

APPROVED

[2023] IEHC 526



THE HIGH COURT
CIRCUIT APPEAL

2020 No. 35 CA

BETWEEN

KENNETH PRICE

PLAINTIFF/APPELLANT

AND

ANN DOUGLAS
(AS PERSONAL REPRESENTATIVE OF PATRICIA O'CALLAGHAN)

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 September 2023

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The principal judgment on the appeal was delivered on 17 July 2023: *Price v. Douglas* [2023] IEHC 407. This supplemental judgment addresses the allocation of the legal costs of the appeal proceedings and considers, in particular, the relevance of earlier correspondence offering to compromise the appeal. Section 169(1)(f) of the Legal Services Regulation Act 2015 provides

NO REDACTION REQUIRED

that a court, in allocating legal costs, is required to have regard to any offer of settlement made.

PROCEDURAL HISTORY

2. The procedural history has been set out in detail in the principal judgment and it is not necessary to repeat same here. It is sufficient for present purposes to highlight the following aspect of the procedural history. There has been a change in the identity of the parties to the proceedings since the appeal was lodged in the Central Office of the High Court on 31 January 2020. More specifically, the original respondent to the appeal, Patricia O’Callaghan, died on 26 November 2020. An order was made by the High Court (Meenan J.) on 24 March 2022 substituting Ms. O’Callaghan’s personal representative, Ann Douglas, as defendant/respondent to the proceedings (“*the personal representative*”).
3. Thereafter, there were complications in relation to the service of the proceedings on the personal representative. This is addressed in an earlier judgment delivered by me on 12 May 2023: *Price v. Douglas* [2023] IEHC 247. An order was ultimately made deeming the service, which had previously been effected on the personal representative’s *solicitor*, to be good service on the personal representative herself. (It should be explained that the solicitor has never been on record in the proceedings and thus the default position is that the proceedings should have been served on the personal representative personally). This order was subject to the right of the solicitor to apply to have service set aside. In the event, no such application was made. This order was perfected on 12 June 2023.

4. Relevantly, the very earliest date upon which the appeal proceedings may be regarded as having been properly served on the deceased's personal representative is 27 January 2023. See affidavit of service of 7 February 2023.
5. The provisional view on legal costs proposed in the principal judgment had been that each party should bear its own costs in circumstances where, prior to the hearing of the appeal, the personal representative had indicated, through her solicitor, that she was "*neutral*" on the outcome of the appeal. The personal representative was neither objecting nor consenting to the orders sought.
6. The parties were given liberty to file written legal submissions if they wished to contend for a different form of costs order than that proposed in the principal judgment. The plaintiff/appellant filed written legal submissions on 31 July 2023 seeking an order for costs in his favour.

APPLICATION FOR LEGAL COSTS

7. The plaintiff/appellant has applied to recover the legal costs of the appeal against the deceased's personal representative. This application is predicated on correspondence sent on behalf of the appellant to the personal representative's solicitor during the period 31 January 2022 to 4 March 2022. The gist of this correspondence was to the effect that the appellant would be agreeable to going "*back to back*" on legal costs if the personal representative would consent to the appeal being allowed. If accepted, this offer would have resulted in the setting aside of that part of the Circuit Court order which had directed the appellant to pay the legal costs of the proceedings before that court. (The appeal had been confined to the question of costs). Each party would bear its own costs of the appeal proceedings before the High Court.

8. It is expressly stated in the correspondence that the appellant would rely on the content of same to support an application that the personal representative should pay the legal costs incurred by the appellant from 18 February 2022 onwards.
9. The appellant contends that he is entitled to recover his legal costs on the basis that he has been entirely successful in the appeal, and further had made a reasonable offer to settle the appeal proceedings which was not accepted by the personal representative at the time. Reference is made in the written legal submissions to Section 169(1)(f) of the Legal Services Regulation Act 2015 and to the judgment in *Higgins v. Irish Aviation Authority* [2020] IECA 277 which, in turn, cites the judgment of the Supreme Court in *M.N. v. S.N. (Costs)* [2005] IESC 30, [2005] 4 I.R. 461. The appellant also cites the judgment of the Court of Appeal in *Shannon v. O'Sullivan* [2016] IECA 105, [2016] 1 I.R. 313. The appellant submits that these judgments are authority for the principle that the making of an offer of settlement can assume “*decisive importance*” in determining what order for costs is just in the context of an appeal, and that this principle ought to apply also in cases where one party to the appeal chooses not to participate. This submission is made notwithstanding that it is expressly stated in the Supreme Court’s judgment that same should not be used to fetter the discretion of a judge hearing a circuit appeal (as opposed to an appeal *from* the High Court) on the basis that different principles apply.
10. This case law is not directly relevant to the present appeal in circumstances where, as explained below, the offer of settlement had been made to a solicitor who was not on record in the proceedings and related to a client who was not a party to the proceedings.

