THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 277
Record Number: 2019/515CA

Noonan J.
Murray J.
Binchy J.

BETWEEN/

PADRAIG HIGGINS

RESPONDENT

- AND -

THE IRISH AVIATION AUTHORITY

APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 9th day of October 2020

1. In his judgment delivered on 16 June 2020 (with which Noonan J. and I both agreed), Binchy J. identified four issues that fell for resolution in this appeal ([2020] IECA 157 at para. 33):

   (i) Whether the Court should set aside the award made by the jury to the respondent in the sum of €300,000 in respect of general compensatory damages;

   (ii) Whether the Court should set aside the award made by the jury in the sum of €130,000 in respect of aggravated damages;

   (iii) In the event that the Court answered either of the foregoing in the affirmative, whether it should substitute its own award for that of the jury; and

   (iv) Whether the Court should increase the discount of 10% on the damages awarded to reflect the offer of amends.

2. In answering the first three of these questions in the affirmative, the Court agreed with the position adopted by the appellant, while the answer to the fourth as determined by the Court was that urged by the respondent. However, in reducing the damages to €70,000 in respect of general compensatory damages, and in awarding an additional sum of €15,000 by way of aggravated damages (the total sum being reduced by 10% to reflect the offer of amends) the Court (a) rejected the contention advanced by the appellant that it would be unreasonable to impose aggravated damages in the circumstances of the case and (b) awarded the respondent a sum that was – when costs

are taken into account – less than an offer made by the respondent without prejudice save as to costs shortly before the trial. It was also higher than the €50,000 urged by counsel for the appellant at the hearing of the appeal. The question that now arises is how the costs of the appeal should be disposed of having regard to all of these considerations.

3. Both parties contended that they had won '*the event*' and that the costs of the appeal should in consequence be ordered in their favour. The appellant says that it had sought two reliefs on appeal – the setting aside of the award, and the substitution by the Court of its own award. It emphasises that the damages payable by the appellant to the respondent had been reduced from €387,000 to €76,000. Referring to the judgments of Clarke J. in *Veolia Water UK plc v. Fingal CC (No. 2)* [2007] 2 IR 81, in *Christian v. Dublin City Council* [2012] IEHC 309 and in *MD v. ND* [2016] 2 IR 438 the appellant says (a) that this is not the type of case in which it is appropriate to split costs as it was not '*complex litigation*' of the kind referred to by Clarke J. in *Veolia*, and (b) that is not appropriate to engage in an exercise in '*adding up the points*' in order to allocate costs.

4. The appellant also relies upon the '*Calderbank letter*' to which I have referred, noting in that connection to the decision of the Supreme Court in *MN v. SM* (costs) [2005] IESC 30 [2005] 4 IR 461. In that letter the appellant proposed that the respondent retain €100,001 of the damages awarded in his favour, that he would keep the benefit of the order for costs made in the High Court, and that the parties would each bear their own costs of the appeal. The offer (dated 14 April) was open for acceptance until 21 April (the appeal being listed for hearing on 28 April). The letter said:

> *'In the event that the Plaintiff refuses to accept the offer set out in this letter or if the Plaintiff neglects to respond to this letter within the period outlined above, whereupon the offer lapses, the Defendant reserve [sic.] the right to rely on this letter at the conclusion of the Appeal in relation to the issue of costs and the Defendant will refer, in addition to the terms of previous correspondence making proposals to the Plaintiff to resolve this matter.'*

5. The respondent did not reply to this letter. In his submissions, he says that the effect of this correspondence was that the parties had '*narrowed*' the substance of "*the event*" on appeal. He explains the position as follows:

> *'The **Calderbank** offer made by the Appellant relieved the Respondent of making a so called "reverse" **Calderbank** offer … because the Respondent was confident that this … Court would not reduce the award below a sum of 100,001.00 inclusive of the costs of the appeal.'*

6. The respondent further says that there were three issues in the case, and that he succeeded on all of them. The issues as he defines them were as follows:

   (a) The award of general damages;

(b) The award of aggravated damages (and the amount of that award); and

(c) The amount of the discount allowed in respect of the offer of amends.

