THE COURT OF APPEAL

Irvine J.
Hogan J.
Mahon J.

BETWEEN

[2015 No. 167]

ANTHONY SHANNON

PLAINTIFF/RESPONDENT

AND

DEBBIE O'SULLIVAN

DEFENDANT/APPLICANT

[2015 No. 166]

RITA SHANNON

PLAINTIFF/RESPONDENT

AND

DEBBIE O'SULLIVAN

DEFENDANT/APPLICANT

JUDGMENT of the Court delivered by Ms. Justice Irvine on 13th day of April 2016

1. This is the ruling of the Court in relation to the costs of the defendant's appeals against the Orders of the High Court made on 25th March 2015 in these two personal injuries actions.

2. There is no dispute as to the costs of the proceedings in the High Court. In this regard it is agreed that the plaintiffs are entitled to their costs, the same to be taxed in default of agreement.

3. Having succeeded on appeal, the defendant submits that as per Ord. 99 r. 1(4) of the Rules of the Superior Courts, costs should follow the event. That being so, it is contended that the defendant's costs of both appeals should be set off against the orders for costs made in favour of the plaintiffs in the High Court.

4. In addition, Mr. Fox S.C., on the defendant's behalf relies upon two letters of offer ("*Calderbank letters*") written by his solicitor on 16th April 2015 in support of his application. These, he submits, may be taken into account by the court under the provisions of Ord. 99 r. 1A (b) when considering the costs of the appeal.

5. Having regard to the submission made by Mr. Fox, it is relevant to note that in the High Court Mrs. O'Sullivan was awarded a total sum of €131,463 by way of damages and Mr. O'Sullivan a sum of €91,463. These sums were reduced respectively on appeal to €66,463 and €41,463.

6. In the *Calderbank* letters the defendant's solicitor, in what was stated to be "an attempt to avoid further unnecessary litigation", offered a sum of €72,001 and "the costs of the High Court hearing" to settle Mrs. O'Sullivan's case and a sum of €42,401 and High Court costs to settle that of Mr. O'Sullivan. The offers were to remain open until 29th April 2015. The letters also advised that if the offers were not accepted and the plaintiffs were to receive lesser sums from the Court of Appeal than those offered that the letters would be brought to the attention of the court for the purposes of seeking to affix the plaintiffs with all of the costs subsequent to 29th April 2015, and that is precisely what happened.

7. Insofar as the sums awarded by the court were in both cases marginally below the sums offered by the defendant in the letter of 16th April 2015, Mr. Fox argued that the justice of the case could only be met by the court awarding the defendant the costs of both appeals.

8. Counsel for the defendant, Mr. Treacy S.C., emphasises the discretion retained by the court in respect of the costs of the appeals and submits that in the particularly circumstances of this case that no order as to costs is the fair and just order for the court to make. He argues that the letters of offer should be disregarded by the court. The court is not bound to consider these letters in the same manner as the High Court is bound to deal with tenders made prior to the hearing of the action. He also asks the court to take into account the following matters, namely :-

> (a) The *Calderbank* offers represented 55% of the award made to Rita Shannon and 40% of that made to Anthony Shannon.
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> (b) The *Calderbank* offers were less than the amounts which the defendant was required to pay to the plaintiffs as a condition of the stay granted by the trial judge, i.e. €80,000 in the case of Rita Shannon and €55,000 in the case of Anthony Shannon. These amounts were accordingly considered unappealable by the High Court judge.
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> (c) That the awards of the Court of Appeal were a multiple of the original tenders made by the defendants, *i.e.*, €24,600 in Mrs. Shannon's case and €14,600 in Mr. Shannon's case.

(d) That the *Calderbank* offers lacked certainly as they did not specify that the defendant would discharge the plaintiffs' costs incurred between the date of judgment and the date upon which the offer was too close i*.e* 29th April 2015. Certainty was a prerequisite to penalising the plaintiff for non acceptance of such an offer and there was no certainty in the offers made by reason of the lacunae identifie.

(e) That the plaintiffs were somewhat wrong footed by the judgments of this court in *Payne v. Nugent* [2015] IECA 268 and *Nolan v. Wirenski* [2016] IECA 56, decisions which had led to a recalibration of damages in personal injuries actions. The plaintiffs' solicitor could not have known in April 2015 that the court would so recalibrate damages.

(f) The Court of Appeal had endorsed the views expressed by the trial judge as to the good character of both plaintiffs.

Decision

9. The starting point for the court's consideration must be Ord. 99 of the Rules of the Superior Courts which provide that costs shall, unless otherwise ordered, follow the event. Hence, without ever engaging with *Calderbank* letters the costs should, having regard to the fact and extent of the defendant's success on each appeal, be awarded to the defendant.

