Neutral Citation Number: [2004] IEHC 406

THE HIGH COURT

2003 No. 6781 P

BETWEEN

DENIS MURNAGHAN

PLAINTIFF

AND
MARKLAND HOLDINGS LIMITED
AND
CANTIER CONSTRUCTION LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 20th day of December, 2004.

1. I have considered the submissions made by the parties on the issue of costs on 9th December, 2004.

2. On that occasion the court was apprised of the fact that at 11 a.m. on 19th October, 2004, the date on which the hearing commenced, the first defendant's solicitors furnished what was described as a "Calderbank letter" by counsel for the first defendant, to the solicitors for the plaintiff. This letter was headed "Without Prejudice Save as to Costs". Although it was furnished by the solicitors for the first defendant it was expressed to be written on behalf of both defendants. In the letter the plaintiff was offered the sum of €300,000 in full and final settlement of all the claims in these proceedings, without admission of liability. It was stipulated that the offer was available for acceptance by the plaintiff up to 2 p.m. on that day. It was further stipulated that, in the event that the plaintiff was not awarded a sum in excess of €300,000 at the trial of the action, the contents of the letter would be brought to the attention of the court and the court would be asked to make an appropriate order for costs in favour of the defendants in the light of the offer of €300,000.

3. On the question of costs, the letter stated as follows:

> "Obviously, a question arises as to the costs of these proceedings. Because of the way in which the plaintiff has prosecuted the proceedings, the defendants are not prepared to accept liability for any costs to date. It is the view of the defendants that the issue of the proceedings is premature, that the injunction sought by the plaintiff was unnecessary, and the hearing due to commence in July, 2004 was adjourned because of the plaintiff's own fault, and that throughout the proceedings the nature of the claim made by the plaintiffs has regularly shifted. However, it is in no way a precondition of acceptance of the offer of €300,000 that Mr. Murnaghan pay his own costs. Instead, the defendants are perfectly prepared to bear such costs as the Court may award in favour of the plaintiffs.
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> If, therefore, the offer of €300,000 is accepted the only issue to be determined by the Court is the question of costs. The plaintiffs are (sic) at liberty to argue that all of his costs in these proceedings should be awarded against one or other of the defendants, or both of them. By the same token, the defendants are free to argue that the costs of the proceedings (or certain of them) should be awarded against the plaintiffs or each of them."

4. As it happened, the court was taken up with other business on the morning of 19th October, 2004 and the hearing, which was scheduled to commence at 11 a.m., did not commence until 2 p.m. It was submitted by the defendants that, in the exercise of the discretion conferred on it under O. 99, r. 1 of the Rules of the Superior Courts, 1986, the court should have regard to the fact that the award to the plaintiff was only approximately 80% of the offer of €300,000.The genesis of the so called "Calderbank offer" is explained in the following passage from Foskett on *The Law and Practice of Compromise*, 5th Edition (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 widespread recognition following a Family Division case [*Calderbank v. Calderbank* [1976] Fam. Law 93], although it had been used fairly widely in other Divisions and its use had been commended and encouraged."

5. Since the emergence of the "Calderbank offer" procedure new Rules of Court have been introduced in England and Wales. Having pointed out that the "Calderbank offer" is the blueprint for an element of the new rules, Foskett outlines the approach adopted by the courts before the introduction of the new rules in the following passage at para. 26 – 06:

> "Shortly before the [Civil Procedure Rules] came into force the Court of Appeal had the opportunity to review the practice applicable to the assessment of a Calderbank offer in relation to the question of costs. For an offer to have been effective in relation to the costs of the litigation the essential test is that propounded by St. Thomas Bingham M.R., as he then was, in *Roache v. News Group Newspapers Ltd.*, where he said this:
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> > 'The judge must look closely at the facts of the particular case before him and ask: Who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?'"

6. The court was not referred to any jurisprudence in this jurisdiction on the issue of the assessment of a "Calderbank offer" in relation to the question of costs, although the existence of the procedure has been recognised (for example, by the Supreme Court in *O'Neill v. Ryanair (No. 3)* [1992] 1 I.R. 166).

