THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number: [2021] IECA 139
Record Number: 2019/525
High Court Record Number: 2018/8764P

Whelan J.

Noonan J.

Power J.

BETWEEN/

EMMA MCKEOWN

PLAINTIFF/RESPONDENT

-AND-

ALAN CROSBY AND MARY VOCELLA

DEFENDANTS/APPELLANTS

COSTS RULING of Mr. Justice Noonan delivered on the 11th day of May, 2021

1. The principal judgment herein was delivered on the 11th August, 2020. The appellants (the defendants) were successful in that the damages awarded by the High Court of €76,000 were reduced to €41,000. The parties were given liberty to make written submissions on the issue of costs which, due to administrative oversight, were recently received by the court. The defendants seek a number of consequential costs orders:

(a) An order awarding the defendants the costs of the appeal.

(b) An order awarding the plaintiff Circuit Court costs *simpliciter* in respect of the hearing before the High Court without the benefit of a certificate for senior counsel.

(c) An order pursuant to section 17(5)(a) of the Courts Act, 1981 (as amended) directing the plaintiff to pay to the defendants the additional costs incurred by the defendants in defending the case in the High Court, rather than the Circuit Court (a "costs differential order").

2. In the High Court, the plaintiff's general damages were assessed in the sum of €70,000 being €65,000 for damages to date and €5,000 for the future. The sum of €6,000 was agreed in respect of special damages. In this court, the plaintiff's general damages were reduced from €70,000 to €35,000 made up of damages to date of €30,000 and into the future of €5,000. The resultant award accordingly fell well within the jurisdiction of the Circuit Court which was, at the relevant time, up to a maximum of €60,000. The chronology of matters relevant to the costs determination herein is as follows:

- 8th October 2018 – The Personal Injuries Summons issued.
- 7th November 2018 – The defendants' solicitors entered an appearance and served a notice for particulars and by covering letter of the same date, indicated to the plaintiff's solicitors "that in the event of you not achieving damages within the High Court jurisdiction we will be applying under section 14 of the 1991 Courts Act for our costs arising from the case being taken in the wrong jurisdiction". The latter section amended section 17 of the 1981 Act to provide for costs differential orders.
- 17th January 2019 – The defendants delivered a defence admitting liability and putting quantum only in issue.

- 17th May 2019 – The defendants served a notice of tender offer on the plaintiff in the amount of €30,182 together with Circuit Court costs.
- 11th December 2019 – The trial took place at Dundalk High Court.
- 12th December 2019 – The trial judge delivered her *ex tempore* judgment and refused a stay on any part of her order.
- 18th December, 2019 – The defendants' solicitors sent a "Calderbank" letter to the plaintiff's solicitors "without prejudice save as to costs" indicating that they had been instructed to appeal and to avoid further costs were prepared to offer the sum of €47,156 plus Circuit Court costs without a certificate for senior counsel. The offer was subject to a proviso that the sum of €4,920 be offset against the plaintiff's costs being the amount which the defendants' solicitors claimed represented the additional costs incurred in defending the matter in the High Court. The net offer was thus €42,236 and was available until close of business on the 6th January, 2020. This letter was received by the plaintiff's solicitors on the 19th December, 2019.
- 19th December 2019 – The defendants served a notice of appeal appealing against "so much of the judgment of O'Hanlon J. as concerns the award of general damages to date perfected on 17th December 2019. The defendant/appellant will seek an order reducing the award of general damages to date to such sum as the sum of a court shall seem appropriate…"
- 23rd December 2019 – The plaintiff's solicitors wrote refusing the defendants' offer and by way of "reverse Calderbank" proposed that the plaintiff would accept the sum of €61,000 plus High Court costs stipulating the same time frame for acceptance i.e. by the 6th January, 2020.
- 18th February 2020 – The plaintiff's solicitors wrote repeating the same offer stating that it would remain open until rescinded by the plaintiff.

- 25th February 2020 – The defendants' solicitors wrote repeating their offer of the 18th December, 2019 stating that it remained open for acceptance until the 27th February, 2020.

