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Judgment: approved by the Court for handing down | *Delivered:* 13/09/2002
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

CHARLES O'NEILL and GOLF LINK SYSTEMS LIMITED
Plaintiffs

and

J DONAL MURPHY T/A MURPHY KERR & CO SOLICITORS (A FIRM)
Defendant

WEATHERUP J

[1] The plaintiffs obtained judgment against the defendant for £16,500 and interest and the defendant resists the plaintiffs' application for the costs of the action to be awarded against the defendant.

[2] The plaintiffs claimed damages for loss and damage alleged to have been sustained by reason of the negligence and breach of contract of the defendant in the provision of legal services for the plaintiffs in relation to litigation undertaken by the plaintiffs. The loss and damage claimed by the plaintiffs related to the alleged impact of the defendant's actions on the plaintiffs' business involving the provision of computer services to golf clubs. The original statement of claim of 24 March 1999 claimed £482,000 special damage for loss of sales and maintenance for a number of years and in addition there was a claim for general damages for loss of goodwill and business reputation. The claim was amended on several occasions and at its height the claim for special damage amounted to £1.7million. The final claim for special damage was some £650,000 and included the sum of £60,000 for the loss of keypad sales and the sum of £114,000 for the loss of finance introduced into the business.

[3] At the hearing the defendant did not dispute that there had been delay in dealing with the plaintiffs' original litigation but contended that the plaintiffs were entitled to nominal damages only. Accordingly the issues at

the hearing were whether the actions of the defendant had caused loss and damage to the plaintiffs, and if so to determine the nature and extent of such loss and damage. By preliminary ruling the claim for loss of keypad sales and the claim for loss of finance introduced into the business were dismissed. A further claim for diminution of the amount of damages that it was alleged might have been recovered in the original action was rejected in the final judgment. That left the plaintiffs' claims for loss of sales and maintenance in Ireland and in Great Britain which formed a substantial part of the issue between the parties and took the greater part of the hearing time. The claim in relation to Great Britain was rejected in the final judgment and the damages recovered by the plaintiffs related to loss of business in Ireland.

[4] On 30 April 2001 the defendant sent a "Calderbank letter" to the plaintiffs offering to settle the plaintiffs' claims for £25,000, including interest, together with the plaintiffs' costs.

[5] By Section 59 of the Judicature (Northern Ireland) Act 1978, subject to rules of court, the costs of proceedings are in the discretion of the court and the court has power to determine by whom and to what extent the costs are to be paid.

[6] Order 62 rule 3(3) of the Rules of the Supreme Court provides that –

> "If the court in the exercise of its discretion sees fit to make any orders to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

Order 62 rule 9 provides that-

> "The court in exercising its discretion as to costs shall take into account-
> (a)
> (b) any payment of money into court and the amount of such payment."

[7] Before considering the "event" and the operation of the exception under rule 3(3), reference should be made to payment into court and Calderbank letters. Order 22 rule 1(1) provides that in any action for debt or damages any defendant may without leave at any time before the close of pleadings or with leave or on consent at any later time make a payment into court in respect of the plaintiffs' claims. By Order 22 rule 1(7) it is provided

that the plaintiffs' cause in respect of a debt or damages shall be construed as a cause of action in respect also of such interest as may be included in the judgment, if judgment were given at the date of payment into court.

[8] Had the defendant in the present proceedings made a payment into court on 30 April 2001 of £25,000 the plaintiff would have "beaten the lodgement". For the purposes of the operation of Order 22 the exercise is to compare the value of the payment into court with the value of the judgment at the date of the payment into court. The value on 30 April 2001 of the plaintiffs' judgment for £16,500 plus interest at the court rate from time to time from 1992 would have been greater than £25,000. Reference is made to the example given in the Supreme Court Practice (1999) para. 22/1/10.

[9] "Calderbank letters" are offers in writing "without prejudice save as to costs" and they developed in claims which did not involve debt or damages and to which Order 22 did not apply. They have taken their name from Calderbank v Calderbank [1975] 3 All ER 333 where the Court of Appeal approved the procedure in a claim for financial provision in matrimonial proceedings. This approval was extended in Cutts v Head [1984] 1 All ER 597 to other proceedings that did not involve debt or damages, although it was stated by Oliver LJ that while a Calderbank letter was admissible to be taken into account on the question of costs-

> "……it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a *Calderbank* offer as carrying the same consequences as payment in."

The procedure found expression in the English Supreme Court Rules where Order 22 rule 14 provided that a party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings. This led to an amendment of Order 62 rule 9 to add rule 9(1)(d) to provide that the court in exercising its discretion as to costs should take into account any written offer made under Order 22 rule 14 but-

> "….the court shall not take such an offer into account if, at the time it was made, the party

> making it could have protected his position as to costs by means of a payment into court under Order 22."