7. The respondent's position on the second and third of these is straightforward. He notes that the verdict of the jury that the respondent was entitled to aggravated damages was upheld as was the verdict of the jury that the award of damages should be reduced by 10%. As to the first, the respondent focusses on the *Calderbank* offer made by the appellant. Effectively, it is his case that by making this offer the appellant imposed on itself, and afforded to the respondent the benefit of, a new constraint. On this construct, if the respondent '*beat*' the offer he was entitled to his costs. For the purposes of contending that the respondent did in fact '*beat*' the offer, he treats it as a cost inclusive proposal. So, because the €76,000 plus the costs of the appeal was more than the €100,001 offered in the letter of 14 April, it is said that the appellant has prevailed and should have all his costs. The '*event*' (he says) for the purposes of the costs of the appeal must be determined by reference to the *Calderbank* offer so that he succeeded if he obtained an award, inclusive of costs, greater than the sum offered.

8. The respondent presents an alternative argument in the event that he does not succeed in this aspect of his submission. He says that the Court should take a '*graduated approach*' to the costs, in which connection he stresses seven features of the case:

(i) This was an assessment of (unliquidated) damages in an offer of amends case.

(ii) Despite the offer of amends, the appellant did not apologise for six and a half years for what the Court found was a serious defamation. The High Court found that the delay on the part of the respondent approving the apology was at the door of the appellant in answering correspondence and their refusal to identify who in Gardai and Revenue should receive the apology.

(iii) The conduct of the appellant in the proceedings was such that it resulted in an award of aggravated damages.

(iv) The finding in relation to the discount to be allowed was upheld by this Court and represents the lowest discount allowed. It was a very significant issue both at trial an on appeal.

(v) Given the unusual circumstances and procedural history of the case it was reasonable for the respondent to contest the appeal and seek a re-trial by jury.

(vi) The appellant already sought and was granted the costs of a two-day discovery hearing before Ms. Justice Baker on the basis of an argument that was rejected by the Court of Appeal and the Supreme Court.

(vii) Any award of the costs of the appeal against the respondent, whether in respect of his own costs or the appellant's costs, or both sets of costs would be ruinous and

disproportionate by effectively setting off his award to nil and leaving him in fact with significant legal fees.

9. Both parties referred in their submissions to ss. 168 and 169 of the Legal Services Regulation Act 2015. In this case, the application of these provisions when viewed in the light of O.99, r.3(1) RSC involves the Court in addressing four questions:

   (a) Has either party to the proceedings been '*entirely successful*' in the case as that phrase is used in s.169(1)?

   (b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party?

   (c) If neither party has been '*entirely successful*' have one or more parties been '*partially successful*' within the meaning of s.168(2)?

   (d) If one or more parties have been '*partially successful*' and having regard to the factors outlined in s.169(1)(a)-(g) should some of the costs be ordered in favour of the party or parties that were '*partially successful*' and if so, what should those costs be?

10. In answering these questions, it is particularly important to bear in mind that whether a party is '*entirely successful*' is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is '*entirely successful*' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If '*partially successful*' the costs of that part on which the party has succeeded *may* be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is '*partially successful*' may still succeed in obtaining *all* of his costs, in an appropriate case.

11. Central to the first question is the meaning of the term '*entirely successful*' in proceedings as it appears in s.169(1). Understandably, the parties here reference this to who '*won the event*'. The phrase '*costs to follow event*' appears in the marginal note to the section. However, it does not appear in the section itself, and has been purged entirely from the recast version of Order 99.

12. As Simons J. suggests in the course of his judgment in *Naisiunta Leichtreach Contraitheoir Eireann Cuideachta Faoi Theorainn Rathaiochta v. The Labour Court and ors.* [2020] IEHC 342 at paras. 42-46 the inquiry as to whether a party has been '*successful*' in proceedings can be pointed in one of three possible directions. First, by examining the relief claimed and determining whether the party has obtained (or successfully resisted the application for) the orders sought in the action. Second, by breaking the issues in the action down and assessing which party has prevailed on which issue. Third, by interrogating the case further and examining the arguments advanced on each issue assessing which party won which argument.

13. The third of these can be immediately discounted. The allocation of costs has never been determined on the basis of adding up points, and the process of determining where costs should lie would become hopelessly cumbersome if it did. The argument for the first may at the level of principle - at least when the provision is put in context – at first appear strong. The starting point under the law prior to the 2015 Act was that a party who has had to come to Court to obtain relief should have their costs of securing it (*Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535 at para. 52-64 *Veolia* at para. 2.8).

14. However, while such a party can certainly be accurately described as having been '*successful*' it seems to me that in those cases where a party obtains the relief it claimed but has failed to prevail on a distinct issue in the action on which it has chosen to base its claim, it is very difficult to see how it could be said that they have been '***entirely*** *successful*'. In *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, for example, the applicant obtained the relief it claimed in its action on a very narrow point (that the statutory notice challenged in the case was not formulated in compliance with the Act). The issue occupied little of the hearing. The applicant failed on the central ground on which the notice was challenged – that customers of the applicant had been wrongly designated by the respondent as '*ordinarily resident*' in the State. To say in that situation that the party who obtained the relief claimed was '*entirely successful*' seems to me to turn ordinary language on its head. The applicant failed on the central point in the case.

