**THE COURT OF APPEAL**

Neutral Citation Number [2022] IECA 247

**Record Number: 2021/185**

**High Court Record Number: 2013/12442P**

**Noonan J.**
**Faherty J.**
**Binchy J.**

**BETWEEN/**

**KEVIN MEEHAN**

**PLAINTIFF/RESPONDENT**

**-AND-**

**SHAWCOVE LIMITED, ELLICKSON ENGINEERING LIMITED, KILELL LIMITED, OTIS LIMITED, OTIS ELEVATOR IRELAND LIMITED, AND DALDOSS ELEVETRONIC SPA**

**DEFENDANTS/APPELLANTS**

**COSTS RULING of Mr. Justice Noonan delivered on the 3rd day of November, 2022**

1. The principal judgment herein was delivered on the 8th September, 2022 ([2022] IECA 208). The defendants' appeal was confined to the quantum of the award of general damages obtained by the plaintiff in the High Court. That court gave judgment on the 23rd June, 2021 in the amount of €508,649, inclusive of general and special damages. The general damages component amounted to €375,000 which this court reduced to €250,000, resulting in a net award to the plaintiff in the sum of €383,649.

2. There is no issue arising in relation to the costs in the High Court, the plaintiff's award both in that court and this court on appeal having far exceeded any offers made prior to the trial.

3. The appeal first came on for hearing before this court on the 24th March, 2022 when the matter was adjourned with an order for the costs thrown away in favour of the plaintiff. The appeal again came on for hearing on the adjourned date of the 15th July, 2022. On the previous day, the 14th July, 2022, the defendants made an offer of €351,501 which was rejected by the plaintiff. No counter offer was made by the plaintiff from the date of

filing of the Notice of Appeal. In accordance with para. 88 of the principal judgment, both parties have now delivered written submissions in which each claims the costs of the appeal.

4. The defendants claim to have "won" the appeal in that they claim to have succeeded in the only issue arising, namely that the damages awarded by the High Court were excessive. They therefore claim to have prevailed on the "event" and to have been "entirely successful" as that expression is used in s. 169 of the Legal Services Regulation Act, 2015. The plaintiff on the other hand says that he has been entirely successful in that by proceeding with the appeal, he has obtained an award in excess of any prior offer made by the defendants. He too claims therefore to have prevailed on the "event" and been "entirely successful".

5. A not dissimilar, albeit more complex, situation arose in *Higgins v The Irish Aviation Authority* [2020] IECA 277, a costs judgment of Murray J. following the principal judgment delivered by Binchy J. ([2020] IECA 157). In that case, a jury had awarded damages in the amount of €387,000 which were reduced on appeal to this court to €76,500. Shortly prior to the hearing of the appeal, the defendant made an offer which, when the costs of the appeal were factored in, was less than the amount ultimately awarded to the plaintiff in this Court. In considering the relevant statutory provisions, Murray J. said:

> "19. In particular s.169(1)(f) 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."

6. Murray J. then turned to an analysis of the judgment of the Supreme Court in *M.N. v S.M. (Costs)* [2005] IESC 30, [2005] 4 IR 461. He endorsed the views of Geoghegan J., speaking for the Supreme Court, who pointed to the fact that it was open to both the defendant and the plaintiff to make offers of settlement of an appeal which could be considered by the court in arriving at a fair outcome on the allocation of costs.

7. Murray J. then considered the argument of the plaintiff that, as here, he should be entitled to his costs because he had succeeded in obtaining an award that was greater than the defendant's offer to settle the appeal:

> "27. However, I do not think it would be proper that the respondent be enabled to rely upon that offer as a new cap which if he exceeded it, should result in his obtaining his costs. This would discourage the making of such offers as it would mean that a defendant who did not attempt to obtain a resolution of the matter prior to the hearing of the appeal might be in a better position in resisting an application for the costs of the appeal than the defendant who made such attempt. If the respondent had wished to secure his costs of the appeal, it was incumbent upon him to make an offer of his own. Had he done this, and had it not been accepted, if he retained what

he offered to take or obtained more than that on appeal his case for costs would be very strong."

8. Murray J.'s conclusion in the circumstances was that there should be no order as to the costs of the appeal. He went on to indicate his view that for an offer by a defendant to be effective, it would have to incorporate the costs incurred up to the date of the offer. With regard to the plaintiff's failure to make an offer of his own, Murray J. said (at para. 29):

> "He 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 costs burden of the appeal."

9. In my judgment, the same considerations apply with equal force in the present appeal. While the plaintiff ultimately succeeded in obtaining an award that exceeded all prior offers made by the defendants, as in *Higgins*, the plaintiff made no counter offer which would have afforded him protection in relation to the costs of the appeal.

10. In the event, I would therefore direct that there should be no order as to the costs of this appeal. That is of course without prejudice to the costs order already made herein in favour of the plaintiff.

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