

Differential Costs Orders – Nowhere to hide for Exaggerated Claims

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A recent decision of the Court of Appeal has clarified the position of differential costs orders which places a responsibility upon the Plaintiff to ensure that proceedings are issued in the correct court and if the damages awarded to the Plaintiff fall short of the particular court jurisdiction in which the proceedings are brought, the Court can hold the Plaintiff responsible for a portion of the Defendants costs.

Differential Costs Orders are designed to ensure that when lawyers are issuing proceedings, those proceedings are issued in the correct Court jurisdiction. If proceedings are issued in the High Court, in circumstances where the correct jurisdiction is the Circuit Court, the High Court can penalise the Plaintiff (even after succeeding with their claim) by awarding a portion of the costs of the action against the Plaintiff. The Court can order that the Plaintiff pay the Defendant the difference in the costs of having the matter heard in the High Court over the Circuit Court.

The jurisdiction of the High Court will be of interest to Plaintiffs, ensuring their claim is not inflated when issuing proceedings, and to Defendants, clarifying what steps they can take to ensure they protect their position on costs where they believe that a Plaintiff will not meet the High Court jurisdiction.

In two recent personal injury cases which came before the Court of Appeal (*Molin .v. Sicika* and *O'Malley .v. McEvoy* [2018] IECA 240) the Court considered the operation of the provisions of section 17(5) of the Courts Act 1981 (as amended by Section 14 of the Courts Act 1991). The cases commenced in the High Court which has a jurisdiction of €60,000 (€75,000 in other actions). In these cases, while the Plaintiffs succeeded with their claims, the Court awarded damages (including special damages) of approximately €35,000 in each, significantly under the monetary jurisdiction of the High Court in which proceedings commenced.

Both Defendants sought differential costs orders as the High Court trials concluded. The Defendants informed the Court that, in each case, that they had written to the Plaintiffs in advance of the trials and advised that the Defendants believed that the Plaintiffs would not meet the High Court jurisdiction. The Defendants advised the Plaintiffs that they would seek differential costs orders if the Plaintiff did not meet the jurisdiction at trial. The High Court refused to grant the orders sought by the Defendants.

The Defendants appealed the decisions of the High Court to the Court of Appeal and the Appeal Court said that the High Court had erred in refusing to grant the differential costs orders.

The factors taken into consideration by the Appeal Court were:

1. The awards of damages fell substantially below the High Court jurisdiction,
2. The Defendants had put the Plaintiffs on notice that they did not expect the Plaintiffs to meet the jurisdiction and that they would be seeking a differential costs order if the Plaintiffs did not reach the jurisdiction at trial.

The Appeal Court indicated that if the award of damages was borderline with the jurisdiction, it would not be appropriate to make a differential costs order.

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What can be taken from the clarification given by the judgment is that when Plaintiffs are issuing proceedings, a detailed analysis of their claim from a monetary prospective should be carried out and, if there is uncertainty of the

Plaintiff reaching the High Court jurisdiction, proceedings should issue in the Circuit Court. From a Defendant's perspective, if they believe that the Plaintiff may not reach the jurisdiction, the Defendants should write to the Plaintiffs (and as soon as the Defendant becomes aware of the issue) to put them on notice that if the Plaintiff does not reach the jurisdiction, the Defendants will apply for a differential costs order at the conclusion of the trial.