THE COURT OF APPEAL

Peart J.
Hogan J.
Baker J.

Neutral Citation Number: [2018] IECA 240

Record No.: 2017/498

BETWEEN:

JIBRAN MOIN

PLAINTIFF/RESPONDENT

- AND -

VERONICA SICIKA

DEFENDANT/APPELLANT

THE COURT OF APPEAL

Record No: 2017/429

BETWEEN:

JOHN O'MALLEY

PLAINTIFF/RESPONDENT

- AND -

DAVID McEVOY

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 24TH DAY OF JULY 2018

1. Each of the plaintiff/respondents received an award of damages for personal injuries in the High Court that was well within the jurisdiction of the Circuit Court, and was on a full liability basis with no deduction for contributory negligence. At the conclusion of each trial the trial judge awarded costs of the proceedings to the plaintiff on the Circuit Court scale, and gave a certificate for Senior Counsel.

2. It is against those orders for costs that the defendant/appellant in each case appeals. As the issue that arises for determination on these appeals is identical, it is convenient that the appeals were heard together, and that a single judgment be delivered.

3. The issue arises from the provisions of s. 17(5) of the Courts Act, 1981 (as amended by substitution by s. 14 of the Courts Act, 1991) and which provides:

> "(5)(a) 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:
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> > (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
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> > (ii) an amount equal to the difference between:
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> > > (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.
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> (b) A person who has been awarded costs under paragraph (a) of this subsection may, without prejudice to his right to recover the costs from the person against whom they were awarded, set off the whole or part thereof against any costs in the proceedings concerned awarded to the latter person against the first-mentioned person."

4. The meaning of these provisions is clear. It gives two options to a trial judge who has awarded damages to a plaintiff which are within the jurisdiction of a court lower than that in which the case has been commenced and determined.

5. Under option (a) the trial judge may simply measure a sum which he/she considers to be the difference between the costs actually incurred and those that would have been incurred had the proceedings been commenced and determined in the appropriate court, and direct that the plaintiff pay that sum to the defendant. It is a matter for the trial judge to decide if he/she is in a position to measure that difference in any particular case. Clearly option (a) has an attractive simplicity if it possible to fairly make such a measurement, and it avoids the need for, and addition costs involved in, a taxation of the costs by the Taxing Master which is required under option (b). But as this Court made clear in *Landers v. Dixon* [2015] IECA 155, [2015] 1 I.R. 707, 714 "the judge must have some evidential or other objectively defensible basis for the manner in which costs are measured." As Hogan J. indicated, there may nonetheless be simple and straightforward cases where a judge "will have personal knowledge of the sums likely to be allowed in straightforward cases of the type presently before him or her." Neither of the two cases presently before this Court would appear to fall into this category.

6. Under option (b) the trial judge does not make any measurement of the difference above. Instead that task is given to the Taxing Master who is tasked with taxing costs on two bases. Firstly he/she taxes the costs actually incurred in the High Court proceedings in which the award was made, and also taxes the costs on a hypothetical basis that the proceedings had been commenced in the Circuit Court, in order to determine on a taxed basis the difference between the two amounts to which the defendant will be entitled to payment.

7. Whether the exercise is carried out under option (a) or option (b), a set-off is provided for in s. 17(5)(b) as set out above.

8. The appellants submit that in each case the respective trial judges fell into error in not making a costs order under s. 17(5) of the Act of 1981 despite each being requested to do so after the awards of damages were made. In the first proceedings (*Moin v. Sicika*) the plaintiff had been a passenger in a car and sustained soft tissue injuries when there was a collision. The total damages awarded including special damages were in the sum of €41,305. The jurisdiction of the Circuit Court in respect of a personal injuries action at the relevant date was €60,000. Counsel for the defendant requested that the trial judge would exercise her discretion under s. 17(5) of the Act of 1981 by making an order under what I have referred to as option (b) - and what has been referred to on this appeal as a differential order. When making that request counsel drew attention to the fact that some eleven months previously by letter dated the 21st November 2016 the defendant's solicitor had written to the plaintiff's solicitor in which, apart from enclosing notice for particulars, stated the following:

> "In addition to the above, you might also note that we intend to seek a costs differential order at the conclusion of these proceedings on the basis of having to defend this case in the incorrect High Court jurisdiction."

