THE SUPREME COURT

S:AP:IE:2021:000056

MacMenamin J.
Dunne J.
Baker J.
Woulfe J.
Hogan J.

BETWEEN:

PADRAIG HIGGINS

APPELLANT

AND

THE IRISH AVIATION AUTHORITY

RESPONDENT

Judgment as to Costs of Mr. Justice John MacMenamin dated the 29th day of July, 2022 delivered electronically and with which the other members of the Court agree

1. This is the judgment in relation to costs arising from the substantive appeal judgments delivered by this Court in the defamation proceedings ([2022] IESC 13).

2. The appeal to this Court was against the judgment and order of the Court of Appeal ([2020] IECA 157 in an appeal from the High Court jury award. In the High Court, the jury awarded the plaintiff, Captain Higgins, general damages in the sum of €300,000, and aggravated damages of €130,000. Applying a 10% discount under s.22 of the Defamation Act, 2009 ("the Act"), he was awarded €387,000 in total. The Court of Appeal reduced the award in general damages from €300,000 to €70,000; the award in aggravated damages from €130,000 to €15,000, but did not interfere with the 10% discount awarded by the High Court jury on the grounds that the defendant ("the IAA") had not acted sufficiently quickly in bringing an offer of amends pursuant to s.22 of the Act.

3. Murray J. delivered a closely reasoned judgment for the Court of Appeal on the costs issue ([2020] IECA 277). He concluded, in the circumstances then obtaining, that the justice of the case required that Captain Higgins should retain the costs of the High Court hearing, but that both sides should bear their own costs of the appeal to the Court of Appeal. The judgment referred to ss. 168 and 169 of the Legal Services Regulation Act, 2015, and adverted to the fact that the IAA had sent a "Calderbank" letter to the plaintiff, however that letter had not conformed to the formal requirements laid down for reliance on a costs application. The judgment made particular reference to the judgment of this Court in *MN v. SM (costs)* [2005] 4 I.R. 461, in which an award of €600,000 made by the High Court was reduced to €350,000 on appeal. As in this case, the judgment in *MN* dealt with costs of an appeal where an award is reduced.

4. In *MN*, Geoghegan J. held that if the plaintiff were to be awarded his costs of the appeal despite the fact that he had sustained a substantial reduction in damages, that might be legitimately viewed as an injustice to the defendant. Any reduction in damages which the defendant would have achieved by his well-founded appeal would have been eaten away by his having to pay two sets of costs. Geoghegan J. observed that, had Calderbank letters been written, this could have had a significant bearing on an award of costs, but this had not been done. In the circumstances, he held each party should bear its own costs on an apportionment of balance of hardship, resulting from the circumstances arising.

5. In the Court of Appeal judgment on this case, Murray J. pointed out that Captain Higgins had not made a counter-offer to the offer in the non-conforming "Calderbank letter", a step which might have further protected his position (see, *Calderbank v. Calderbank* [1975] 3 ALL ER 333). As the issue of "offer and counter-offer" has not been argued in this application

for costs, I would reserve making any observation on that important point which would require further consideration. The point does not presently arise.

6. The appeal before this Court is unique and without exact precedent in a number of respects. Frequently, in defamation cases an appeal will focus on the trial judge's rulings in the case, or his charges to the jury. In this appeal, however, there was no such criticism. No party made any criticism of the trial judge's conduct of the case. Additionally, the appeal to this Court which raised complex issues of defamation law, was conducted by the appellant in person. He had been very ably represented by leading counsel in the courts below.

7. Seen together, the judgments of this Court unanimously held that the appeal from the Court of Appeal should be allowed and the judgment of that court set aside. The majority of this Court substituted an award of €175,000 in general damages in place of the Court of Appeal award of €70,000, and replaced the Court of Appeal award of €15,000 in aggravated damages with an award of €50,000. This Court upheld the Court of Appeal on the discount issue, finding that the discount of 10% made by the jury on damages was appropriate and proportionate. As a result, in the event, Captain Higgins was awarded €202,500 in net damages. The award by this Court is therefore very substantially greater than that of the Court of Appeal, although less than the total jury award of €387,000.

