Summary - Court of Appeal Judgement of Mr Justice Michael Peart - Moin v. Sicika and O'Malley v. McEvoy 24/07/2018

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On the 27th July the Court of Appeal issued a very important judgment highlighting the Costs implications of bringing proceedings in the High Court where the proceedings should ordinarily have been brought in the Circuit Court. The Judgment acts as a stern warning to any Plaintiff who issues High Court proceedings where they should have issued proceedings in the Circuit Court. In particular the Judgment addresses the circumstances where the making of costs differential orders against such Plaintiffs can and should be made by trial judges.

The appeal arises from two similar High Court cases [Moin v. Sicika and O'Malley v. McEvoy] where the trial judge awarded damages to the plaintiffs, which did not just narrowly fail to achieve an award of damages within the jurisdiction of the High Court i.e. an award applicable to a lower court than which the cases had been commenced and determined, and at the conclusion of each trial the trial judge made an order for costs of the proceedings to the plaintiff on the Circuit Court scale, and gave a certificate for Senior Counsel. The appeals were based upon the provisions of s. 17(5) of the Courts Act, 1981 (as amended by substitution by s. 14 of the Courts Act, 1991) which provides as follows:

"(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:

(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
(ii) an amount equal to the difference between:

(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.

(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."

The Court of Appeal noted that under s. 17(5) of the Courts Act, 1981 as amended the trial judge had two options:

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 but as the Court of Appeal went on to explain this is unlikely to occur.

Under option (b) the trial judge opts 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.

In considering the facts of the cases and in particular the judicial discretion exercised by the trial judge, the Court of Appeal noted that the solicitor acting for the Defendant had written to the plaintiff's solicitor in which stated that the case had been commenced in the wrong jurisdiction and in particular 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."

This Court of Appeal judgment sets out an informative summary of the legislative purpose of Section 17 and references the judgments in O'Connor v. Dublin Bus [2003] and Sivikis v. The Governor of Castlerea Prison and others [2016].

With regard to the present appeals the Court of Appeal noted as follows:

"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."

The Court of Appeal found that it was appropriate that these appeals should be allowed, and that differential costs order should now be made by the Court of Appeal in the terms of s. 17(5)(a) of the Act of 1981. The Court specifically made 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. 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.

In conclusion the Court acknowledged the time and expense associated with taxation and expressed a hope that the parties would agree figures to conclude matters.