UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 259
Appeal Number: 2018/257

Donnelly J.
Faherty J.
Haughton J.

BETWEEN/

A.I.B. MORTGAGE BANK AND ALLIED IRISH BANKS PLC

PLAINTIFFS/APPELLANTS

- AND -

KEVIN O'BRIEN AND GILLIAN O'BRIEN

DEFENDANTS/RESPONDENTS

Costs Ruling of Ms. Justice Faherty dated the 28th day of September 2020

1. Judgment in this matter was delivered by the Court on 15 July 2020 ("the principal judgment"). The appeal was dismissed on all grounds. At para. 99 of the principal judgment, I indicated a provisional view that as costs follow the event in the normal way, the costs of the appeal should be awarded to the defendants (the respondents to the appeal) but stayed pending the determination of the High Court proceedings. However, in the event of any of the parties wishing to contend for an alternative order, the Court gave the parties liberty to deliver written submissions. Both the plaintiffs and the defendants have now delivered submissions.

The defendants' submissions

2. The defendants submit that the course proposed by the Court in awarding them their costs accords with the facts and the relevant law. They ask, however, that the costs order in their favour not be stayed and that they be allowed to enforce it.

3. They point to para. 86 of the principal judgment where it was noted that when the trial judge remitted the matter to plenary hearing, he did so on the basis that the defendants' assertion that there was no consideration for the 2010 loan facility was arguable. It is submitted that had the plaintiffs not appealed, the absence of consideration argument as well as the second defendant's defence of *non est factum* could have been dealt with at the plenary hearing in circumstances where it was always accepted by the plaintiffs that their claim against the defendants was to be the subject of a plenary hearing. Instead, the plaintiffs appealed the trial judge's ruling on the consideration issue and persisted in the appeal on the basis that it raised a systemic issue for them, even though their concerns in that regard were without foundation and, in any event, ought to have been allayed by the decision of Noonan J. in *Allied Irish Banks plc v. Gormley* [2018] IEHC 744 which distinguished the trial judge's decision, as this Court pointed out at para. 78 of its decision.

4. The defendants submit that despite their severely constrained financial circumstances they had no option but to participate in the appeal and defend it vigorously. The consequences of not doing so would have been potentially catastrophic in that it would have undermined their counterclaim, as noted by this Court at para. 85 of its decision.

5. Specifically, the second defendant submits that despite her grave financial constraints, and the medical toll the proceedings took on her, she was compelled by the actions of the plaintiffs to defend the appeal. This was notwithstanding the fact that her case at all times was that she had no engagement with the plaintiffs at the relevant times

and no understanding as to what benefit was conferred on her by the advance on €760,000 in 2008 when the plaintiffs took security over her property. It is again emphasised that any failure by the second defendant to defend the appeal would have undermined a potential counterclaim against the appellants. It is argued that it would not be fair on the second defendant to have her legal representatives to forego their costs of the appeal whilst the plaintiffs, given their overwhelming financial fire power, can afford to continue to pay their representatives whether they win or lose the proceedings or any particular part of them.

6. Accordingly, the defendants ask the Court not to place a stay on the order for costs of the appeal which it is proposed to make in their favour. It is submitted that the defendants are "ordinary" people, in the sense noted by Barrett J. in *UCC v. ESB* [2015] IEHC 598 who should be able to recoup the costs of winnable litigation. The defendants were compelled to defend the within appeal notwithstanding their clear preference that the matter proceed to plenary hearing, which would have saved considerable time and costs. In such circumstances, it is submitted that it is equitable that they be awarded the costs found to be due to them, without any stay being imposed.

7. They defendants rely on the decision of the Court of Appeal in *Permanent TSB v. Skoczylas* [2020] IECA where it is stated that unless it is in the interest of justice not to do so, a costs order should be immediately enforceable.

At para. 44 Baker J. opined:

> *"44. The principles discussed in Godsil apply to the execution of orders for costs and not merely to the making of such orders. To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of costs orders would be an entirely hollow protection for successful litigants if such orders were not, in general, immediately*

enforceable. A successful party has a legitimate expectation that where costs are awarded in his favour that he may take all lawful steps to recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such stays are, of course, frequently granted pending appeal. Such a stay has been ordered by this Court but the additional stay now sought by Mr Skoczylas is quite different in nature and scope."

8. It is thus submitted that the default position is that where a court has awarded costs in favour of a party they should be immediately enforceable: a stay should only be granted where the opposing party satisfies the court that it is in the interest of justice to do so.

9. The defendants contend that it would be not be in the interest of justice to grant a stay on the award of costs for the reasons set out above. They say that they had no real choice but to defend the appeal; by failing to do so their counterclaim would be wholly undermined. At the end of the day, the defendants incurred legal costs in defending an appeal which this Court, in effect, found was entirely misconceived. It is submitted that the last thing the defendants expected when they successfully persuaded Binchy J. to send the summary judgment application to plenary hearing was to be obliged to defend what transpired to be a misconceived and costly appeal.

10. It is further submitted that the outcome of the plaintiffs' claim for recovery of the 2010 loan facility at plenary hearing will not change the facts that the defendants successfully defended the appeal before this Court and that costs have been awarded in their favour. Accordingly, there is no reason why, in the interests of justice, the defendants' ability to enforce the costs order made by this Court should be stayed until the

plenary hearing has concluded, which could be many years hence, particularly with delays likely to arise on account of the Covid-19 pandemic.

