hart ordered that the applicants pay the respondents' costs of the application before the Master and the costs of the appeal before him (not to be enforced without further order), and the Court of Appeal affirmed that order, but made no order as to costs in respect of the appeal to the Court of Appeal. I understand that the restriction on enforcement has now been removed. The taxation process undertaken by Master McGivern therefore related to the costs of the main action, and the subsequent hearings before Master McCorry and Mr Justice Hart.

[5] A hearing was then convened on 4 September 2017 for the purpose of taxing the respondents' costs, which was attended by Mr McAteer. An assessment of £47,746.64 was made. The applicants then sought a review of that assessment, which was convened on 23 October 2017, at which submissions were made by Mr McAteer. Master McGivern gave a reasoned written ruling on 28 March 2018 and confirmed her certification of the sum of £47,746.64, and it is this decision that the applicants now wish to have reviewed."

[3] The central thrust of the appellants' application for review was not with the amounts claimed in respect of costs but that the order made by Master Wells, on 19 September 2008 striking out the action for failure to comply with the 'unless order' was improperly obtained.

Background and Chronology of key events

[4] The writ in the underlying action was issued on 10 September 2004 alleging, inter alia, breach of contract and negligence in relation to legal services provided by the respondents to the appellants. The appellants were represented at the time by Harrisons solicitors, and the writ was signed off by Craig Dunford of counsel. The respondents served a Notice for Particulars dated 24 May 2005.

[5] Replies were not provided, and the respondents issued a summons on 12 October 2005. On 27 October 2005, Master Wilson issued an order that the appellants do, within 28 days from the service of a copy of his order, serve on the respondents full and proper replies to the respondents' Notice for Particulars. Replies were served dated 22 February 2006 but were considered deficient in relation to the loss the appellants alleged to have sustained. This generated considerable correspondence seeking proper particulars.

[6] On the 11 October 2007, Master McCorry ordered that the appellants' action be *stayed* for a period of two months and that within 21 days from the end of that period the appellants were to serve 'full and proper replies to no. 6(c) and (d) of the defendants' Notice for Further and Better Particulars dated 24 May 2005.'

[7] These particulars were not provided, and a further summons was issued. During this period, the first appellant wrote to the respondents' solicitors asking what had happened regarding the summons to compel replies to particulars. Brian Turtle of Carson McDowell replied on 8 April 2008 stating:

> "We acknowledge receipt of your letter of 3rd inst. The summons to compel replies to Notice for Particulars has been adjourned until Friday 25 April 2008. There has therefore been no hearing but as you have been informed earlier same is in the High Court list for Friday 25 April 2002 in the Queen's Bench Division."

[8] The appellant (McAteer) responded by letter dated 10 April 2008 stating:

> "As I explained I am already scheduled to be in the High Court on another matter on 25 April 2008 and I will write to the Queen's Bench office today to advise them of this."

[9] He goes on to enclose draft amendments to the Statement of Claim.

[10] By letter dated 22 April 2008, Brian Turtle of Carson McDowell responds:

> "We refer to the above matter and would confirm that we shall consent to the proposed amendments to the Statement of Claim shown red in the draft attached to your correspondence of 10 April 2008, subject to our right to

> serve any amended Defence as may be necessary and also our right to serve any Notice for Particulars arising therefrom.
>
> With regard to your suggestion that you are still not in a position to provide particulars of your losses, we fail to see how this can be the case in the light of the Roebuck Judgment. *This matter has gone on long enough and unless we receive satisfactory replies in advance of 25 April 2008 we intend to press on with our application on that date."*
> [our emphasis]

[11] In default of compliance with his extant Order for particulars dated 11 October 2007, Master McCorry made an 'unless' Order on 25 April 2008:

> "IT IS ORDERED that, unless the plaintiff serves full and proper replies to number 6 (c) and (d) of the defendants' notice for further and better particulars dated ***24 May 2005*** in compliance with the orders of this court dated 11 October 2007, *within 28 days* from the service of a copy of this Order, the plaintiffs' action shall be struck out and the defendants shall be at liberty to enter judgment against the plaintiff together with the costs of the action."
> [our emphasis]

[12] A copy of that 'unless' Order was served on the appellants by letter dated 6 May 2008. The 'unless order' provides that unless the plaintiffs serve full and proper replies "within 28 days" of service the action "shall" be struck out and the defendants shall be at liberty to enter judgment. Since service was effective from in or about 6 May the 'unless order' took effect from early June 2008.

