A costly failure to consider a reasonable offer of settlement

A recent High Court decision has highlighted the importance for parties to give due consideration to compromising their proceedings without the need for a hearing. It also provides a warning to Plaintiffs who choose to ignore reasonable offers of settlement made during the course of proceedings.

In O’Reilly & Anor v. Neville & Ors [2018] IEHC 228, the claim was one for breach of contract arising from defects in a property purchased by the Plaintiffs from the Defendant builders in 2005. Due to the defects, the Plaintiffs moved into rented accommodation and sought rescission of the building agreement and compensation for inconvenience, distress and upset.

In his Judgment, Mr Justice Binchy held in favour of the Plaintiffs in making an order for specific performance of the building agreement. He ordered the Defendant builders to carry out remedial works to the property, to the satisfaction of an independent architect. He also awarded the Plaintiffs the cost of rental accommodation for the period during which they had vacated the property. No general damages were awarded. Binchy J. held over his determination on costs until a later date. The trial of this action had been before the High Court for a period of 11 days and as such the costs incurred were significant.

The general principle when it comes to costs is that a party which has been substantially successful in its litigation is entitled to recover its costs. In legal terms, this is known as “costs follow the event” and this is provided for in the Rules of the Superior Courts. Order 99 Rule 1(4) provides that, “the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.”
Here, the Plaintiffs argued that they were entitled to an order for costs in their favour because they had succeeded in their action. However, in the course of the proceedings and before the case came to trial, the Defendants had made six offers to settle the case, seeking to avoid trial costs. The Defendants argued that as a result, the Plaintiffs ought not to be entitled to the full costs of the proceedings. Pursuant to Order 99, Rule 1 of the Rules of the Superior Courts, when making its determination on costs, the court can have regard to offers of settlement made in writing. The Defendants further submitted that the judgment in favour of the Plaintiffs was no more than they would have achieved had they accepted one of the offers to remediate the property made by the Defendants.

**Key findings**

Mr Justice Binchy in determining the issue of costs took into account the offers made. He ruled that the Defendants were entitled to all costs incurred from the date of the Defendants’ final offer made on 18 February 2016. This final offer had been made in open correspondence some nine months before trial. The letter had set out a comprehensive mechanism for identification of defects and suggested the involvement of an independent expert, as well measures to remediate. The Judge noted that the Plaintiffs’ own expert engineer had thought that the Defendants’ final offer ought to have been accepted by the Plaintiffs, as it had adequately addressed whatever reasonable concerns they might have had about the Defendants’ involvement in the suggested remedial works.

The Plaintiffs were only entitled to their legal costs up to 18 February 2016, in addition to the costs of the alternative accommodation. Therefore, the Plaintiffs did not recover any of the costs of the 11 day trial, which would have been very significant. Mr Justice Binchy decided that the Defendants’ final offer ought to have been accepted by the Plaintiffs. Importantly, he acknowledged that throughout the litigation, the Defendants had shown a willingness to engage with the Plaintiffs to resolve matters. In contrast, the Plaintiffs had failed properly to engage and by that failure had caused the parties to incur almost all of the costs which followed, including the costs of 11 days at hearing, rather than the relatively short hearing the trial ought to have required.

The Judge emphasised that parties are to be encouraged to put forward proposals intended to lead to an early resolution of litigation, which results in significant savings on legal costs and court time.
Conclusion

This is a welcome decision for defendant parties and indeed their insurers. The costs of preparing for trial and running a trial are very often the most expensive part of defending a claim and the intention behind settlement offers is to avoid incurring these costs. Plaintiffs and their legal advisors all too often fail to give adequate consideration to fair and reasonable settlement offers. It is hoped that this decision will help to focus the minds of litigators, particularly those who act for plaintiffs and ensure that they advise their clients on the risk of failing properly to engage with defendants in efforts to settle and of declining reasonable offers made by defendant parties. This decision might also provide encouragement to defendant parties perhaps to consider the making of an open offer of settlement where the exigencies of the situation suggest that it would be appropriate.

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