

THE HIGH COURT

2002 3591 & 3592 P

BETWEEN

PATRICK GERAGHTY AND GABRIEL GILMORE

PLAINTIFFS

AND

COUNTY COUNCIL OF THE COUNTY OF GALWAY,

DOOLIN CONSTRUCTION LIMITED AND

BY ORDER, CHARLOTTE SHERIDAN AND KEVIN WOODS

CARRYING ON BUSINESS UNDER THE STYLE AND TITLE OF SHERIDAN WOODS ARCHITECTS AND URBAN PLANNERS

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy in respect of Costs date the 30th November, 2011.

1. Background

The Court has already delivered judgment on the 9th November, 2010, on the substantive issue in these cases which were heard together. Two matters were left over.

On the further application regarding satisfactory evidence in relation to the loss of rent of Mr. Geraghty and of the assessment of direct and indirect costs associated with remedial and reinstatement works on Mr. Gilmore's property, given that he was not in a position to give evidence at the trial. In relation to this matter the court gave a judgment on the 13th October, 2011.

Consideration of costs was adjourned.

2. Costs

On the 24th November, 2011, the parties applied to the court in relation to costs.

A letter "without prejudice save as to costs" was sent by the third named defendant to the solicitors on behalf of Mr. Gilmore and Mr. Geraghty on the 25th March, 2010. Such a letter was considered by the English Courts in *Calderbank v. Calderbank* [1076] 2 All E.R. 333.

The letter provided as follows:-

"The defendants, in a final effort to resolve the outstanding disputes with the plaintiffs, had instructed us to make the following offer to settle the above entitled proceedings on the following terms:

- (1) The defendant pay to the plaintiffs the sum of €300,000 inclusive of VAT;
- (2) This offer takes into account any liability for remedial building work to both premises carried out as one project in the sum of €151,528, inclusive of VAT at the applicable rate being the figure advised by the defendants expert;
- (3) This offer takes into account all reasonably foreseeable and recoverable consequential losses claimed by Gabriel Gilmore including the costs of restoration of the liquor licence in respect of his public house at the relevant locus in the sum of €75,000; and
- (4) This offer takes into account all reasonable foreseeable and recoverable consequential losses claimed by Patrick Geraghty including loss of rental income in the sum of €73,472.

We have been advised by our client's experts that the figure for remedial building works after November 19th 2009 rate, inclusive of VAT, is €151,528 – (reference was made to an attached "Scott Schedule").

Despite requests the plaintiffs have failed to put forward a credible vouched and quantified claim for consequential losses. Despite such shortcomings in the claims as articulated and again on the high point of exposure to the claims as articulated, the defendants have volunteered the sum €75,000 to Gabriel Gilmore and €73,472 to Patrick Geraghty."

The letter continued as follows:

"This offer will remain open for acceptance for a period of fourteen days from the date hereof. If your clients give notice of acceptance within the fourteen day period, they will be entitled to the costs of the proceedings (accessed on the standard basis if not agreed) to the date of the service of such notice.

If your clients do not accept the offer within fourteen days of the date hereof, such offer will lapse."

3. Outcome

In the event neither client accepted the offer within the said period or at all.

4. Mr. Gilmore's Claim

The court awarded Mr. Gilmore the sum of €97,417, in respect of liability for remedial building work, which was more than the volunteered sum of €75,000.

5. Mr. Geraghty's Claim

The court awarded the sum of €26,000 in respect of consequential losses to Mr. Geraghty which was less than the sum of €73,472, which was volunteered.

(The claim of Mr. Gilmore was also in respect of consequential losses).

Rules of the Superior Courts (Costs) 2008

Statutory Instrument No. 12 of 2008 provides for certain amendments to O. 99 of the Rules of the Superior Courts.

It is the second amendment that is of direct relevance to the present application that provides that the court will have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of the party's (or those of the parties') claim when awarding costs.

The purpose of such a Calderbank letter or offer, as it is commonly known, is to promote the settlement because of the party's consciousness of a potential costs penalty if a reasonable offer is refused. The Calderbank letter also brings to the court's attention any unreasonable behaviour of parties and recognises the offerers willingness to reach a settlement. The rule does not require any necessary formality nor, indeed, separate Calderbank letters to be sent to the parties.

Notwithstanding that, it is clear that there has to be a distinction made between the claims made by each claimant in respect of the claims made by them.

Case Law

In *Denis Moynihan v. Markland Holdings Limited and Cantier Construction Limited* [2004] I.E.H.C. 406, judgment of Laffoy J. of the 20th December, 2004, an offer of €300,000 in full and final settlement without admission of liability was made. The question of costs was left to be decided by the court. The offer was refused and the Court ultimately awarded the plaintiff approximately 80% of the offer.

The defendants argued that as the plaintiff did not reach the offer contained in the letter, he should not be awarded all of his costs, particularly in respect of the 2nd to 12th days of the hearing. It was also submitted by the first defendant that the plaintiff should not be allowed the reserved costs of the interim interlocutory injunctions which he had sought and obtained.

The court held, in awarding the costs of the proceedings to the plaintiff, including all reserved costs save in respect of the costs of the interlocutory injunction and the costs of the earlier adjourned hearings in February and July of that year, that the "Calderbank letter" could have no bearing on the issue of costs as it came too late in the proceedings and it left the liability for costs wholly at large. The court also held that the Calderbank letter lacked certainty as to the totality of the outcome flowing from either acceptance or non acceptance which was a prerequisite to penalising the offeree for non acceptance.

The court further held that, having regard to the efforts made by the first defendant to address the problems before the interim injunction was sought. The plaintiff should not be awarded the costs of the interim injunction. It also found that the costs of the day of the final adjournment in July were to be costs thrown away by the plaintiff.

The court in that case referred to the genesis of the so called "Calderbank offer" is explained in Foskett: *The Law and Practice of Compromise* (5th Ed. 2002) at para 26-05:

"This is an offer expressed to be "without prejudice except (or save) as to costs". In other words, it is intended to have all the features of a pure "without prejudice" offer but enables reference to it to be made on the issue of costs if it is not accepted. An offer of settlement of this nature first gained more rights by its recognition following a family division case in *Calderbank v. Calderbank* [1976] Fam. Law Case."

The court notes that its use is more extensive than that confined to family law and indeed has been commended and encouraged.

The acceptance of actions because of the parties, consciousness of a potential costs penalty if a reasonable offer is refused.

Application to Present Case

In the present case the letter of the 26th March, 2010 headed "Without Prejudice Save as to Costs" was made over ten weeks after the commencement of the hearing of the action on the 15th June, 2010, when the defendants admitted liability. Accordingly, the function of the court was to adjudicate on the -----

The offers is made in respect of both Mr. Gilmore's and Mr. Geraghty's claim in recognition of the damage to the adjoining premises being jointly repaired as stated in term (2) above.

It was accepted by the defendants that the award to Mr. Gilmore's claim exceeded that offered that was referred to in the letter of the 25th March, 2010. Accordingly Mr. Gilmore is entitled to his costs to be taxed in default of agreement.

The court awarded Mr. Geraghty €26,000 for consequential losses. The letter of the 25th March, 2010, had offered €73,472. Accordingly the court cannot award Mr. Geraghty his costs in respect of his claim for consequential losses.