8. In the appeal to this Court, Captain Higgins, sought to have the decision of the Court of Appeal set aside, and for this Court either to reinstate the High Court jury award, or failing that, to substitute its own figure in damages. The IAA sought to stand over the award of the Court of Appeal. The IAA accepts that Captain Higgins, as the successful party, should be entitled to whatever reasonable outlay he may have incurred in bringing this appeal as a litigant in person, but submits that the costs order made by the Court of Appeal should not be disturbed as, in essence, this Court did not uphold the High Court jury award in totality, and that to that extent the Court of Appeal judgment had not been entirely displaced.

9. In a defamation claim, there are a myriad of factors to consider when awarding costs. A court may be slow to generalise on what remains a fact-specific and discretionary area where each of the factors outlined in ss. 168 and 169 of the 2015 Act falls to be weighed and balanced. In this appeal, from a costs standpoint, there are a number of noteworthy features. First, put at its simplest, and as a matter of principle, Captain Higgin's position has substantially improved as a result of the award made by this Court, compared to that made by the Court of Appeal. Second, and more specifically, the award made by this Court placed the levels of general and aggravated damages in significantly higher "brackets" than those identified by the Court of Appeal. Third, as mentioned earlier, prior to the Court of Appeal hearing, the IAA's solicitors,

in the letter referred to earlier, proposed that Captain Higgins be permitted to retain €100,001 of the damages awarded in his favour in the High Court, and that he would retain the benefit of the order for costs made in that court. This letter stated that, in the event that Captain Higgins refused the offer or if he neglected to respond, it might be relied on in any costs application. In the Court of Appeal costs judgment, Murray J. referred to the fact that Captain Higgins did not respond to this within the allotted time. But he had also observed that the letter did not comply with the formalities necessary for it to constitute a true Calderbank letter on which the IAA could fully rely in a costs application.

10. The position after the appeal to this Court is, ironically, a slightly altered mirror image of that which obtained after the Court of Appeal hearing. But now there is one important distinction. Subsequent to the grant of leave to appeal to this Court, Captain Higgins' then solicitors wrote a formal Calderbank letter to the IAA's solicitors. They proposed that, in full and final settlement, Captain Higgins would retain the sum of €101,001 by way of damages; that he would retain the benefit of the High Court costs order, to be adjudicated in default of agreement; that the IAA respondent would pay the sum of €30,000 by way of contribution to Captain Higgins' costs in dealing with the appeal to the Court of Appeal; and that the IAA would pay a further sum of €5,000 by way of contribution to Captain Higgins' costs in dealing with the application for leave to the Supreme Court.

11. The IAA does not dispute that this letter did comply with the requirements of a Calderbank letter. There was no formal response to it. The IAA states that they did make a final written offer of settlement to Captain Higgins on the 19th October, 2021, but that the letter was written on a wholly without prejudice basis. As such, the solicitors acting for the IAA correctly take the view that they should not share or rely on that correspondence for the purpose of this costs application.

12. Order 99 of the Rules of the Superior Courts (Costs) 2019 is now to be read subject to the provisions of ss. 168 and 169 contained in Part II of the Legal Services Regulation Act, 2015, ("the Act") which statutory provisions, in turn, closely reflect the decision of the High Court in *Veolia Water UK Plc. v. Fingal County Council (No. 2)* [2006] IEHC 240).

13. In this appeal, ss. 168 and 169 of the 2015 Act require this Court, first, to ask itself whether either party to the proceedings was "entirely successful" in the case, as the two words are used in s.169(1) of the Act. Second, in the circumstances of this case, the Court must inquire whether, having regard to the matters specified in s.169(1)(a) to (g), there is any reason why all of the costs should not be awarded in favour of a successful party. Third, if neither party has been entirely successful, the court must ask itself whether one or more of the parties have been

partially successful, within the meaning of s.168(2)(d) of the Act. If a party has been partially successful, and having regard to the factors outlined in ss. 169(1)(a) to (g), the court must then consider whether some of the costs should be awarded in favour of the party that was "partially successful", and if so, what those costs should be. Section 169(1)(f) of the 2015 Act also allows a court to have regard to the "actions of the parties" when assessing the appropriate order for costs in a case. The "actions of the parties" must include the existence of the Calderbank letter and the absence of response.