9. The trial judge inquired if she was required to make an order under s. 17(5) in the circumstances, and she was correctly assured that the section provided a discretion to make such an order where the award of damages was within the jurisdiction of the Circuit Court. Having heard brief submissions from counsel for the parties, the trial judge stated that the plaintiff had come across as a decent and honest person, and that he was genuine. She went on:

> "The other significant factor in this case, I think, is that whether you like it or not, especially with a back injury, his solicitor would have been negligent, in my view, in starting in the circuit court. Why? How on earth can a solicitor take the risk of saying to him 'definitely it's Circuit Court' with a back injury? And he had a 'good' back injury if you can call it that. No back, no injury is a good one. But who on earth, what sort of a solicitor would be telling him not to, not to go to the High Court?"

10. The trial judge awarded costs on the Circuit Court scale and gave a certificate for Senior Counsel. The appellant submits that the trial judge has erred in principle.

11. In the second proceedings, the trial judge made a total damages award, including special damages, in a sum of €34,808. In this case also the defendant's solicitor had written to the plaintiff's solicitor some fifteen months previously on the 8th April 2016 indicating that the case had been commenced in the wrong jurisdiction and warning that in the event that damages were awarded below the level of the Circuit Court jurisdiction they would be seeking a differential costs order under s. 17(5) of the Act of 1981.

12. At the conclusion of the case in the High Court counsel for the defendant asked for an order under s. 17(5) and urged that the trial judge should not give a certificate for Senior Counsel. Again, the trial judge was assured that he had a discretion to exercise in relation to s. 17(5) of the Act of 1981. The trial judge expressed his conclusions briefly as follows:

> "On the basis that the case was one from the outset that could merit a High Court award on one view of the case it would be very difficult to expect a solicitor and junior counsel not to opt for the High Court jurisdiction and on that basis I would award Circuit Court costs but acknowledging the Court as discretion in relation to the matter. I think given that it would have had at inception as a potential High Court costs case I think it would be appropriate to have had the services of Senior Counsel experienced in High Court matters. Notwithstanding that perhaps Senior Counsel might have applied the brakes more strongly in the case but I will certify for Senior Counsel."

13. These are both cases in which the plaintiff did not just narrowly fail to achieve an award of damages within the €60,000 jurisdiction of the Circuit Court, but failed by a considerable margin. It is submitted that while the trial judge has discretion as to whether or not to make a differential costs order as provided for in s. 17(5) of the Act of 1981, it is a discretion that must be exercised in the light of all the circumstances of the case, and in the light of the clear legislative intention to limit the amount of costs to be awarded in a case commenced in a higher court than was appropriate given the amount of the damages awarded.

14. It is submitted by the appellants that on an application made by a defendant for a differential costs order under s. 17(5) of the Act of 1981 the onus is on the plaintiff to establish a basis for obtaining a costs order to which under the section he/she is not otherwise entitled. In other words, it is submitted that where an award of damages in the High Court falls below the level of the Circuit Court jurisdiction, the default position is that a differential order should be made absent some identified reason which justifies not making such an order.

15. Counsel for each appellant has emphasised the clear intention of the Oireachtas that there should be costs consequences for a plaintiff who commences and pursues a personal injury action in a higher court than the value of the injuries sustained justifies.

16. Section 17(5) of the Act of 1981 has been the subject of judicial consideration in both the Supreme Court and in this Court. The parties have drawn attention to *O'Connor v. Bus Atha Cliath/Dublin Bus* [2003] 4 I.R. 459 and *Sivickis v. The Governor of Castlerea Prison and others* [2016] 3 I.R. 292.