3. Neither the offer nor counter offer were accepted and accordingly the appeal proceeded. As appears from the foregoing, the defendants' offer exceeded the amount awarded by this court, even allowing for the costs differential reduction proposed by the defendants' solicitors.

4. The statutory framework for the resolution of costs issues is now to be found in sections 168 and 169 of the Legal Services Regulation Act, 2015 together with a recast O. 99 of the Rules of the Superior Courts introduced by S.I. 584/2019. The relevant sections of the 2015 Act came into force on the 7th October, 2019 and the new O. 99 took effect from the 3rd December, 2019. It appears likely that although both of these measures slightly predated the hearing in the High Court, the vast majority, if not the entirety, of the costs in the High Court had by then been incurred and accordingly fell to be dealt with in accordance with the prior regime. However, both measures predate the service of the notice of appeal herein and accordingly the costs in this court are governed by the new provisions.

5. Cases confined to the assessment of damages can sometimes give rise to particular difficulties where, as here, the outcome on appeal results in a reduction of the damages awarded to a plaintiff by the High Court. These difficulties were identified by the judgment of the Supreme Court in *MN v SM* [2005] 4 IR 461. That decision was recently considered by this court, also in the context of a quantum appeal, but in defamation proceedings, in *Higgins v The Irish Aviation Authority* [2020] IECA 277. In delivering the court's judgment on the issue of costs in that case, Murray J. considered the judgment in

MN and the difficulties that can arise in such appeals and I think it is worth quoting in full what he said: -

> "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.
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> 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.
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> 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.' "

6. In the present case, a letter precisely in the terms proposed by Geoghegan J. was written by the defendants in advance of serving notice of appeal herein. Although the plaintiff suggests that the notice of appeal was in fact served before the letter was actually received, in my view nothing much turns on this as virtually all of the costs of the appeal would have been avoided had the plaintiff accepted the defendants' Calderbank.

7. A close analogue of this case is to be found in another judgment of this court in *Shannon v O'Sullivan* [2016] IECA 105 with the sole judgment of the court being delivered by Irvine J. (as she then was) and with whom the other members of the court agreed. In those two appeals, Calderbank letters had been despatched to both plaintiffs who had declined the offers therein and in consequence, the court awarded the costs of the appeal against the plaintiffs with a direction that those costs should be set off against the costs awarded in favour of the plaintiff of the High Court herein. I cannot see any basis on which a similar order ought not be made in the present appeal.

8. The award of damages made by this court falls well within the jurisdiction of the Circuit Court and as such the provisions of s. 17(1) of the 1981 Act clearly apply, which provide that where the court's award falls within the jurisdiction of a lower court, the plaintiff shall not be entitled to recover more costs than he or she would have been entitled to recover had the proceedings been commenced in the said lower court. As the authorities show, this section is plainly mandatory and it follows accordingly that the plaintiff is entitled to the costs in the High Court on the Circuit Court scale appropriate to an award of €41,000.

9. Given that this court found that the injury in this case was of a kind that fell squarely within the relevant category in the Book of Quantum, there is not to my mind any basis upon which it could reasonably be contended that it was appropriate to commence these proceedings in the High Court even were that a relevant consideration, which it is not. It therefore does not seem to me to be appropriate to make any order with regard to the costs of the High Court other than an order for Circuit Court costs *simpliciter*.

10. The defendants further seek a costs differential order pursuant to s. 17(5)(a) of the Courts Act 1981 as substituted by s. 14 of the Courts Act 1991 which provides:

> "Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (not being an appeal) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant or respondent in the proceedings by the plaintiff or applicant of an amount not exceeding whichever of the following the judge considers appropriate:

(i) the amount, measured by the judge, of the additional costs as between party and party incurred in the proceedings by the defendant or respondent by reason of the fact that the proceedings were not commenced and determined in the said lowest court, or

(ii) an amount equal to the difference between-

(I) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar, and

(II) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court, or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar on a scale that he considers would have been appropriate if the proceedings had been heard and determined in the said lowest court."