14. In the Court of Appeal, Captain Higgins did not succeed in critical parts of his appeal. The quantum of award made by the jury was reduced, and the matter was not remitted to the High Court for a new hearing, as he sought at that stage. However, this Court was asked to substitute its own award in the event that it concluded that the judgment of the Court of Appeal should be set aside.

15. It can now be said that, from a costs standpoint, the position now facing this Court is rather less complex than that facing the Court of Appeal. Applying the statutory criteria, the appellant, Captain Higgins, has been successful in setting aside the order of the Court of Appeal, and obtaining substantially higher awards in different categories of damages. In response, the respondents contend that Captain Higgins has not been entirely successful, in that the general damages are lower than the High Court jury award, and that the award of aggravated damages is also a reduction from that made by the jury in the High Court also.

16. It must be said that it is likely that, at some future point, this Court may be called upon to definitively identify the precise inter-relationship between Order 99 RSC, as amended, and ss. 168 and 169 of the 2015 Act. This judgment does not purport to identify broad principles. It is to be seen as based on the facts of this case.

17. I am not persuaded that in this case, at least, the points raised by the respondent render the appeal to this Court, or the case as a whole, a "partial success" for the purposes of the 2015 Act. I am not convinced that this case is susceptible to such a "segmented" approach to the issue of costs. Here, now that the proceedings are at an end, it is necessary to look at the big picture. The issues of general and aggravated damages were closely interlinked in the evidence. The case in the High Court ran as a single, integral unit, where it is simply not possible to now separate out one issue, for costs purposes, from any other. It would, for example, be entirely artificial to identify the "discount issue" as one individualised factor, separate from general and aggravated damages, thereby justifying a discrete approach to what was a relatively insignificant issue in the overall scheme of things. The discount question occupied a short period of time at hearing and in the appeal. This is not, either, an instance where a litigant

initiated proceedings, ran a series of issues which substantially lengthened the case, and then succeeded in achieving a successful result, or an "event" in the costs sense, on very few, or just one issue. In a different costs application, a court would be justified in taking such matters into account.

18. Viewing these particular proceedings in a holistic way, the only fair conclusion is that the appellant not only succeeded in this appeal from the Court of Appeal, but in this case, for the purposes of ss. 168 and 169, has, in fact, "entirely succeeded" in the litigation. He has obtained awards in damages which are appropriate. The discount first identified by the jury has been upheld. There is a sense that the true issue in this costs application could be reduced to one rhetorical question: had the plaintiff obtained in the High Court what he has now obtained in this Court, would it be said that he had been "entirely successful" for the purposes of s.169(1) of the 2015 Act? The question allows for only one answer.

19. Looking now at the ultimate outcome, it cannot be suggested that the appellant has only been partially successful. The fact that the IAA displaced the jury award in the Court of Appeal must be counter-balanced against the significantly larger award made by this Court in substitution for that of the Court of Appeal and the outcome seen in its totality. In the radically changed circumstances which now exist, it is necessary to vary the Court of Appeal judgment on the costs issue. Were there any doubt in the issue - and there is not – the position with regard to the Calderbank letter would remove it.

20. The justice of the case now requires that the appellant will have the costs of the High Court on the main issues, the legal costs of the Court of Appeal, such legal costs as he incurred in the Supreme Court prior to discharging his solicitor, and his own reasonable outlay in the conduct of this appeal as a litigant in person. The Court will not interfere with the High Court order on the discovery application heard in Cork. It is presumed that the parties will be in a position to reach agreement on any outstanding issue without the need for further litigation. In default of agreement, the costs will have to be the subject of adjudication.