15. The problem presented by that case may well be outside the norm in private law litigation, but it is important in public law challenges where single reliefs are not infrequently claimed by reference to a range of issues, some of which present important questions of principle for the parties. It is also – as this case shows – potentially important in appeals where a party's success can be defined at competing levels of generality. In this case, the appellant says it succeeded because the jury award was significantly reduced, while the respondent says it succeeded because it ran its hearing to obtain more than the respondent was prepared to offer. Both are right and both were therefore successful, but neither left Court with everything they sought to achieve and neither success was thus complete.

16. That being so, I am inclined to agree with (as he described it) the pragmatic conclusion ultimately reached by Simons J. in *Naisiunta Leichtreach Contraitheoir Eireann Cuideachta Faoi Theorainn Rathaiochta* as to whether a party is '*successful*' for these purposes. As Simons J. said (para. 43) in determining whether a party has been successful for the purposes of s.169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues.

17. In this case, at para. 33 of his judgment, Binchy J. identified four issues. Neither party prevailed on all of them. The respondent wished to hold the award and in the alternative to have the matter remitted for determination by a jury. He failed on both fronts. The appellant certainly had greater success and in particular obtained a very substantial reduction in the award made, but at the same time failed both to convince to Court to

pitch damages at the level for which he contended, and to increase the deduction made in respect of the offer of amends. It also failed in its submission that it was unreasonable to impose aggravated damages in the circumstances that presented themselves in the case.

18. That being so, the costs of the parties here fall to be allocated according to the power provided for in s.168(2)(d) to order costs in favour of the parties according to the elements of the proceedings on which they were partially successful. Order 99, r.3(1) requires, as I have noted, the Court to conduct that exercise having regard to the matters in s.169(1). The matters referenced in that section reflect the types of considerations that have traditionally been taken account of by the Court in exercising its discretion in connection with costs.

19. In particular s.169(1)(f) requires the Court to have regard to '*whether a party made an offer to settle the matter the subject of the proceedings and, if so, the date, terms and circumstances of that offer*'. Order 99, r.3(2) states that for the purposes of this provision '*an offer to settle includes any offer in writing made without prejudice save as to costs*'. In the particular circumstances in which an appeal is brought to this Court only against the assessment of the quantum of damages by the High Court, the facility for the making of offers of the kind referred to in these provisions can assume decisive importance in determining what order for costs is just.

20. The specific difficulties in fixing a fair outcome as to costs in these circumstances were explained by the Supreme Court in *MN v. SM (costs)* [2005] IESC 30, [2005] 4 IR 461, 476. There, the plaintiff was awarded the sum of €600,000 by the High Court for damages for injury caused by multiple sexual assaults. On appeal by the defendant, the award was reduced to €350,000.

21. In the course of his judgment on costs, Geoghegan J. considered the dilemma arising where costs fall to be decided when a plaintiff is awarded damages in the High Court which are too high and are, therefore, reduced on appeal. He observed that this will not usually arise from any fault on the part of the plaintiff and that it is a considerable hardship to the plaintiff if in addition to suffering a reduction in his award he then has to pay two sets of costs – one to the opposing lawyers and one to his own lawyers - out of the legitimate award.

22. On the other hand, Geoghegan J. noted, if the plaintiff were to be awarded his costs of the appeal despite the fact that he had suffered a reduction in damages, that may legitimately be viewed as an injustice to a defendant. The reduction in damages which the defendant by his well-founded appeal has achieved is eaten away by his having to pay two sets of costs on the appeal.

23. In the intermediate situation where the appeal court decides to make no order as to costs on the appeal Geoghegan J. noted that there was, on one view, a hardship to both sides. On the one hand the plaintiff has to suffer a reduction in his ultimate legitimate award in order to pay his own lawyers even though he was in no way to blame for the High Court awarding him an excessive sum. On the other hand, the defendant notwithstanding that

he was found to have brought a legitimate appeal and has successfully obtained a reduction in the High Court award finds himself having to pay his own lawyers thereby greatly reducing the benefit which he has achieved by the appeal.

