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FOIL UPDATE December 2020

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Update – FOIL Ireland Learning Event – Costs, tenders, *Calderbank* and other *detritus*

This event was presented by **Pearse Sreenan**.

Relevant legislation referred to:

Personal Injuries Assessment Board Act 2003 (as amended) (PIAB) - PIAB awards relate only to personal injury

Civil Liability and Courts Act 2004 (as amended) (CLA)

- S8 CLA relates to personal injury actions only

Legal Services Act 2015

The Rules of the Superior Courts (Costs) Order 2019 (SI 584/2019)

IN BRIEF

This learning event looked in detail at how the courts in Ireland deal with various forms of offer, when considering what costs to allow .

Save where a PIAB award is involved, there is considerable judicial discretion in the award of costs and the presentation detailed many of the factors that will be taken into account.

The courts in Ireland recognise the importance of costs issues at the conclusion of cases but also the complexity of the rules relating to them.

S8 CLA allows the courts to penalise plaintiffs who do not issue their initiating letter in time (now one month). The speaker viewed this as a redundant piece of legislation in that there are now so many 'get out of gaol' provisions that the rule has become ineffectual. He was unaware of any case in which the plaintiff had suffered a penalty in costs under this provision.

Under S51 A (3) PIAB (amendment) Act 2007, no award of costs may be made in favour of the plaintiff where the amount of damages awarded or accepted does not exceed the amount of the assessment. There is no discretion. Injuries Board awards are therefore highly significant. If a defendant makes an Injury Board award, they should take no further action: just stand on it. A tender or lodgement will mean that S51 A (3) will not apply.

O'Byrne letters only apply if there is more than one defendant. The relevant statutory provision is now s169(3) of the 2015 Act. Where a plaintiff sues more than one defendant, there must be a reasonable basis for doing so where a defendant escapes liability (several cases reaffirm this principle). Also, the case of *White v Bar Council* stated that a plaintiff will not be protected where s/he brings separate causes of action against different defendants but in relation to the same subject matter.

S17 CLA deals with formal offers. The speaker again considered this to be a fairly ineffectual provision. Both parties are supposed to indicate (within 14 days after service of notice of trial) what they are prepared to offer and the court is required to take those offers into consideration. In practice, neither side has any regard for this requirement, which is honoured in the breach, as the court cannot penalise the failure to make offers. Although the court can order a party to make an offer, the legislation does not stipulate which party should go first. The provision adds nothing to the other available options.

Turning to the Legal Services Act 2015 and the Rules of the Superior Courts (Costs) Order 2019 (SI 584/2019), S168 of the Act provides the court with the power to order a party at any time during the proceedings to pay the costs (or a portion of the costs) of another party, where that party is successful or partly successful. This may include costs incurred before proceedings were commenced but costs of some issues may be disallowed (e.g. discovery).

Under S169, a party who is entirely successful in civil proceedings is entitled to its costs from the unsuccessful party, unless the court otherwise orders, having regard to the particular nature and circumstances of the case *and* the conduct of the proceedings by the parties. A series of factors is listed in relation to conduct, including any offers made and a party's response to an invitation by the court to engage in some form of alternative dispute resolution, including settlement discussions.

The case of *Veolia* (which was the background to the Act) was then considered, in which the judge made an issues-based order, disallowing the claimant's costs of an issue on which it was unsuccessful and ordering the claimant to pay the defendant's costs of that issue and the court time for which the trial had been elongated. *Veolia* had prior to 2015 in general been applied *only* to complex cases but in *Chubb* it was confirmed that the 2015 Act applies to all cases.

Where under s168, a party is partly successful, the court will take the same factors into account as under S169.

Thus litigation 'misconduct' may be punished by awarding costs on a solicitor and own client basis. Alternatively, the court may allow the successful party only a proportion of its costs.

Plaintiffs making scattered allegations of negligence of which only a limited number are successful may also recover only a proportion of their costs, to reflect the time spent on the unsuccessful allegations. The court is, however, likely to have regard to the fact that the plaintiff was successful overall and will look carefully to determine what additional costs were unnecessarily incurred.

Another of the factors to be taken into account under S.169, is whether a party exaggerated his/her claim (to be distinguished from dismissal of the claim under S26 CLA 2004). Where exaggeration is found, the court may again award only a proportion of the plaintiff's costs.

Calderbank letters must also be taken into account by the courts under S169 and Order 99 of the RSC (inserted by the 2019 SI), provided they are clear and deal with costs.

As far as tenders and lodgements are concerned, the MIBI 2009 Agreement has its own built-in tender procedures. Otherwise, defendants are entitled to make or increase a lodgement following the delivery of replies to particulars by the plaintiff, or the delivery of unsolicited particulars by the plaintiff. However, the court retains a discretion as to the costs to be awarded when a party fails to beat a lodgement. This discretion will usually be exercised where the lodgement is within 5% of the final award but there are a number of factors to be taken into account. Interest is to be ignored. However, where a plaintiff barely beats a lodgement, the reasonableness of the decision not to accept the offer may be a material factor when looking at costs.

Lodgements may be made after settlement negotiations or after a mediation has taken place, although it is advisable in advance of a mediation to warn that a lodgement will be made if settlement is not achieved.

The costs of interlocutory hearings will rarely be reserved now, but in most cases will be dealt with at the hearing.

There are rare cases where a costs order has been made against a non-party litigation funder.

Appeals against costs orders are also rare, given that they involve judicial discretion.

Plaintiffs are required to monitor the value of the claim to ensure that it is dealt with in the lowest court possible.

The award of interest remains discretionary.

Payments should be made on account of costs, as interest is payable on those costs.