11. As is apparent from the terms of the subsection, the making of a costs differential order is discretionary. A number of authorities have considered how that discretion should be exercised having regard to the rationale and purpose of s. 17 as a whole. In *O'Connor v Bus Atha Cliath* [2003] 4 I.R. 459, the plaintiff obtained an award of damages in the High Court that fell well inside the jurisdiction of the Circuit Court. At the commencement of the trial, he abandoned a substantial claim for loss of earnings which might conceivably have brought the case within the High Court jurisdiction had it succeeded. The trial judge declined to make a costs differential order on the basis that although he found that the

plaintiff had significantly exaggerated his injuries, he considered the plaintiff to be honest and the claim was not fraudulent. The defendant appealed on various grounds, one of which was that the exercise of the discretion was erroneous in relation to the costs order. Each member of the Supreme Court delivered a judgment dismissing the appeal on the damages issue. However, Murray and Hardiman JJ. allowed the appeal on the costs issue with Denham J. dissenting on this point.

12. In the course of his judgment, Murray J. said (at p. 493-494):

> "It is clearly in the public interest that claims are in principle brought before the lowest court having jurisdiction to hear and determine the claim with a view to the proper and efficient administration of justice and for the purpose of minimising the cost of litigation generally and in particular for the parties. There is therefore an onus on a plaintiff to bring the proceedings before the court having the appropriate jurisdiction.
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> In my view, when the order made by a court in favour of a plaintiff falls well within the jurisdiction of a court lower that that making the award, it is incumbent on the trial judge to have specific regard to the nature of the claim and all the reasons for which the plaintiff's claim fell within the lower jurisdiction or as the section puts it, all the circumstances of the case. An unsuccessful defendant should not be wantonly burdened with the costs of defending a claim in the higher court when it could reasonably have been brought in the lower court."

13. Murray J. was of the view that the fact that the plaintiff was considered to be honest in his evidence was not a reason to decline making the order sought (at p. 495):

> "Even though the respondent may be considered genuine and honest in his approach the fact that the claim was brought in the High Court on the basis of his gross exaggeration and imagined on-going problems must have the consequence, in my view, that he bear the extra costs incurred by the defendant in defending the proceedings in the High Court rather than in the Circuit Court."

14. Hardiman J., in his judgment, said of s. 17 (at p. 505):

> "Moreover, looking at s. 17 as a whole, it seems clear that the legislative purpose is to provide a strong incentive to the institution of proceedings, generally, in the lowest court having jurisdiction to make the award appropriate to them."

15. He was of the opinion that any realistic assessment of the plaintiff's claim would have led to the conclusion that the Circuit Court jurisdiction was more than adequate to it. Commenting on the trial judge's view that a costs differential order would only be made if he thought the claim fraudulent, Hardiman J. said that this was not the trigger for the exercise of the discretionary power (at p. 506):

> "In my view the sole fact which triggers the discretion is that the plaintiff was awarded a sum, in the High Court, which a lower court would have had power to award. This fact alone does not, of course, require the court to make an order under s. 17(5). For example, where the award is very close to the limit of the jurisdiction of the lower court or where there has been some unpredictable development during the trial which has an effect in reduction of the ostensible value of the claim, there may be good reason for exercising the discretion in favour of the plaintiff.
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> Here, however, the issue most relevant to the exercise of the discretion is that any realistic assessment of the plaintiff's case, on the facts as known to him at the time

> the statement of claim was drafted, would have led inexorably to the conclusion that this was a case well within the Circuit Court jurisdiction. But no such assessment took place, apparently because the plaintiff never attempted the essential exercise of quantifying his claim for loss of earnings.
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> The core issue in this case was the quantum of damages. The injuries were 'of a very moderate nature'. No reasonable person could have thought that those injuries in themselves would have required proceedings in the High Court."

