THE COURT OF APPEAL

UNAPPROVED

Neutral Citation: [2023] IECA 282
Record Number: 2022/117
High Court Record Number: 2019/6715P

Noonan J.

Binchy J.

Allen J.

BETWEEN/

GEAROID O'DALY

PLAINTIFF/RESPONDENT

-AND-

BUS EIREANN – IRISH BUS AND DECLAN SHEEHAN

DEFENDANTS/APPELLANTS

COSTS RULING of Mr. Justice Noonan delivered on the 15th day of November, 2023

1. In the principal judgment in these personal injuries proceedings ([2023] IECA 232), this Court reduced the award made in the High Court of €124,795.51 to €65,688.10. The Court invited written submissions on the question of the proper allocation of the costs of the appeal and these have now been delivered.

2. The Court has been informed by the parties of the following matters relevant to the issue of costs. In the run up to the hearing of the appeal on the 12th January, 2023, both

parties made offers to settle, without prejudice save as to costs. On the 12th December, 2022, the plaintiff offered to accept a sum of €90,000 and costs. On the 22nd of December, 2022, the defendants made a counter offer of €75,000 together with the plaintiff's costs up to that date, with the offer remaining open for acceptance until close of business on the 6th January, 2023. The defendant's offer was accordingly made on the first day of the Christmas vacation with the appeal due to be heard on the second day of Hilary term.

3. In quantum appeals in personal injuries cases, the issue of how costs should be allocated frequently arises where there is a reduction in the award made by the High Court. The plaintiff will often argue, as he does here, that where no, or no effective, offer has been made by the defendant, the plaintiff should not be penalised in costs for the fact that the High Court judge incorrectly awarded him or her an excessive amount of damages. This precise issue was considered by the Supreme Court in *MN v SM (Costs)* [2005] IESC 30, [2005] 4 IR 461. This judgment was commented upon in a more recent judgment of this Court delivered by Murray J. in *Higgins v The Irish Aviation Authority* [2020] IECA 277 where he said:

> *"19. In particular s.169(1)(f)* [of the Legal Services Regulation Act, 2015] *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."

4. In further discussing the relevance of *"Calderbank"* offers, Murray J. observed:

"28. ... 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 plaintiff] *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."*

5. While *Higgins* was a claim in defamation, in *Meehan v Shawcove Limited* [2022] IECA 247, this Court applied *Higgins* in a personal injuries appeal where an offer was made by the defendant, albeit very late, which in any event fell short of the amount awarded on appeal and was thus ineffective. By the same token, the plaintiff had made no counter-offer to protect his own costs in circumstances where the award of the High Court was substantially reduced on appeal. The outcome in *Meehan* was no order as to costs in relation to the appeal.

6. The present case is slightly different to the extent that while the defendants' offer was made very late in the day, it did in fact exceed the amount ultimately awarded by this Court. Clearly the plaintiff's own offer was ineffective having regard to the outcome. It obviously remains to be seen in a case such as the present how effective an offer can be that is made so late in the day when most, if not all, the costs of the appeal have actually been incurred. That however seems to me to be a matter for the Legal Costs Adjudicator rather than for this Court.

7. In all the circumstances therefore, the appropriate order appears to me to be an order that the defendants shall have such costs of the appeal as accrued subsequent to the 22nd December, 2022, same to be adjudicated in the normal way in default of agreement.

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