The plaintiffs' submissions

11. The plaintiffs contend that the defendants' submissions have failed to engage with the fundamental fact that no decision has yet been made in respect of the plaintiffs' claim for judgment. The plaintiffs' claim is for a significant sum of money, in excess of €2.7m. Until such time as that claim is determined, it is entirely appropriate and just that the recovery of any costs should be stayed.

12. The defendants' reliance on *Permanent TSB v. Skoczylas* is entirely misplaced. In that case the unsuccessful party in the Court of Appeal was first granted a stay pending an application for leave to appeal to the Supreme Court. When that application was declined he then sought a further stay pending determination of other unrelated proceedings to which Permanent TSB was not a party. It is submitted that *Skoczylas* can be distinguished on the basis that in the present case there is an extant claim for judgment to be determined before the High Court. Where such proceedings exist, and where the issues in those proceedings remain to be decided, it is plainly in the interests of justice that the execution of costs by stayed.

13. In aid of their submissions, the plaintiffs point to para. 36 of the first rdefendant's first affidavit where it is averred that:

> "I admit for the purposes of the Proceedings herein and not otherwise, that I am indebted to the First Named Plaintiff in respect of sums advanced to me in 2006 in order to complete the purchase of 24 Clonfadda Wood. I do not accept that the said sums are due and owing at the present time".

They also point to para. 74 of the same affidavit where the first defendant states:

"I say that the only party entitled lawfully to demand repayment is the First Named Plaintiff to which I am indebted."

14. They further contend that the second defendant's submissions fail to engage the undoubted fact that the substantial monies advanced by the plaintiffs were used to purchase a property of which the second defendant remains a joint owner and in respect of which no repayments have been made since 25 January 2016.

15. The plaintiffs point to the fact that they delivered a statement of claim in the High Court proceedings on 14 February 2020 to which the defendants have not either raised a notice for particulars or delivered a defence. The plaintiffs' wish is to bring the High Court proceedings to hearing and they argue that the efficient progression of the proceedings rest with the defendants at this stage. In turn, expedition of the lifting of the stay proposed by the Court lies largely in the defendants' hands: the sooner the proceedings conclude the sooner the costs order in the defendants' favour can be executed. It is submitted that in the interim, the defendants will suffer no significant prejudice in circumstances where the costs have yet to be adjudicated. It is contended that in all of those circumstances the Court in its proposal has correctly struck the appropriate balance in relation to the costs issue and the defendants have not demonstrated any good or compelling reason to depart from the approach indicated in the principal judgment.

Discussion

16. Albeit that the Court in the principal judgement indicated a proposal to stay the costs awarded to the defendants, I am satisfied to accede to the defendants' submission that there should be no stay on the costs order. The following factors are relevant to my decision in this regard:

(1) The defendants were entirely successful in the appeal;

(2) The defendants were required to defend the appeal. Had they not done so, the appeal, if successful, would have undermined their counterclaim;

(3) An important ground pursued by the plaintiffs at the appeal stage was that forbearance to sue was the consideration for the 2010 Facilities. This was not a ground pleaded in the summary summons or argued by the plaintiffs in the High Court;

(4) The within appeal was brought in circumstances where irrespective of the outcome thereof the matter was destined for plenary hearing.

(5) The purpose of the plaintiffs' appeal was to strike down part of the defendants' defence to the plaintiffs' claim. Rather than appealing in the manner they did, this objective could have been pursued in the aftermath of the trial judge's remittal of the matter to plenary hearing and the exchange of pleadings that presumably would have followed had there been no appeal. The pleadings would have drawn the battle lines on the consideration and forebearance to sue issues. If the plaintiffs believed that a defence was raised that on the facts pleaded, and taken at their high point, did not disclose a defence known to law, then it would have been open to the plaintiffs to bring an application to strike out that particular ground of defence.

(6) Had the plaintiffs pleaded their claim adequately in the summary summons in the manner that *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 requires a plaintiff to do, consideration would have been pleaded along with forbearance to sue. Those issues might then conceivably have been capable of being resolved by Binchy J. at the summary stage (and if

necessary on appeal before this Court) but, as found by this Court, the summary summons contained no such pleas;

(7) Whatever way one looks at it, the appeal was a "stand alone" matter. No outcome of the plenary trial can result in overturning this Court's decision on costs;

(8) There is likely to be a considerable delay before the trial –particularly as there is likely to be extensive discovery. In this context, the relative impecuniosity of the defendants is a weighty matter. Their legal teams are entitled to be paid regardless of whether a stay is granted. It may reasonably be assumed that the defendants are not in a position to pay their legal teams – or at least not the full costs. If a stay is granted this may well put the defendants at a litigious disadvantage. On the other hand, refusal of a stay and the immediate obligation to discharge the costs will not disadvantage the plaintiffs who are established financial institutions.

17. In all the foregoing circumstances and being satisfied that the plaintiffs have not discharged the onus on them that it is in the interests of justice to stay the costs order, there will be no stay on the costs granted to the defendants.

18. Donnelly J. and Haughton J. have indicated their agreement to the proposed costs order.