16. He held that the subjective honesty of the plaintiff was not a factor relevant to the exercise of the discretion and an order should be made to give effect to the legislative intention in enacting the provision. The relevant considerations were (at p. 508):

> "… What is relevant is this: the plaintiff's claim was never one appropriate to the jurisdiction of the High Court; the claim for future loss of earnings was one which should never have been made. Once made, it should have been withdrawn years before the full hearing at which it was in fact withdrawn; and the case could have been more quickly and more cheaply resolved in the Circuit Court. The fact that this did not happen was due either to total inattention on the part of the plaintiff to the value of his claim or alternatively to the pursuit by him of some perceived tactical advantage in taking his case in the High Court. In either event the mischief of litigation which is more elaborate and more expensive than it should be is precisely the mischief at which s. 17(5) is aimed. Unless the court, by the exercise of its discretion, imposes a price on those who thoughtlessly, or in pursuit of tactical advantage, embark on litigation which is elaborate and expensive when it could have been simpler and cheaper, the intention of the legislature will in by view be frustrated. Litigation which is unduly elaborate and expensive imposes a cost on

> others: most directly on the defendant but on wider groups and on society as a whole in the form of a social cost. The legislative intent in s. 17(5) is, in an appropriate case, to impose the cost of overblown litigation, or part of it at least, on those who make it so."

16. *O'Connor* was considered by this court in the joint appeals in *Moin v Sicika* and *O'Malley v McEvoy* [2018] IECA 240 where Peart J. delivered a judgment with which the other members of the court agreed. The sole issue in those appeals was the application of s. 17(5). Both plaintiffs were awarded damages in the High Court which were well within the Circuit Court jurisdiction but in each case, the trial judge refused to make a costs differential order. Peart J. referred to *O'Connor* and other relevant authority and said (at para. 21. et seq):

> "21. While there is no doubt that the power to make a differential order is a matter for the exercise of the trial judge's discretion, there is a clear legislative objective as identified in the cases to which I have referred. As pointed out by Murray J. in *O'Connor*, the provisions of s. 17 are inserted into the Act of 1981 under a heading 'Limitation on account of plaintiff's costs in certain proceedings'. In my view it is incumbent upon a trial judge in circumstances where an award is significantly within the jurisdiction of a lower court to make a differential order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purpose, and have regard to all the circumstances of the case at hand which are relevant to the exercise of his/her discretion….
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> 22. In my view, neither trial judge in the present cases gave sufficient consideration to the legislative purpose of the section, and the change that it wrought in the customs of the past where, unless the defendant made an application

> to have the proceedings remitted to, say, the Circuit Court, there was no consequence for commencing the proceedings in the High Court needlessly other than that a successful plaintiff would receive only Circuit Court costs and in all probability a certificate for senior counsel. In those circumstances there was no real incentive in ensuring in a reasonable way that proceedings were brought in a jurisdiction appropriate to the real value of the claim. In addition there was the unfairness to the unsuccessful defendant which was identified by Irvine J. in *Savickis* who was faced with paying his own costs on a higher scale than ought to have been required.
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> 23. Neither trial judge gave consideration to the fact that in each case the defendant had specifically warned a year or more prior to the trial that the proceedings were in the wrong jurisdiction and that an application for a costs differential order would be made. In each case the plaintiff ought at that point at least to have engaged with the issue raised by the defendant, and to have considered whether it would be wise and appropriate to bring an application to have the case remitted to the Circuit Court rather than risk such an order being granted…"

17. In the first appeal, the award was €41,305 and in the second, €34,808. Peart J. noted that the awards were so far within the level of the Circuit Court jurisdiction that there was no question of the cases being border-line. He was satisfied that there was a clear error of principle by the trial judges in failing to have proper regard to relevant considerations in the exercise of their discretion and again emphasised that the defendants had specifically drawn the plaintiff's attention to the fact that in their opinion, the cases were in the wrong jurisdiction and an application would be made for a costs differential order. He allowed the appeals, exercising the court's discretion in favour of making the orders sought.

18. In the present appeal, obviously the trial judge was not called upon to exercise her discretion to make a costs differential order having regard to her award but that is no bar to this court making a costs order appropriate to the award made on appeal. There are a number of factors to be considered. The first is that the award here is remarkably close to that in *Moin*, characterised there as so far within the jurisdiction of the Circuit Court as to rule out any suggestion of being borderline. Further, the outcome here was certainly predictable, particularly in circumstances where the court noted in the principal judgment that the injury fell readily within a category specified in the Book of Quantum. The result was entirely in keeping with other recent decisions of this court, referred to in the judgment, and it can hardly have come as a surprise to the plaintiff. No realistic assessment of this case could ever have led to the conclusion that it was other than a Circuit Court case and comfortably so.