24. In the context of an outcome that produces some element of hardship for one or both of the parties either way the entitlement of the parties to make, and obligation of the Court to consider, an offer made without prejudice save as to costs affords a mechanism for at least abating the element of unfairness that might otherwise arise. Geoghegan J. commented on the utility of such an offer made by the parties 'without prejudice save as to costs' as follows:

> *'Thus a defendant who considered that the plaintiff's award was too high and would likely be reduced on appeal may write a letter to the plaintiff claiming that the award of say €100,000 was too high but that he would be prepared to pay €75,000 and that if that sum was not accepted the letter would be used in the Supreme Court for the purposes of a costs application in the event of the damages being reduced to €75,000 or less. By the same token, it would be open to a plaintiff in such a case to write to the defendant offering to accept €75,000 and warning the defendant that if a reduction of damages was achieved by the defendant but the resulting sum was still €75,000 or more the plaintiff would use the letter with a view to obtaining his costs of the appeal notwithstanding the reduction. This practice which has proved useful in other jurisdictions should be availed of in this jurisdiction.'*
>
> *….*
>
> *If this procedure was adopted more often, the injustices which can arise in relation to costs of an appeal would be greatly reduced.'*

25. In *MN*, the Court ultimately decided to make no order as to the costs of the appeal, but so concluded because the defendant's means were such that there was no reality to his making an open offer that might have been acceptable to the plaintiff. It is clear that but for that consideration, the facility of, and failure of the defendant to make, such an offer would have weighed heavily against him in relation to costs, even though he had succeeded in the appeal.

26. In this case, the appellant did make such an offer. However, given the late stage at which it was made and the fact that it was not accompanied by an offer to pay costs incurred up to that date, the offer was less than effective. On any reasonable estimate of the costs incurred by the respondent in connection with the appeal, the benefit to him of the offer was less than the sum this Court awarded on appeal. It must follow that the appellant cannot rely upon that offer to obtain an order for costs against the respondent (see *Murnaghan v. Markland Holdings Ltd.* [2004] IEHC 406, [2004] 4 IR 537).

27. However, I do not think it would be proper that the respondent be enabled to rely upon that offer as a new cap which if he exceeded it, should result in his obtaining his costs.

This would discourage the making of such offers, as it would mean that a defendant who did not attempt to obtain a resolution of the matter prior to the hearing of the appeal might be in a better position in resisting an application for the costs of the appeal than the defendant who made such attempt. If the respondent had wished to secure his costs of the appeal, it was incumbent upon him to make an offer of his own. Had he done this, and had it not been accepted, if he retained what he offered to take or obtained more than that on appeal his case for costs would be very strong.

28. That leads me to the same conclusion as the Court reached in *MN*, albeit for reasons that are different and particular to this case. The appellant obtained a substantial benefit from the appeal, and it had to incur legal costs in obtaining that benefit. However, it was not the entire benefit it sought, and it could have protected its costs by making an offer that reflected the respondent's entitlement as determined by the Court. I emphasise this in particular having regard to the submission made by the appellant that litigants not be encouraged to '*view an outing in Court as a free run*'. If a defendant to proceedings wishes to put their opponent on risk of costs where they appeal against the quantum of an award made against them they have it in their power to make an offer that reflects the damages likely to be awarded to the plaintiff. If they do this at the same time as they lodge their appeal, they avoid having to pay their opponent's costs. If they do so (as happened here) at a later stage when additional costs have been incurred, they should offer to pay their opponent's costs up to that point for the offer to be effective.

29. The respondent was presented by the appellant with an offer which it refused, and in resisting the appeal (and incurring consequent costs) it obtained a better award than the appellant had tendered. However, he failed in critical parts of the appeal (both in not holding the quantum awarded by the jury and in not having the matter remitted to the High Court for a new hearing before a jury). He could have protected his costs by making his own offer or counter-offer but failed to do so. In those circumstances, making no order as to costs appears to me to be the option that most fairly distributes the cost burden of the appeal.

30. I should say in conclusion that the appeal was briskly and efficiently presented by each party and I do not believe time or cost can be reliably split here by reference to the issues on which the parties prevailed. Nor do I believe that the circumstances relied upon by the respondent in support of its '*graduated approach*' alter the outcome. The issues raised by the respondent regarding the conduct of the appellant (as to the merits of which I express no view) do not impact on the costs in this Court where both parties acted entirely reasonably and properly in agitating the issues on appeal.

31. In those circumstances, I would make the following Order:

    (i) An order allowing the appeal and substituting the amount of €76,500 as the award to the respondent;

    (ii) An order that the respondent recover the costs of the proceedings in the High Court, to include any reserved costs, based on the award made by this Court;

(iii) An order that there be no order as to the costs of this appeal.

32. Noonan J. and Binchy J. are in agreement with this judgment and the Order I propose.