[13] The appellants then wrote to Carson McDowell, months later, long after the 'unless order' took effect, on 9 August 2008, in the following terms:

> "I refer to your letter dated 07 August 2008, the contents of which surprise me. You were made perfectly aware that due to my copious other High Court commitments, I was not able to attend the hearing on 25 April 2008. The subject matter of your applications to have judgment entered against me (ie the alleged failure to provide a reply to 6(c) and 6(d)) is not valid in that the Replies were already given to you. The manner in which you have tried to have judgment entered against me is clearly mischievous.

> I have today written to the court advising them of my position and a copy of this correspondence is enclosed for your attention.
>
> I will revert to you once I have heard from the court Office.
>
> In the meantime, please be assured that I intend continuing with the action against your clients as outlined in my Statement of Claim that was forwarded to you on 10 April 2008."

[14] That correspondence enclosed the appellants' correspondence to the court office seeking to have the matter mentioned before the Master.

[15] Brian Turtle of Carson McDowell responded by letter dated 12 August 2008:

> "We acknowledge receipt of your letter of 9th inst. enclosing your letter to the court. We resent the accusation that having Judgment entered against you was "mischievous." You were informed by letter of 8th April 2008 that there was to be a Hearing of the matter on Friday 25 April on our Summons to Compel Replies to Notice for Particulars. You chose not to appear at that hearing despite having been informed. We obtained an Order from Master McCorry on 25 April which clearly stated that unless you gave proper Replies to the Notice for Particulars the action would be struck out. Despite this absolutely clear Unless Order you chose to do nothing in regard thereto and therefore Judgment was automatically entered against you. You seem to have omitted mention of our letter of 22nd April 2008 in which we stated that unless we receive satisfactory Replies in advance of 25th April 23 intended to press on with our application on that date. That was a further warning which you sought to ignore. As for the suggestion that you have properly replied to the Notice for Particulars this is quite obviously incorrect.
>
> We have obtained judgment and will resist any attempt by you to have same set aside." [our emphasis]

[16] The matter then appeared in the Master's list for mention on Friday 19 September 2008. Carson McDowell wrote to the appellants on 15 September 2008 pointing out that counsel was unavailable and sought to have the matter adjourned for four weeks. In that correspondence Carson McDowell stated:

> "Should you consent, we will make the necessary application for adjournment this Friday and you need not attend. Should you refuse consent we will be obliged to make the application early this week and will give you notice thereof. We await hearing from you as soon as possible."

[17] The appellants replied by email dated 15 September 2008 consenting to adjourning the matter.

[18] By letter dated 16 September 2008, Carson McDowell replied:

> "Firstly, could we thank you for agreeing to the adjournment to 17 October. We shall move the adjournment and confirm the position to you. There is no need for you to attend. We enclose a copy of even date to the court.
>
> We would make two points:
>
> We act for the defendants in this matter. Unless specifically bringing an Application or Summons it is not our duty to notify any party and certainly not the party who has brought the action of any time limits, review dates etc. Please let us have the name of the person in the court office who said they had been relying on us to notify you of hearings.
>
> The Application to have judgment set aside was made by you by letter of 9 August 2008 to the court. We received on 15 August a letter of 13 August from the court enclosing a copy of your letter and informing us of the Hearing on 19 September. No mention was made of us having to notify you and we, not unsurprisingly as it is your application, assumed the court had notified you."

[19] When the matter then appeared in the Master's List on 19 September 2008, Deputy Master Wells noted that there was an extant summons on behalf of the respondents in respect of the appellants' failure to have the matter set down, but there was no application on the part of the appellants before the court (as the respondents' solicitors had believed there was as a result of the appellants' correspondence referred to above) and the Deputy Master correctly recognised the nature and effect of the previous unless order and Ordered that the plaintiffs' action be struck out for failure to comply with that Unless Order dated 25 April 2008.

[20] In light of this, Carson McDowell wrote to the appellants by letter dated 3 October 2008:

> "We refer to the above matter and to recent correspondence herein.
>
> We could confirm that our Counsel attended before the Master on 26th (sic) ultimo for the purpose of an adjournment.
>
> We had understood that you were making application to reinstate your claim which had been dismissed by virtue of your non-compliance with the Unless Order.
>
> However, when our counsel appeared on 26 (sic) ultimo, it appeared that there was no such application before the court. What was before the court was one of the Defendants' Summonses which had been adjourned from before the expiry of the Unless Order. The Master, rightly, ruled that this Summons had merged with the Unless Order and the action had been struck out in its entirety.
>
> In the circumstances, we intend to proceed with the enforcement of the recovery of the defendants' costs.
>
> If you wish to challenge the Unless Order dismissing your claim it is a matter for you to make the appropriate application although we are satisfied any such application is groundless and will only incur further costs, which we shall seek from you.
>
> We suggest that you seek legal advice on the matter."

