



LITIGATION AND DISPUTE RESOLUTION

Rejecting Settlement Offers Led to an Adverse Costs Award

by **Shane Neville**

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A party to proceedings may make an offer to settle the dispute in “open correspondence” for tactical purposes, which will result in a shift in the costs risk of litigation.

In **O'Reilly v Neville & Ors**, costs were awarded against the Plaintiffs, the O'Reillys, following their rejection of an open offer of settlement which the Court held “**should have been accepted**”.

Shane and Antoinette O'Reilly v Seamus Neville & Ors [2017] IEHC 554

The O'Reillys purchased a property that the Defendants built in 2005. The O'Reillys alleged that the property was defective and issued proceedings seeking damages for breach of contract: comprising damages of €97,000, which was the estimated cost of the repairs to be undertaken; special damages in respect of the cost of renting alternative accommodation; and general damages in respect of the adverse impact upon the lives of the O'Reillys.

In his judgment dated 31 July 2017, Mr Justice Binchy made an order of specific performance requiring the Defendants to carry out the repairs to the property together with damages in respect of the cost of alternative accommodation. Mr Justice Binchy left the issue of costs to be determined pending submissions from the parties.

The default rule in court proceedings in Ireland is that “costs follow the event”. In other words, the winner of litigation is paid its costs of the litigation by the loser.

The O'Reillys submitted that, in obtaining an order for specific performance of the building agreement, they succeeded in the “event” in the proceedings, and that they were entitled to an order for the costs incurred by them in obtaining the order, in accordance with the general principle that costs follow the event.

The Defendants submitted that it was necessary for the court to analyse the “event” and to take into account the various opportunities afforded to the O'Reillys by the Defendants to resolve the dispute. The Defendants, in open correspondence, had made a number of offers to resolve the dispute, all of which were rejected by the O'Reillys.

Offers of Settlement

Some nine months before the matter came to trial, the Defendants, in an open letter dated 18 February 2016, set out a comprehensive mechanism for the identification of defects in the dwelling house, as well as the measures required to rectify those defects. In particular, the offer included the involvement of the O'Reillys' engineer and provided for the intervention of an independent expert to resolve any dispute between the parties. The O'Reillys rejected the offer. Mr Justice Binchy held that the open offers made by the Defendants were exemplary.

The Defendants sought to rely on Order 99, rule 1A(1)(c) of the Rules of the Superior Courts, which provides that the High Court in considering costs may, where it considers it just, have regard to the terms of any offer in writing sent by any party to another party offering to satisfy the whole or part of that other party's

claim.

The Defendants argued that the order for specific performance, which the O'Reillys obtained was no more than they would have achieved had they accepted the offers made. They further contended that the only matter that would then have had to proceed to trial would have been the claim for the cost of renting alternative accommodation which, it was submitted, would have involved a short hearing.

Award of Costs

The trial lasted for eleven days in total. Mr Justice Binchy found that "***the offer made in February 2016 should have been accepted, and by their failure to do so, the O'Reillys caused almost all of the costs that followed, with the sole exception of those costs that were exclusively related to the recovery of rent paid by them for alternative accommodation***".

The Defendants were awarded all costs incurred from the date of the final offer except those costs incurred in connection with the O'Reillys claim for the cost of alternative accommodation. Mr Justice Binchy awarded the O'Reillys just one day of costs out of the eleven-day hearing.

It remains to be seen if the judgment of Mr Justice Binchy will be appealed.

Comment

Well-pitched offers of settlement are strategically important, whether you are a claimant or a defendant.

An open offer allows the court to have regard to the terms of any offer in considering costs. A carefully worded open settlement offer may result in conclusion of a claim on acceptable terms or, if the offer is not accepted, it can be a useful tool in contesting an award of costs.

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