7. It was not suggested on the part of the defendants that the fact that the plaintiff did not beat the offer contained in the letter dated 19th October, 2004 should deprive him of all costs. It was submitted that it should have a bearing on the award of costs of the second to twelfth days of the hearing.

8. I have come to the conclusion that the letter of 19th October, 2004 can have no bearing on the issue of costs for two reasons. First, it came too late in the proceedings. While it came literally at the eleventh hour, metaphorically it came way beyond "the eleventh hour". Secondly, and more importantly, it is impossible to apply the test postulated in the Roache case. The offer left liability for costs, including the costs which had accrued to the date of the offer, wholly at large. That being the case, in my view, it is impossible to say who, as a matter of substance and reality, has won, because it is impossible to form a judgment as to what would have happened in relation to costs if the evidence had not unfolded as it did at the hearing. In my view, the offer lacked certainty as

to the totality of the outcome flowing from either acceptance or non-acceptance, which must be a pre-requisite to penalising the offeree for non-acceptance

9. It was also submitted on behalf of the defendants that it would be unreasonable to award the entire costs of the proceedings against the defendants because, as regards special damages, the award represented less than a quarter of the amount claimed by the plaintiff by way of special damages and the plaintiff did not pursue a claim for defamation included in the proceedings or his claim for aggravated damages.

10. Counsel for the second defendant relied on the decision of the English Court of Appeal in *Re Elgindata Ltd. (No. 2)* [1993] 1 All E.R. 232 as authority for the proposition that, where a successful party has raised issues or made allegations improperly or unreasonably, the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs. It is clear from the judgment of Nourse L.J. at p. 237 that that principle was expressly provided for in the Rules of Court then in force in England and Wales. Accordingly, I do not find this authority particularly helpful.

11. As appears from my judgment on the substantive issues in this case delivered on 1st December, 2004, the second defendant relied on the judgment of the Supreme Court in *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232. There is a separate reported judgment on the issue of the costs of the appeal delivered by Denham J. in that matter: at [2003] 1 I.R. 263. While I was not specifically referred to that judgment in connection with the issue of costs in this case, I have considered it. In her judgment, Denham J. referred to a then recent English case, *Molloy v. Shell U.K. Ltd*. [2002] P.I.Q.R. 56, a case in which the claim for loss of earnings was found to be "grossly and deliberately exaggerated". In the Court of Appeal it had been found that the claimant had been guilty of "nothing short of a cynical and dishonest abuse of the court's process". Denham J. quoted the following passage from the judgment of Laws L.J.:

> "For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs."

12. Denham J. went on to issue the following warning:

> "It is important that the minority of plaintiffs who are prepared to engage in abuses such as those described be made aware that, in doing so, they risk losing all their costs, may be made to pay the other side's costs and raise the possibility of more drastic action."

13. In my judgment delivered on 1st December, 2004 I found that the plaintiff had made decisions which were manifestly unreasonable and which could not be rationalised or justified by reliance on professional advice and that, on the basis of those decisions, he had advanced claims which were transparently unreasonable. The decisions in question were the decision to sell No. 5 Pembroke Place at the time and in the manner set out in the judgment when it was intended to present the purchase price as representing the then value of the premises in these proceedings and the decision to rent alternative premises over a period of fifteen months at a rent which was significantly in excess of the rent which No. 5 would have achieved at the same time. In relation to the plaintiff's decision to pursue a claim for damages based on the assumption that the only way in which the damage to No. 5 which is attributable to the wrongdoing of the defendants could be remedied would be by demolishing No. 5 and reconstructing it, in my view, the plaintiff pursued a claim which was not sustainable in fact. However, I do not consider pursuit of that claim to constitute an abuse of process or to be within the class of conduct in respect of which Denham J. issued the foregoing warning.