[21] The appellants subsequently applied to Master McCorry for, inter alia, a declaration that the Unless Order had been complied with and seeking that the order of Master Wells be annulled, revoked or reversed.

[22] The appellants put before the court an affidavit exhibiting all the correspondence on which they wished to rely. Master McCorry heard that application for review and reinstatement of the appellants' claim and refused it.

Appeal to the High Court -Hart J

[23] The appellants then appealed to the High Court. The appellants were represented by Harrisons solicitors and Mark Mulholland of Counsel. That appeal came on for hearing before Hart J, who had the benefit of submissions from

Mr Mulholland, evidence from Mr Wilson of Harrisons solicitors and a skeleton argument drafted by Mr Mulholland.

[24] We agree with the respondents that from the transcript of that appeal the following is clear:

(i) Mr Mulholland made an application to have the matter adjourned (a) on the basis that Mr McAteer had attended with a consultant neurologist and (b) on the basis that there was not at that time a legal aid certificate in place. In the event that that application was refused, Harrisons solicitors would apply to come off record on the basis that 'Mr McAteer had contacted Mr Wilson and in terms…had stated that it was his preference that we no longer acted for him, in effect that we should come off record.'

(ii) Having heard from Counsel for the appellants and evidence from Mr Wilson, Hart J granted leave for Harrisons to come off record. He then set out the history of the case and turned to the appellants' allegations about the circumstances in which the Masters' Orders were made:

> "…affidavits were filed by Mr McAteer saying that he had sought and agreed adjournment from the defendants of the hearing before Master McCorry in April 2008 on the basis that he was engaged in another piece of litigation and subsequently has alleged that Mr Turtle, acting on behalf of the defendants, had agreed to adjourn the matter and that Mr McAteer, therefore, alleges that had he not acted on that assurance or belief that the Master might not have made the order and in any event he didn't have the opportunity to appear in front of the Master to put his case, Mr Turtle has filed and affidavit saying in terms that he has no recollection of such conversation and does not believe that one took place. Mr McAteer has in the affidavit delivered yesterday taken issue with that and…I'm sorry in an earlier affidavit has taken issue with that and he now says that he genuinely believes that the conversation took place that's in yesterday's affidavit and I proceed to say nothing more about that dispute because clearly it is not something that can be easily decided on the basis of affidavit evidence only.
>
> **It remains the case that the plaintiff have still not produced these particulars. I do not see any basis upon which he has failed to do so and I, therefore, have no hesitation in his absence due to a deliberate decision by him to discharge his legal representatives to proceed in this case in his absence. He's not here to pursue his**

> **appeal and does not have a good reason for not being here because he's dismissed his lawyers and in those circumstances the appeal is dismissed. The order of the Master is affirmed and the net result of all of this is, of course, that this action now stands dismissed and it will be dismissed with costs**."
> [our emphasis]

[25] When the appeal was determined by Hart J, the matter had already appeared before Gillen J who directed the production of medical evidence that was never produced. Hart J was well aware of the fact that the appellants had legal representation, which they chose to instruct not to continue to act (despite their offer to continue to act on a pro bono basis) and also, that the first appellant had been in a position to swear an affidavit on the eve of the hearing.

[26] The appellants then appealed the Order of Hart J to the Court of Appeal. The appellants were represented by solicitor and counsel.

Appeal to Court of Appeal

[27] Coghlin LJ, delivering the judgment of the court, set out in detail the history of the matter and dismissed the appeal. Addressing the failure to provide proper particulars, Coghlin LJ stated:

> "[10] Mr Lavery focussed his well-prepared argument primarily upon the submission that, despite the appellants' legal representation coming off record, Hart J should have given detailed consideration to the complex history of the litigation and, in particular, to the appellants' claim that, having regard to the continuation of the accounts and inquiries before the Master, they had given the best replies to particulars that they could in the circumstances. He reminded the court of the letter from Mr McAteer of 4 January 2008 and also drew attention to a letter from solicitors acting for the appellants dated 13 May 2011. While the letter post-dated the decision by Hart J, Mr Lavery submitted that it confirmed the stance that had been taken throughout on behalf of the appellants. The relevant paragraph of that letter read as follows:
>
> > 'I have taken my client's instructions in relation to the Replies sought to Particulars 6(c) and (d). I can confirm that no other loss or damage (excluding any loss or damage particularised elsewhere) is being claimed by the plaintiffs in relation to the Roebuck Inn matter other than

> the indemnity claimed against the plaintiffs (sic) in respect of all loss, damage and costs which may arise out of the action brought by Sanjev and Anoop Guram against the plaintiffs (Writ No. 2003 No. 614) which is yet to be determined.'