These changes to the Rules were not introduced in Northern Ireland. However a Calderbank letter remains admissible to be taken into account on the exercise of the discretion as to costs.

[10] If costs are to be awarded, Order 62 rule 3 involves a two-part process. The starting point is that the costs should follow the event. There is then an exception in the discretion of the court depending on the circumstances of the case.

The defendant submitted that the plaintiff should pay the defendant's costs from 2 May 2001 (being the last date for acceptance of the defendant's written offer) or alternatively there should be no order for costs from that date.

[11] The defendant relied on two principal factors. First the plaintiffs' lack of response to the defendant's written offer. It appears that while there was no formal response to the defendant's written offer there were discussions between counsel and it is apparent that the plaintiffs would not have accepted any sum in the region of that eventually awarded by the court. In view of the without prejudice discussions between counsel this factor, rightly, was not pressed on behalf of the defendant. Secondly, the defendant contended that "the event" was that the plaintiffs had been unsuccessful in their claim for substantial damages.

[12] Recovery by a plaintiff of nominal damages, on assessment of damages after summary judgment, will render the defendant the successful party. Alltrans Express Limited v CVA Holdings Limited (1984) 1 All ER 685. The plaintiff claimed damages for breach of contract and obtained summary judgment. After a 15 day hearing on the assessment of damages the plaintiff was awarded £2. The defendant had not paid money into court and the assessor considered the plaintiff to be the successful party and awarded the plaintiff the costs.

The Court of Appeal allowed the appeal on the basis that the consequence of the summary judgment was that the plaintiff was entitled at least to nominal damages and the actual issue between the parties at the hearing was whether the plaintiff was entitled to more than nominal damages and on that issue the defendant had succeeded. Further it was found that a payment into court of £2 would not have been accepted by the plaintiff and would not have made any difference to the proceedings so it was wrong to hold that the absence of a payment into court made the plaintiff the successful party.

On the issue at the hearing it is clear that the defendant was the successful party as the plaintiff recovered no more than the nominal damages to which it would have been entitled without a hearing.

[13] Recovery by a plaintiff of "trivial" damages may render the defendant the successful party. Anglo-Cyprian Trade Agencies Limited v Paphos Wine Industries Limited (1951) 1 All ER 873. The plaintiff claimed damages of £2,000 for breach of contract being the full purchase price of goods delivered. At the trial the plaintiffs amended their statement of claim to claim in the alternative £52 as the cost of repairs to the defective goods. The plaintiff recovered only the £52 and costs were awarded to the defendant. Devlin J stated at page 874F –

> "No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a "successful" plaintiff. In certain cases he may be, eg where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case."

On the facts of that case Devlin J found that in substance the defence consisted of one point which was found to be a good point, namely, there was only a minor defect in the goods. While in law there had been a breach of contract and the plaintiff was awarded "trivial" damages-

> "…the plaintiffs, therefore, have not established anything which is of the least value to them, and, in my judgment, they are not to be regarded as successful plaintiffs." (At page 875A).

The judgment went on to consider the effect of the amendment to plead the alternative claim for £52 and Devlin J held that it was a necessary amendment and a matter of the first importance and he then set out the significance of the proper pleading of special damage to enable the defendant

to know the claim so that he may if he so desires make a payment into court. The success of the amendment was found not to make any difference to the order which would have been made if judgment had been entered for the defendant in the original pleadings.

On the issue at the hearing the defendant was considered to be the successful party as the limited recovery by the plaintiffs was said to be not of the least value to them.

[14] There will be cases where the plaintiff has recovered modest damages and the defendant has eroded a substantial claim and both parties can claim some measure of success. In Lipkin Gorman v Karpnale Limited (1989) 1 WLR 1340 the plaintiff firm of solicitors claimed damages of £250,000 against a bank and a gaming club. A partner in the plaintiff firm had lost the money from the client's account by gambling in the club. By a late amendment the plaintiff claimed against the club a sum of £3,735, being the value of a bank draft drawn in favour of the solicitors and accepted by the club. The plaintiff recovered the £3,735 only and the club was awarded the costs to the date of amendment. It is apparent that in respect of the claim against the club prior to amendment the club was successful and therefore recovered costs.

In respect of post amendment costs May LJ stated at 1390B –

> "But it is very difficult in a case with the complications of this one to give an answer as to who was the successful party without qualifying that answer, at least to some extent. Both parties were successful in one sense. The club was successful to a substantial extent. However Order 62 rule 3(3) itself refers to a situation 'when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs' – so that one need not be too rigid in seeking to discover precisely what the event was. In the circumstances of the instant case one must exercise one's discretion in making a proper order for costs, doing justice to all the circumstances of the case, but bearing in mind that the underlying principle is that the winner, whoever may be described as the winner, is in general entitled to be paid his costs."

