



Costs Differential Orders

Moin v Sicika and O'Malley v McEvoy [2018] IECA 240

October 2018

In a move to clarify the position in relation to differential costs orders the Court of Appeal has allowed an appeal and determined that proceedings were brought incorrectly in the High Court. The Court of Appeal in [Moin v Sicika and O'Malley v McEvoy \[2018\] IECA 240](#) held that:

- a) a differential costs order should have to be made by the trial judge (the difference between costs in the High Court and the Circuit Court costs if the case was brought in the Circuit Court);
- b) the costs should be set off between the parties; and
- c) the awards of damages were so far within the level of the Circuit Court jurisdiction that these cases could not be considered border-line.

What are differential costs orders?

Section 17 (5) of the Courts Act, 1981 (as amended by section 14 of the Courts Act 1991) allows a trial judge who has awarded damages which are within a lower monetary jurisdiction to measure a sum which the judge considers to be the difference between the costs actually incurred and those which would have been incurred had proceedings been brought in the correct jurisdiction. This section was broadly ignored by judges and practitioners and operated against defendants because of a discretion allowed to judges.

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Implications of the Decision

It will be interesting to see the effect which this judgment will have. It appears it will assist in reducing defendant legal costs.

The key changes that will apply following this decision are as follows:

- a) Where warning letters are issued to plaintiff's solicitors in advance of any court hearing challenging the monetary jurisdiction the plaintiff will have to seriously consider the implications of failing to initiate proceedings in the correct jurisdiction.
- b) A plaintiff in the past faced no consequence for issuing proceedings in a higher court other than a successful plaintiff may only receive Circuit Court costs in place of High Court costs and still obtain a certificate for senior counsel. A plaintiff in such a case faced no major penalty and this did not encourage them to fully assess the real value of the claim at the outset and throughout.
- c) An unsuccessful defendant was required to pay their own defence costs on a higher scale than would ordinarily be necessary. The judgment has sought to put an end to this and may have a positive outcome for the insurance industry in Ireland in reducing legal costs.
- d) A certificate for senior counsel was not disallowed by the Court of Appeal.¹ The defendants in this case went back to the court on this issue but the certificates remained. It would seem that where a plaintiff has commenced proceedings in the incorrect jurisdiction and failed to heed warnings which have issued from the defendant solicitor, the certificate for senior counsel should be disallowed. It is likely that the certificate for senior counsel will be challenged in all future cases.
- e) Plaintiffs may in the future engage further experts in an effort to review the plaintiff's symptoms and meet the various thresholds. This would lead to an increase in costs at an early stage in the case.
- f) Plaintiffs may refuse to engage in settlement talks at an earlier stage in the proceedings. This will not suit insurers who aim to settle cases as early in the process as possible. Court lists may lengthen.
- g) Any costs which cannot be measured by the court will involve having bills assessed independently to arrive at the figure to be paid to the defendant or to be set off against monies owed to the plaintiff. This will usually involve additional time and expense and the Court of Appeal urged the parties to try and agree the figures between them if possible to save on the cost and time involved with taxation.

¹ The judgment still allowed for senior counsel fees to be paid in this instance.

Conclusion

The courts were reluctant to make such differential orders in the past given the discretion provided by the section. Following this recent decision in the Court of Appeal, a trial judge must now make the differential order unless the trial judge has sufficient reasons for not doing so. Where damages are awarded well below the courts financial thresholds then the judge will have little or no option but to apply this case. This will result in a different approach to initiation of proceedings, engagement of expert and willingness to settle.

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