DISCUSSION AND DECISION

11. The default position under Section 169 of the Legal Services Regulation Act 2015 (“*LSRA 2015*”) is that a party who has been “*entirely successful*” in proceedings is normally entitled to recover their legal costs against the unsuccessful party. This is subject always to the overriding discretion of the court to make a different order having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties.
12. Here, the consideration which is of most immediate relevance to the allocation of costs is the fact that the personal representative did not oppose the appeal. Rather, the personal representative’s solicitor had indicated, in correspondence sent prior to the hearing, that her side were “*neutral*” on the outcome of the appeal. Thereafter, the personal representative did not participate at the hearing of the appeal. This meant that the appeal could be disposed of shortly. All of this militates against the making of a costs order against the personal representative.
13. The logic of the appellant’s argument seems to be that this concession on the part of the personal representative came too late and that it should, instead, have been made in response to the correspondence sent during the period 31 January 2022 to 4 March 2022.
14. It is correct to say, as the appellant does, that a court, in allocating legal costs, is required to have regard to an offer of settlement. This is expressly provided for under Section 169(1)(f) of the LSRA 2015 which states that the court is 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,

rule 3 of the Rules of the Superior Courts states that an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

15. The objective of these provisions has been summarised as follows by the Court of Appeal in *Fitzpatrick v. Murphy* [2022] IECA 33 (at paragraph 28):

“What is important is that s.169(1)(f) enables the court to take an offer of settlement into account in determining whether to award costs. The making of offers of this kind (either open or, as is enabled by Order 99 R. 3(2), served ‘without prejudice save as to costs’) encourages settlement, reduces costs and saves court time. However, it only achieves these objectives if a failure to accept an offer carries with it some consequence.”

16. As appears from the wording of Section 169(1)(f) of the LSRA 2015, the court should consider the date, terms and circumstances of any offer of settlement.

The striking feature of the offer of settlement in the present case is that it was made at a time when the personal representative was not actually a party to the proceedings. The personal representative was not, in fact, joined to the proceedings until 24 March 2022, i.e. a number of weeks *subsequent* to the correspondence now relied upon by the appellant. Moreover, the proceedings were not properly served on the personal representative until, at the very earliest, January 2023. (Strictly speaking, the formalities in relation to service were not finalised until after the judgment of 12 May 2023). The hearing date for the appeal was not fixed until 12 June 2023.

17. It should also be explained that the personal representative’s solicitor has never been on record in these proceedings. A *different* firm of solicitors had acted for the deceased during her lifetime and that firm was only released from the proceedings on 12 December 2022. The correspondence relied upon by the appellant had thus been sent to a solicitor who was not on record in the proceedings and related to a client who was not a party to the proceedings. The

correspondence also threatens to fix the personal representative with costs incurred *prior* to her joinder to the proceedings. This threat undermined the reasonableness of the offer of settlement.

18. Having regard to the unusual procedural history of the present case, involving as it does the death of the original respondent to the appeal and the delay in the joinder and subsequent service of her personal representative, the earlier correspondence is not determinative. The rationale underlying the requirement that the court must consider any offer of settlement when allocating legal costs is that additional costs may have been incurred unnecessarily where a party pursues a matter to hearing in circumstances where they could have achieved the same or a better result by accepting an earlier offer of settlement. The interests of justice may require that the party who failed to accept the offer of settlement should be held liable for those additional costs, in whole or in part. See, generally, *O'Reilly v. Neville* [2020] IECA 215 (at paragraphs 40 to 53). This may be appropriate even where that party has been "*entirely successful*" in the proceedings.
19. A similar rationale applies where a party fails to accept an offer of settlement in a timely manner, which failure has had the result that additional costs are incurred unnecessarily between the date of the offer and the date of its ultimate acceptance.
20. This rationale presupposes that the person to whom an offer of settlement has been made is a party to, and has capacity to compromise, the proceedings. Here, the personal representative was not, as of the date of the offer of settlement, a party to the proceedings. Accordingly, she lacked capacity at that time to compromise the proceedings. Moreover, a different firm of solicitors had been

on record in the proceedings: this firm was only released on 12 December 2022. Thereafter, once the question of joinder and service had been properly attended to by the appellant, the personal representative's solicitor notified the appellant's solicitor that she did not intend to oppose the appeal. Having regard to this chronology, I have concluded, first, that the personal representative acted reasonably in her conduct of the litigation, and, secondly, that the earlier pre-joinder correspondence is not determinative of the allocation of legal costs. The appropriate outcome, in the interests of justice, is that each party bear its own costs of the appeal.

CONCLUSION AND FORM OF ORDER

21. For the reasons explained, and having regard to the provisions of Sections 168 and 169 of the Legal Services Regulation Act 2015, there will be no order in respect of the costs of the appeal to the High Court. Rather, the appropriate outcome, in the interests of justice, is that each party bear its own costs of the appeal.
22. The formal order of the court, therefore, is to the effect that the appeal will be allowed, and the costs order made by the Circuit Court on 24 January 2020 will accordingly be set aside.

Appearances

Fintan Hurley for the plaintiff instructed by Neil Buckley Solicitor
No appearance on behalf of the defendant

Approved
Gareth S. Mans