



THE COURT OF APPEAL

Record Number: 2023/107
High Court Record Number: 2018/627P
Neutral Citation Number [2024] IECA 5

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

PATRICIA SWEENEY

PLAINTIFF/RESPONDENT

-AND-

ATLANTIC TROY LIMITED

DEFENDANT/APPELLANT

COSTS RULING of Mr. Justice Noonan delivered on the 15th day of January, 2024

1. In the principal judgment herein ([2023] IECA 268), the Court dismissed the appellant's appeal and the respondent's cross-appeal and in doing so, proposed an order for costs in favour of the respondent in respect of the appeal, and no order as to costs on the cross-appeal. The parties were invited to make written submissions in the event that they wished to contend for an alternative order.

2. The appellant has now delivered such submissions which have been replied to. In essence, the appellant contends that the costs of both the appeal and cross-appeal be awarded

to it. It advances this contention for two reasons, and it is relevant to note in that regard that the appeal was heard on the 31st October, 2023.

3. First, the appellant says that on the 26th September, 2023, counsel for the appellant put a formal offer to counsel for the respondent to settle the case on the following terms:

- (1) The appellant would pay the High Court award.
- (2) The appellant would pay the plaintiff's costs of the High Court.
- (3) The appeal and cross-appeal would be withdrawn.

Secondly, the appellant goes on to submit that this verbal offer was documented in a subsequent letter dated the 17th October, 2023 from the appellant's solicitors to the respondent's solicitors headed "*without prejudice save as to costs*".

4. The first point to be made is that the respondent was "*entirely successful*" in the appeal as that phrase is used in s. 169(1) of the Legal Services Regulation Act, 2015. In such circumstances, the successful party is entitled to all of its costs unless the court exercises its discretion to direct otherwise having regard to the various factors enumerated in the section. One such factor is provided for in s. 169(1)(f) which 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*". Under the recast O. 99, r. 3(2) provides in relation to this provision that "*an offer to settle includes any offer in writing made without prejudice save as to costs*".

5. A number of points arise from the appellant's submission. The first is that reliance is placed on an offer made between counsel which is described as a "*formal*" offer although what this is intended to convey is not explained.

6. The appellant's reliance on an offer made by its counsel to the respondent's counsel is, in my view, entirely misplaced. Such offer is clearly protected by implicit "*without prejudice*" privilege and cannot be relied on in support of an application for costs. Public policy encourages parties to litigation to resolve their differences so that they should be free to make offers of settlement without fear that they will be deployed against them at some future date. In general therefore, offers of settlement are subject to the cloak of privilege subject to limited exceptions. Those exceptions include offers of the kind provided for by O. 99, r. 3(2). Alternatively, a party may desire to make an open offer by expressly so stating or where it is clear from the context that the offer is intended to be made on an open and with prejudice basis.

7. Nothing of that nature arises in the context of offers made between lawyers in the normal course of litigation and if reliance is to be placed on any such offer, it must be made in the form of a Calderbank letter in the absence of a specific provision in legislation or the rules for making such an offer.

8. Accordingly I am satisfied that the offer made by counsel on the 26th September, 2023 must be disregarded for the purpose of the proper allocation of the costs of the appeal.

9. The position is however different, as I have explained, with regard to the appellant's solicitor's letter of the 17th October, 2023. This was 14 days prior to the hearing of the appeal and it appears to me likely that most, if not all, of the costs of the appeal would have been incurred by them so that this letter was sent far too late to be of any meaningful effect.

10. However, and more importantly, it is clear from the content of that letter that while the appellant was offering to pay the full amount of the High Court decree together with costs in the High Court, it was not offering to pay the costs of the appeal up to the date of the offer.

That represents a very significant omission in the context of most if not all of the costs of the appeal having been already incurred.

11. Had the respondent accepted this offer, she would have been obliged to discharge her own costs of the appeal which would have resulted in a very significant reduction in the amount of the High Court award. The respondent's position in that regard was clearly vindicated by the judgment of this Court in that she ended up in a substantially better position by proceeding with her appeal than by accepting the offer. Even allowing for the fact that all of the costs of the appeal might not have been incurred by the 17th October, 2023, for the appellant's offer to have had any effect it would necessarily have to include an offer to pay all the costs of the appeal up to that date. It did not, and therefore in my view, was of no effect.

12. Accordingly, I am satisfied that the provisional view of the Court has not been displaced by the matters relied upon by the appellant. The respondent is entitled to the costs of the appeal, same to include the costs of the written submissions of this costs application.

13. As this ruling is delivered electronically, Binchy and Meenan JJ. have authorised me to record their agreement with it.