

**THE COURT OF APPEAL
CIVIL**

**Haughton J.
Murray J.
Binchy J.**

**Neutral Citation
Number [2020] IECA 339
High Court Record No. 2017/663 Sp.
Court of Appeal Record No. 2018/443**

BETWEEN:

ALLIED IRISH BANK PLC

PLAINTIFF/RESPONDENT

- AND -

GERARD GRIFFIN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 1st day of December 2020

1. In concluding my judgment on the substantive appeal in this matter ([2020] IECA 221), I proposed that the costs of both the hearing in the High Court and of this appeal be costs in the cause. I reached that provisional view because I believed that it was neither unreasonable for the plaintiff to have proceeded to summary judgment in this case, nor to have defended the appeal brought against the Order granting liberty to enter judgment. That being so, the appropriate order for costs appeared to be that suggested by the decision of Clarke J. in *ACC Bank v. Hanrahan* [2014] IESC 40, [2014] 1 IR 1.

2. The defendant in the submissions he has delivered seeking his costs of the High Court and of this Court, or in the alternative of the appeal alone, does not offer any credible basis on which it could be concluded that my provisional view that the plaintiff had acted reasonably in proceeding to seek summary judgment and to defend this appeal is wrong. Instead, he says:

- (i) Costs should follow *'the event'*;
- (ii) His position that the proceedings are not suitable for summary disposal has been vindicated;
- (iii) His defence to the application for summary judgment was not based on bald assertion, sweeping statements or a technical objection;
- (iv) The plaintiff had failed to offer any positive evidence to contradict the defendant's claim that he was assured at the time he paid part of the debt he had incurred jointly with his partners that his entire liability was thus discharged;
- (v) The defendant had to bring this appeal in order to be permitted to defend the proceedings;
- (vi) *ACC v. Hanrahan* was not concerned with an appeal against the entry of summary judgment, but with an adjudication on the issue of costs awarded in the High Court,

3. All but the last of these propositions, with respect, miss the point. This is a case in which the Court expressly observed in the course of its substantive judgment that it was difficult to see how in most cases a defendant could credibly advance a case that the apparent liability assumed by him was unenforceable without evidence grounding either a claim of *non est factum* or a claim that some specific representation was made to him at the time he signed the second facility letter in 2010 that that facility letter would not be enforced (at para. 22). Yet, the defendant presented precisely such an argument without advancing or grounding either of the defences to which I have referred. The reason the Court refused summary judgment was not simply because representations alleged to have been made in 2008 in some sense ‘carried over’ to the 2010 facility letter, but because of its concern as to whether there was consideration underpinning the second facility letter were the plaintiff to in fact establish the representations he claimed were made to him in 2008.

4. *ACC v. Hanrahan* suggests that in the majority of cases the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should be either reserved or become costs in the cause. The defendant has offered no basis on which that rule should be departed from insofar as the High Court proceedings are concerned.

5. It is correct to say, as the defendant observes, that *ACC v. Hanrahan* was not concerned with the costs of a successful appeal against the grant of summary judgment. There is, without doubt, some merit to the suggestion that where a defendant must appeal in order to have an Order granting summary judgment granted against him reversed, the decision in that case may not apply. In that circumstance it might be said that in some cases it is only fair that having won such an appeal, costs should follow. Indeed, the Court in

AIB v. Cuddy [2020] IECA 291 has recently reserved that very issue for future consideration.

6. However, in this case the basis on which the defendant ultimately succeeded in this Court was not argued before the High Court. While the Court raised the matter itself, and explained that it felt that the issue of the consideration underpinning the second facility letter was within the scope of the Notice of Appeal, it was only during hearing that the plaintiff was presented for the first time with the specific basis on which the appeal was allowed. It follows that it was not acting unreasonably in defending the appeal and, to that extent, the rationale of *ACC v. Hanrahan* is, in the particular circumstances of this case, equally applicable to the appeal.
7. When the Court expresses a provisional view as to how costs should be addressed the parties are, of course, fully entitled to dispute that proposal. That is why it is presented as a proposal. Where, however, a party chooses to apply to ask the Court to reach a different conclusion, the usual rule should be that it must take the consequent cost risk of so doing. That being so, while the Court will order that the costs of the High Court and of this Court on the substantive issue will be costs in the cause, the Court will order that the costs of the plaintiff of this application shall be borne by the defendant.
8. Haughton J. and Binchy J. are in agreement with this judgment and the Order I propose.