10. Plaintiffs who receive excessive awards from a court of first instance are, of course, placed in a very difficult position. They obtain a court order for payment of a sum that is likely to be set aside on appeal with the effect that they will usually have to pay the costs of that appeal, unless they can point to some special circumstances which would render that approach unjust. In many instances a defendant, confident of the likely outcome of the appeal, may not afford such a plaintiff the opportunity of settling for a lesser sum than that awarded by the High Court and thus denying them the opportunity of avoiding the costs of the appeal. However, that is not what happened in the present case. The defendants by making the offers which they did on 16th April 2015 afforded the plaintiffs an opportunity to avoid the consequences of a costs order being visited upon them should they recover less than that the sums awarded by the High Court.

11. While the court acknowledges the skilful submission made by Mr. Treacy in somewhat difficult circumstances, it is nonetheless satisfied that the justice of the case would not favour the approach which he proposes.

12. The court rejects Mr. Treacy's submission that there is a *lacuna* in the *Calderbank* letters such that they should be disregarded. It is implicit from the letters which state that in the event of the offers not being accepted that the defendant would seek all of the costs from 29th April 2015 *i.e.*, a date three weeks post the making of the offer, that the defendant would pay the plaintiffs reasonable costs incurred over this period. For the avoidance of doubt it might, of course, have been preferable if the defendants had adopted the counsel of perfection advised by Mr. Treacy and had stated in explicit terms that it was prepared to meet these costs. However, it is perfectly clear that whatever costs were incurred by the plaintiffs between the date of the judgment and the date of the *Calderbank* letters (which additional costs would, in all probability, have been very modest), any residual doubt as to whether the defendant would pay any such costs was not the reason why the offers were rejected. Mr. Treacy has explained to the court how difficult it would have been for his solicitors to advise his clients to accept offers reflecting 55% and 47% respectively of the awards made by the High Court judge and less than the sums which she directed be paid as a term and condition of the stay. Had those costs been the deciding factor, a telephone call from the plaintiffs' solicitors would doubtless have produced the required clarification. Having regard to the circumstances of the present case and the nature of the offer made in the *Calderbank* letters, the court is satisfied that the plaintiffs' reliance upon the decision of Laffoy J. in *Monaghan v. Markland Holdings Limited* [2004] IEHC 46 is misplaced.

13. The court also views as irrelevant Mr. Treacy's reliance upon the fact that the awards made by the Court of Appeal were multiples of the tenders made by the defendant in the High Court. Those tenders are irrelevant insofar as they were made prior to the hearing of any evidence. Having received the *Calderbank* offers what the plaintiffs advisors were bound to consider was whether, on the evidence before the High Court, the plaintiffs were at risk of their having their awards reduced below the level of the offers made.

14. Insofar as Mr. Treacy relies upon the recent decisions of this court in *Payne v. Nugent* and *Nolan v. Wirenski*, those decisions did not re-calibrate damages downwards as appears to be implicit in Mr. Treacy's submission. Those decisions do no more than clarify the principles to be applied and the proper approach to be taken by a trial judge when making an award for damages for personal injuries so as to ensure that the award made is just, equitable and proportionate. The court agrees with Mr. Fox that the offers made by the defendant, which were remarkably close to the awards made by this court, would suggest that these cases are simply an example of a High Court judge having made an unfortunate but substantial error as to the appropriate level of the damages to be made to a plaintiff in respect of their injuries.

15. Likewise, the fact that the awards of this court exceeded the sums which the defendants were required to pay over to the plaintiff as a term and condition of the stay on the High Court order is again immaterial to the court's discretion as to how it should deal with the costs of the appeals. It is up to the plaintiffs' advisors following the conclusion of proceedings to themselves form an independent view as to whether the award made by the High Court judge is likely to be upheld on appeal having regard to the evidence. They are not entitled to rely upon the trial judge's assessment of the value of the case or the extent to which the trial judge believes their award made be unappeallable to guide them as to whether or not they should accept an offer made in *Calderbank l*etters.

16. Finally, the fact that this court supported the trial judge's findings as to the credibility and integrity of the plaintiffs is irrelevant to the court's considerations. The court simply cannot ignore the fact that by their actions in failing to accept the offers made the plaintiffs left the defendant with no option but to incur the cost of pursuing these appeals. Those offers were more than adequate to compensate them in respect of their injuries.

17. Harsh and all as it is on the plaintiffs it would not be just or fair to the defendants who made such offers, which had they been accepted would have protected the plaintiffs from the risk of incurring costs on this appeal, to be affixed with paying their own costs in respect of two appeals which they considered were unwarranted having regard to the offers which they made.

18. For these reasons the court will award the costs of the appeals to the defendant and direct that such costs be set off as against the award of costs made in the plaintiffs' favour in the High Court.