14. Indeed, I think it is appropriate to comment that the first defendant defended the plaintiff's claim initially on the basis that it had no liability whatsoever for damage to No. 5 and ultimately, making a small concession on the issue of liability, on the basis that only works of minor repair and decoration were necessary to render No. 5 structurally sound. The defence advanced by that defendant ultimately was that the damage attributable to it could be made good at a cost which was less than a quarter of the amount which the court awarded by way of special damages for the diminution of the value of the property in its damaged condition. As I pointed out in my judgment, the concession was not made until the ninth day of the hearing.

15. It was submitted on behalf of the first defendant that the plaintiff should not be allowed the reserved costs of the applications for interim and interlocutory injunctions. In my judgment delivered on 1st December, 2004 I found that the plaintiff could have, but did not, try to resolve the problems which he encountered without resorting to the remedy of an interim injunction. In support of its submission that the plaintiff should not be allowed the costs of the application for the interim injunction, it was pointed out that the plaintiff had not written a preliminary letter threatening injunctive proceedings before making the application. The plaintiff's response to that argument was that the plaintiff's engineer, Mr. Molloy, sought access to No. 70 Leeson Close on 4th June, 2003, but was refused access. On the evidence, I am of the view that at that stage "the die was cast". Having regard to the efforts made by the architect for the first defendant to make contact to address the problem before the interim injunction was sought, I consider that the plaintiff should not be awarded the reserved costs of the application for the interim injunction. However, I am of the view that the plaintiff is entitled to the reserved costs of the application for the interlocutory injunction, because as I have found, the construction works on No. 70 did cause damage to No. 5. The plaintiff was entitled to pursue the remedy he sought on notice to the defendants. Therefore, the plaintiff will be awarded the reserved costs of the application for the interlocutory injunction.

16. The trial was scheduled for hearing on three occasions prior to 19th October 2004. As I understand it, it did not proceed on the first scheduled date, in February 2004, because of difficulties in relation to discovery on the part of both the plaintiff and the first named defendant. There will be no order for costs arising from the adjournment of that scheduling. The hearing scheduled for May 2004 was adjourned to enable the second defendant to defend the assessment of damages pursuant to the order of this court (Carroll J.) dated 15th December 2003. The plaintiff and the first defendant are entitled to the costs thrown away arising from this adjournment against the second defendant. The hearing scheduled for 13th July 2004 was adjourned because the defendants only became aware on the previous day that the plaintiff had sold No. 5 and was due to complete the sale on the following day, 14th July 2004, in consequence of which the quantification of the plaintiff's loss, if he established liability, would be on a basis different to the basis pleaded. As the transcript of the application heard on that day discloses, I ordered that the matter be adjourned and I found that the plaintiff was the author of his own misfortune in this regard. Each of the defendants is entitled to the costs of the day arising from that adjournment against the plaintiff. For the avoidance of doubt the costs of the day are the "costs thrown away" as explained in Flynn and Halpin on *Taxation of Costs* at p. 137.

17. As I set out in my judgment delivered on 1st December 2004, the plaintiff procured the preparation of a Bill of Quantities by David J. Turner & Associates, Chartered Quantity Surveyors, dealing with the estimated cost of reconstructing No. 5. The Bill of Quantities was not proved nor was it admitted in evidence by agreement of the parties. Its only significance was that it was one of the components of a basis of claim which I found, as a matter of law, the plaintiff was not entitled to pursue. The plaintiff is not entitled

to costs of the preparation of the Bill of Quantities and each of the defendants is entitled to any costs they incurred in examining the Bill of Quantities.

18. Subject to the specific provisions I have made in relation to -

(a) the reserved costs of the application for the interim injunction,

(b) the costs of the abortive hearings in February, May and July, and

(c) the costs in connection with the Bill of Quantities,

the plaintiff is entitled to the costs of the proceedings, including all reserved costs.

19. I think if probable that the eventual outcome of this matter will be that the costs for which the defendants are liable will appear to be disproportionate to the quantum of damages which the plaintiff was awarded. The Rules of Court provide a mechanism for avoiding this type of outcome: lodging money in court.