19. The plaintiff's accident occurred on 21st March, 2017 and the Personal Injuries Summons was issued about a year and a half later on 8th October, 2018. Even if it could by some stretch be thought that there was sufficient uncertainty about the progress of the plaintiff's injuries to warrant issuing the proceedings in the High Court, which I doubt, that uncertainty was dispelled by the report of the plaintiff's orthopaedic surgeon of 5th April, 2019 referred to in para. 10 of the judgment. By then, the plaintiff had regained normal movement of her back and had only intermittent symptoms with a positive prognosis. No reasonable person could have thought at that stage that there was any prospect of the plaintiff's damages falling within the jurisdiction of the High Court. Yet the plaintiff did nothing to remit the case to the Circuit Court despite the clear warning about costs given by the defendants' solicitors on 7th November, 2018.

20. In her submissions on costs, the plaintiff suggests that this court should take account of the fact that the defendant did not apply to remit the matter. With respect, that is to

entirely reverse the proper onus that lay on the plaintiff to ensure that her claim was brought and continued in the appropriate jurisdiction, a choice made by her in the teeth of the defendants' correspondence. The plaintiff cannot escape the consequences of her choice, freely made, by the contention that the defendants ought to have attempted to override that choice. The submissions also rely on the fact that the plaintiff was found to be an honest and credible witness but as *O'Connor* shows, that is an irrelevant consideration to the exercise of the discretion under the section.

21. Finally, the plaintiff submits that it would be unduly harsh to penalise her in costs on the double in suffering the costs of the appeal and a costs differential order which would leave her with little in a case where she suffered injury through no fault of her own. That may well be true and if so is regrettable, but that is likely to arise in many, if not most, such cases and if it were to be regarded as a relevant consideration, would entirely defeat the purpose of the section as explained in the authorities to which I have referred. That outcome is the consequence of two things; first, the decision to commence and continue the proceedings in the High Court; and second, the decision to refuse the defendants' Calderbank. Indeed, one might reasonably ask, if this is not an appropriate case for the making of a costs differential order, what is?

22. There is of course a wide range of circumstances where the court might properly consider exercising its discretion against making a s. 17(5) order where, for example, something unpredictable or uncertain occurs at trial which might not reasonably have been anticipated. Or there might be cases in which it is reasonable to assume that the general and special damages together will fall into the High Court jurisdiction so as to make it appropriate to commence the proceedings there. An apportionment of liability might have the effect of reducing the damages within the jurisdiction of a lower court where the full value was undoubtedly, or at least arguably, within the higher jurisdiction. An item of

special damage might be disallowed with the same effect. The plaintiff might have commenced proceedings in the High Court on the basis of medical opinion subsequently determined at trial to have been incorrect. These are all circumstances that may fall to be considered by the court in the exercise of the discretion conferred by the section. However, none such arise here as I have explained. Since this court has no evidence or basis for measuring costs, I would therefore propose making an order in the terms of s. 17(5)(a)(ii) so that it will be a matter for the Legal Costs Adjudicator to determine the amount concerned.

23. On a separate issue, I accept the submissions made on behalf of the plaintiff that although the defendants had to amend their notices of appeal, the costs of only one such notice should be allowed. I would further propose that there should be no order as to costs in respect of the motion to take up the DAR which had been agreed by both parties.

24. Accordingly, the orders I propose are as follows:

(i) An order that the costs of the appeal be awarded to the defendants;

(ii) The plaintiff is entitled to her costs of the High Court to be adjudicated on the basis of a decree for €41,000 in the Circuit Court without a certificate for senior counsel.

(iii) The defendants are entitled to an order pursuant to s. 17(5)(a)(ii) awarding them the additional costs adjudicated to have been incurred by them in defending the case in the High Court rather than the Circuit Court.

(iv) When adjudicated, the costs of each party shall be set off against each other and any surplus balance paid to the party entitled thereto.

25. As this ruling is delivered electronically, Whelan and Power JJ have indicated their agreement with it.