We reject this submission. The obligation is upon the party requested to provide the best replies that he is able to provide. No reason has been provided by the appellants as to why they could not provide details of the loan that Guinness has allegedly called in, together with any associated costs or expenses, or of the costs alleged to have been incurred by the appellants involving, inter alia, correspondence with insurance brokers. In such circumstances the learned trial judge was correct in his conclusion that the appellants had failed to provide further and better particulars.

In the circumstance, the learned Trial Judge was correct to conclude that there had been no irregularity and that it would be inappropriate as part of his review of the taxation process to 're-open the entire case, including the various findings and orders of the Master, the Deputy Master, Mr Justice Hart and the Court of Appeal. Nor would I wish to do so, as the applicants have not produced any evidence to suggest fraud or misconduct on the part of the respondents' solicitors."

Taxation appeal before McFarland J

[28] As McFarland J stated in his decision:

"[37] Deputy Master Wells made the order because the applicants had failed to comply with the terms of the 'unless order.' The 'unless order' had a specified date for compliance, and at any time thereafter the case was liable to be struck out. All that the Deputy Master Wells did was confirm the reality of the situation. I rely on the report given by counsel who was present at the hearing. This hearing had convened to consider another interlocutory matter. An adjournment was applied for and the Deputy Master was advised that it was an application by consent. The Deputy Master on his own motion, and not at the request of the legal representatives for the respondents, declined to adjourn and instead made the order to strike

> out, which was merely confirming the status of the litigation. The adjourning of the other interlocutory matter would have been pointless as the main action was over, as indeed were all the summonses relating to it. Mr McAteer's presence at the hearing, particularly as he continued to be in default of the 'unless order', is unlikely to have made any difference to the outcome."

Consideration of this appeal from McFarland J

[29] In light of the foregoing history we accept that there is no sustainable basis for contending that the Master's Order is vitiated by fraud or any other reason. The 'unless' order had been granted by Master McCorry on 25 April 2008, Carson McDowell having informed the appellants that they would be proceeding to seek the order on that date. The order was served on the appellants. When the matter came before Deputy Master Wells in September 2008, the respondents' solicitors had been given to understand by the appellants that they had brought an application to have the 'unless' order set aside. No such application was before the court. What was before the court was an extant summons on the part of the respondents to compel the appellants to set the matter down. Master Wells correctly interpreted the effect of the 'unless' order and confirmed the dismissal of the appellants' action.

[30] The effect of an 'unless' order is a matter of settled law. It is clear that the appellants did not comply with that order and that Master McCorry, Hart J and the Court of Appeal all considered (i) that the 'unless' order was regular and properly obtained and (ii) that the appellants had failed to give full and proper replies and were in breach. Each of those courts had the power to set aside the unless order, extend time for compliance or conclude that it had been complied with. McFarland J correctly considered and reviewed the matter and came to the same conclusion.

[31] *Takhar* [2019] UKSC 13 is of no assistance to the appellants. Suffice to say there was no fraud established by the appellants in the process used to obtain the 'unless' order. The appellants sought a review of the order and then appealed it. At each stage the appellants advanced the arguments they now continue to make, and those arguments were rejected by the courts. Thus, this challenge falls within the authorities cited and approved in *Takhar* as being an impermissible challenge to the finality of the judgment of the Court of Appeal. Furthermore, the appellants did not appeal the Court of Appeal judgment to the Supreme Court.

[32] The first appellant also now advances the contention that he is not representing his wife. This is the first time such an assertion has been made, despite being before Master McCorry, Hart J, the Court of Appeal and McFarland J. We note that throughout the appellants' skeleton and communications with the court, references are made to both appellants. In any event as the respondent contends the appellants cannot have it both ways. If the first appellant is not acting on behalf of his wife, then there is no extant appeal on behalf of the second appellant.

[33] The appellants also contended that this appeal should be adjourned pending the outcome of other proceedings. A similar application was made before McFarland J and refused. We decline the invitation to adjourn as we consider it unnecessary and unjustified.

Conclusion

[34] For all the above reasons, the appeal from the decision of McFarland J in the taxation proceedings is dismissed.