17. In each case the Court emphasised the legislative purpose of s. 17(5) of the Act of 1981. In *O'Connor*, the trial judge had held inter alia that absent some finding of fraud in the plaintiff's claim, which he considered was not the case. Murray J. (as he then was) stated that a finding of dishonesty or fraud was not a requirement for the operation of the section, though each may be a factor in exercising the court's discretion. He went on to state ([2003] 4 I.R. 459, 493-494):

> "The Courts Act 1991, which amended, which amended the Act of 1981 by substituting the new s. 17, is an Act which increased the jurisdiction of the Circuit Court from €15,000 to €30,000 and the amending section is a provision that is expressed to be a "limitation on account of plaintiff's costs in certain proceedings".
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> The relevant provisions are part of a statutory scheme whereby claims may be brought in different courts according to the level of their jurisdiction to give the relief sought by a plaintiff. It is clear that among the policy reasons for such provisions is that they facilitate the efficient administration of justice, and are of convenience to all the parties in bringing cases, where appropriate, before courts of local and limited jurisdiction. In particular, in the present context, it will usually mean that lower costs are incurred by both the plaintiff and the defendant than if the proceedings had been brought to the higher court.
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> 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 lower court than 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. Un 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."

18. However, in *O'Connor*, Murray J. went on to state:

> "I would not wish to imply that simply because a trial judge takes a less serious view of a plaintiff's injuries and the award falls somewhat below the jurisdiction of the trial court that that in itself would be a ground for making an order pursuant to s. 17(5), even if it were to be argued that in some very broad or loose sense the plaintiff must be deemed to have overstated or exaggerated his or her complaints. It is in the nature of things that an injured party may tend to take a more serious view of his or her injuries than a trial judge and the defendants tend in the opposite direction. There must also be a margin of appreciation allowed as to the level of damages which might be awarded in each particular case. That is why such matters come to be tried by an independent judge. In this case the situation is wholly different, aggravated as it s by the specific findings of the trial judge to which I have referred."

19. In his judgment in *O'Connor*, Hardiman J. described the section as being "a disincentive to the taking of an action in a higher court than is necessary". He elaborated on this theme ([2003] 4 I.R. 459,505) when he stated:

> " … 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. In this case, it is now beyond argument that the plaintiff's claim could have been dealt with quite adequately in the Circuit Court. This did not occur … .
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> In my view the sole fact which triggers the discretion is that the plaintiff was awarded a sum, in the High Court, that 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."

20. This Court has expressed similar sentiments in *Savickis*. In that case it was s. 17(3) and not (5) that was being considered. Those proceedings were defamation proceedings and not a personal injuries action . Nevertheless the words of Irvine J. in her judgment are apposite to any discussion of the sections legislative purpose. She stated that s. 17 was not to be seen as a penalty. She went on to state:

> "22. It cannot be disputed that the higher the court selected by a plaintiff for the pursuit of their claim, the greater the costs are likely to be. In the High Court parties are routinely represented by senior and junior counsel and the solicitor's instruction fee will be greater than it would be if the same claim were to be pursued in the Circuit Court … .
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> 23. Why should a defendant have to face the expense of defending an action in the High Court when the relief to which the plaintiff was entitled fell comfortably within the jurisdictional limit of a lower court? Worse still, without the type of statutory disincentive provided for in s. 17 of the 1981 Act, a defendant who successfully defended such a claim might end up with an order for costs which they are unable to execute against the plaintiff and remain obliged to discharge the costs of having to meet the claim in the High Court.
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> 24. The provisions of s. 17 of the 1981 Act were clearly intended to ensure that the legal costs recoverable by a successful plaintiff would be proportionate to any award to which they were lawfully entitled. It is designed to encourage plaintiffs to conduct their litigation in a fair and cost efficient manner the section also provides certainty and predictability. It allows those advising a plaintiff to reflect and advise upon the costs consequences of failing to achieve an award within the high court jurisdiction. It also allows a defendant consider in a more reasoned way the costs risk to be borne by them should they decide to defend rather than settle the claim."

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. This Court has been referred to the judgment of McCracken J. in *Mangan v. Independent Newspapers (Ireland) Limited* [2003] 1 I.R. 448 where at p. 448 he stated:

> "It is quite clear from the phrase "if in all the circumstances he thinks it appropriate to do so" that the section confers a discretion on the trial judge. In her judgment in the present case the learned trial judge referred to a number of matters which she clearly took into account in the exercise of her discretion. While she did not comment on the matters individually and merely found that, in all the circumstances of the case, it was not appropriate to make an order under the subsection, nevertheless she clearly was aware of the matters which it was relevant to take into account. There therefore does not appear to be any error by her in the exercise of her discretion."

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.