May LJ ordered the plaintiff to pay 80% of the club's post amendment costs because –

> "….in essence they should have their costs because they were the winners. I am not saying that necessarily that was 'the event' within the terms of the rule, but following the spirit of the rule that, in my view, is what should happen."

May LJ appeared to have been inclined to the view that the "event" for the purposes of Order 62 rule 3 was the limited success of the plaintiff but that in the exercise of discretion the defendant should recover 80% costs post amendment. The existence of the discretion meant that the court did not need to be rigid in identifying the "event".

[15] A further example of modest recovery by the plaintiff on the basis only of a late amendment is Beoco Limited v Alfa Laval Co Limited (1994) 4 All ER 464. The plaintiff recovered against the first defendant on foot only of an amendment made at the hearing and became entitled to damages estimated at £21,000 when the overall claim was approximately £1million. The defendant recovered costs up to the amendment. In respect of post amendment costs the defendant recovered 85% of its costs. The amendment had been made in circumstances where there was no proper pleading of the alternative case and no discovery to the first defendant and no opportunity to investigate or make an estimate of the proper value of the amended claim so that it was considered unrealistic to expect the first defendant to a make a payment into court or to admit liability for damages to be assessed on the alternative basis. In those circumstances and because the first defendant was refused an adjournment to investigate the alternative claim it was held that the first defendant should be awarded a proportion of their costs. Of the likely recovery of some £21,000 Stuart-Smith LJ stated at page 479H –

> "Although this sum cannot by itself be described as trivial, in the context of a claim for £1M and the enormous expense of this action, it is trivial. It makes no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the first defendant had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £21,574 plus interest would obviously not have been accepted and it would have made sound commercial sense to have made it. But for the reasons I have indicated, the first defendant had no chance to do so. Accordingly, in my judgment,

> although some discount should be made to reflect the very modest degree of success that the plaintiff achieved, it should not be a large one."

The court considered that the basis of the plaintiff's limited success was a claim introduced in circumstances where the defendant had no opportunity to protect its position in a proper manner and had the defendant had that opportunity an appropriate payment in would have resulted in the defendant recovering costs after the date of payment in.

[17] It is almost invariably the case in a claim for damages that a plaintiff recovers only a limited amount of the claim and to the extent of that recovery the plaintiff would in general be regarded as the successful party.

However if nominal or trivial damages were awarded, where the amount of damages was the substantive issue, then the defendant may be regarded as having been the successful party.

If modest damages are recovered compared to the total value of the claim then, as observed in Beoco Limited, while not trivial in itself, the award may be described as trivial relative to the overall claim and costs. While agreeing that it is not necessary to be rigid in identifying the "event" it would be wrong to lose sight of the "event" and focus entirely on the flexibility that arises from the exception in the rule.

[18] The defendant submitted that the plaintiffs had not been successful in their claim for substantial damages. It is the case that the plaintiffs have not recovered substantial damages and the defendant has had substantial success in limiting the extent of the plaintiffs' recovery. The plaintiffs have recovered a sum within the jurisdiction of the High Court that could not be described as trivial in itself, although it may be considered trivial relative to the overall claim. In the circumstances of the present case I prefer the approach that the "event" for the purposes of Order 63 rule 3 was the success of the plaintiffs even though that success was limited. Costs will follow that event except where in the discretion of the court some other order should be made "in the circumstances of the case".

[19] It was contended by the defendant that the plaintiffs' claim was not adequately particularised and the defendant referred to a statement to that effect in the judgment of the court. However that lack of particularity was a necessary consequence of the nature of the claim, involving as it did speculation as to the extent of the business that would have been undertaken by the plaintiffs but for the actions of the defendant. The assessment of the plaintiffs' loss necessarily involved the making of various assumptions based on the available evidence and that was all that the defendant would ever have been able to do, given the nature of the claim. This was not a case of a late amendment at the hearing of the action to introduce an alternative head of claim on which the plaintiffs succeeded. The defendant had the opportunity

to seek particulars of the plaintiffs' claims and to obtain such discovery as was available and to engage an expert to examine the plaintiffs' claims. It was always going to remain the position that the extent of the plaintiffs' loss of business was uncertain. The claim for loss of sales and maintenance was a substantial part of plaintiffs' case from the beginning, although the make up of the special damage varied from time to time. The claims were made reasonably in the circumstances even though in large measure they were not made out to the requisite standard. Had it been considered appropriate to do so the defendant could have applied for leave to make a payment into court and did avail of the opportunity to make a written offer of settlement to the plaintiffs. A payment into court or a written offer in the amount of the eventual award would not have been accepted by the plaintiffs. Account is taken of the written offer made by the defendant but it was not sufficient to exceed the award.

[20] The circumstances of the present case do not warrant an exception to an order that costs follow the event.

The plaintiffs are awarded the costs of the action, such costs to be taxed in default of agreement.