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. Instead, nothing was done. The issue appears to have been ignored thereafter by the plaintiff. The trial judge in each case was obliged to have regard to those warning letters.

24. It should also be borne in mind that as provided for in s. 20 of the Courts of Justice Act, 1936 (as substituted by s. 16 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013) where a case remitted or transferred to the Circuit Court from the High Court, the Circuit Court has jurisdiction to award damages in excess of the relevant monetary limitation of the Circuit Court. That is a safeguard to any plaintiff who considers that perhaps the question of damages is borderline as far as jurisdiction is concerned. The plaintiff loses nothing by acting on a precautionary basis, rather than take the risk warned of in the defendant's letter, or even where no such warning letter is written by the defendant. It is the plaintiff who has carriage of the proceedings. It is not up to the defendant to make the move in relation to remitting to a lower court. The onus is on the plaintiff to ensure that the proceedings are conducted in the lowest court that has jurisdiction to make an award in an amount that it is reasonable to expect.

25. I have set out the relevant extract from the transcript in each of the cases under appeal. In the first case the trial judge fell into error when she stated that any solicitor who advised a back injury plaintiff to proceed in the Circuit Court would be negligent. I respectfully cannot agree, given particularly that the jurisdiction of the Circuit Court is €60,000. However, I would add that at the point at which proceedings are commenced, it will often be the case that the extent of the injury and the plaintiff's prognosis are not clearly ascertained, and it may be reasonable where the position is not clear to commence in the High Court. But does not remain the position in most cases.

26. The ongoing progress of a plaintiff and medical reports that are received from time to time until the case is listed for hearing will usually clarify the level of general damages that the injuries sustained by the plaintiff can reasonably be expected to attract at trial. Where the level of damages that can be expected are professionally considered to be within the level of the Circuit Court jurisdiction, whatever the plaintiff himself/herself may think should be awarded, serious consideration must be given to an application to remit to the lower court, or else face the risk of a differential costs order. That is the clear legislative intention of the Oireachtas.

27. In the second case, there was no proper consideration of the relevant circumstances when the trial judge was considering whether or not to exercise his discretion in favour of a differential costs order.

28. In each case, there has been a clear error in principle by the respective trial judges by not having had proper regard to relevant considerations. In those circumstances, this Court may appropriately exercise its own discretion. I consider that the circumstances of these cases clearly indicate that an order should be made in each case under s. 17(5) of the Act of 1981. The awards of damages were so far within the level of the Circuit Court jurisdiction that there was no question of these cases being border-line. The defendants had specifically drawn attention to their view that the claims were within the Circuit Court jurisdiction, and that an application would be made under s. 17(5) of the Act of 1981. These cases were clearly appropriate to be commenced in the Circuit Court, or at least for an application to have been brought in a timely fashion to have the cases remitted to that Court before they were heard in the High Court. That was the purpose of the amending legislation.

Conclusions

29. In these circumstances I have no doubt that it is appropriate that these appeals should be allowed, and that a differential costs order should now be made by this Court in the terms of s. 17(5)(a) of the Act of 1981. Specifically, I would therefore make an order in each case that the plaintiff do pay to the defendant the amount equal to the difference between (a) the amount of the costs as between party and party incurred in the proceedings in the High Court by the defendant as taxed by a Taxing Master of the High Court and (b) the amount of the costs as between party and party incurred in the proceedings by the defendant as taxed by a Taxing Master of the High Court if the proceedings had been heard and determined in the Circuit Court, such taxations of costs to take place in default of any agreement between the parties.

30. I would also in each case, as provided for in s. 17(5)(b) of the Act of 1981, set off those said costs to which the defendant is entitled to be paid by the plaintiff, against the plaintiff's costs in each case which were awarded on the Circuit Court scale with certificate for senior counsel.

31. I am conscious that the orders I am suggesting will involve the additional cost of having the various costs taxed and ascertained in order to arrive at the differential figure to be paid to the defendant or to be set off against those to be paid to the plaintiff, but, as I have explained already, this Court is not in a position to measure the sums concerned. The Act provides for taxation to occur in such circumstances. I would urge that the parties give serious consideration to agreeing the figures for costs rather than incur the costs of taxation. But ultimately that is a matter for the parties themselves.