APPROVED **[2021] IEHC 231**

THE HIGH COURT

2019 No. 232 SP

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

RICHARD FINBARR FITZGERALD

DEFENDANT

EILEEN DALY

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 26 March 2021

1. This is my ruling in relation to the final orders to be made in the above entitled proceedings consequent to the judgment delivered by me on Monday 22 March 2021 (*Allied Irish Bank plc v. Fitzgerald* [2021] IEHC 172) ("***the supplementary judgment***"). As appears from the supplementary judgment, this court has decided that Ms. Eileen Daly, the reputed lessee, does not have a right to possession of the mortgaged property as against the plaintiff bank as mortgagee. Ms. Daly is a trespasser insofar as the bank is concerned. Therefore, the order of possession which was initially granted on 27 April 2020 is good as against Ms. Daly. (See *Allied Irish Bank plc v. FitzGerald* [2020] IEHC 197 ("***the principal judgment***")). The position between Ms. Daly and Mr. Fitzgerald *inter se* is different, but that does not affect the bank's rights, for all of the reasons set out in the supplementary judgment.

NO REDACTION REQUIRED

2. There are two matters then remaining to be determined by this court. The first is in relation to the stay, if any, which should be placed upon the orders pending an appeal. The second is the allocation of the costs incurred in addressing the issue as to the rights, if any, of Ms. Daly, as reputed lessee, as against the plaintiff bank. I will deal with these in sequence.

3. The position in relation to a stay pending an appeal has most recently been authoritatively stated by the Supreme Court in its judgment in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2020] IESC 42 ("***Krikke***"). There, the Supreme Court explained that, in deciding whether or not to grant a stay, the guiding principle must be to do justice between the parties pending the determination of the appeal. It is inevitable that the hearing and determination of an appeal will take some time, and the court should endeavour to put in place arrangements in the interim which best serve the justice of the parties.

4. Relevantly, one of the factors that can be considered is the strength or otherwise of the intended appeal. This is relevant in the present case because, as appears from the supplementary judgment delivered on Monday of this week, the Court of Appeal has already addressed—albeit in the specific context of an application for an interlocutory injunction—the type of argument which Ms. Daly wishes to advance. In *Kennedy v. O'Kelly* [2020] IECA 288, the Court of Appeal indicated that there were strong grounds for saying that a receiver appointed under a mortgage (who is in a broadly analogous position to the plaintiff bank in the present case) is not bound by the provisions of the Residential Tenancies Act 2004. As emphasised in my own judgment this week, however, those findings are not definitive, and, indeed, are expressly stated by the Court of Appeal not to be definitive. Nevertheless, applying the principles in *Krikke,* I am satisfied that it is appropriate to have some regard to the strength of the appeal which Ms.

Daly intends to pursue. It seems to me that, given those comments of the Court of Appeal in *Kennedy v. O'Kelly*, the appeal is a weak appeal, and it seems more likely than not that the appeal will fail. Now that is not to say that the appeal will inevitably fail or that this court is attempting to "second guess" the ultimate outcome of the appeal. It is simply identifying, for the purposes of a stay application, the strength or otherwise of the appeal.

5. Having regard to the weakness of the appeal, it seems to me that the appropriate stay should be along the following lines. I will grant the usual 28 day stay, to run from once the order has been perfected. This is to allow Ms. Daly an opportunity to consider whether she wishes to bring an appeal, and to file same within the time prescribed under the Rules of the Superior Courts. If an appeal is brought within time, then I will place a stay on my order for possession until the first return date in relation to that appeal. Ordinarily in a case such as this, where the plaintiff bank seeks possession for the precise purpose of exercising its power of sale in respect of the mortgaged property, I would grant a stay pending the hearing and determination of the full appeal. This is because the rights of a party asserting a claim to possession of a mortgaged property would be prejudiced if they were ultimately to succeed in an appeal only for the property at issue to have been sold from under them in the interim. As I say, that is the order I would ordinarily make because I do not think it is appropriate to burden the Court of Appeal with unnecessary applications for stays in circumstances where, in most cases, the correct balance of justice in a mortgage suit will be obvious. However, in this case there are two factors which tell against granting an open ended stay. The first is, as I have already mentioned, the weakness of the grounds of appeal; and the second is the delay in these proceedings to date. Some twelve months have already elapsed since the principal judgment granting an order for possession was delivered on 27 April 2020. Having regard to those two factors, it seems to me that the fairest thing is to grant a stay, initially

for 28 days, and then, if an appeal is lodged, until the first return date before the Court of Appeal. That then leaves it open to Ms. Daly, if she wishes, to apply to the Court of Appeal for a longer stay pending the hearing and determination of the appeal.

6. The next issue to be addressed is the costs incurred in relation to Ms. Daly's intervention in the proceedings. The default position under Part 11 of the Legal Services Regulation Act 2015 is that the party who has been "entirely successful" in proceedings is entitled to their costs as against the unsuccessful party. The court does of course have *discretion* to depart from the default position. The type of criteria or considerations to be taken into account in this regard are set out in detail at section 169 of the Legal Services Regulation Act 2015.

7. Having regard to those criteria, it seems to me that the *default* position is that Ms. Daly is liable for the costs incurred for her participation in the proceedings. She created a contest, as counsel for the plaintiff bank put it, and has ultimately been unsuccessful.

8. Two grounds were put forward in support of her application to avoid the order for possession. First, it was suggested that the bank had consented, or, at the very least, had acquiesced in the creation of the lease back in 2002. Secondly, and more recently, it has been suggested that the Residential Tenancies Act 2004 operates so as to protect somebody in Ms. Daly's position. Both of those issues were determined against Ms. Daly in the supplementary judgment. In doing so, it was necessary to prolong these proceedings; to direct the exchange of written legal submissions; and ultimately to incur the costs of a hearing on 15 March 2021. It seems to me, therefore, that the default position applies and that the costs should be awarded against Ms. Daly. The only factor which is put forward in aid of the court exercising its discretion in her favour is an argument that Ms. Daly is not in fact a "party" to the proceedings, and, as such, is not amenable to a costs order. With respect, that argument is simply untenable. Ms. Daly's

entire point throughout the last twelve months has been that she should have been served with the proceedings in the first instance, and that she had a right to be served as a person either in possession of the premises, or, certainly in receipt of the rents from the premises. Ms. Daly was very critical in her early affidavits as to what she said was the failure of the plaintiff bank to properly serve the proceedings on her in accordance with the requirements of the rules.

9. This court, as explained in the supplementary judgment delivered this week, decided that, rather than get embroiled in an argument as to whether the rules had been complied with, Ms. Daly would be given an opportunity in any event to be fully heard in relation to any issues that she wished to raise in relation to her rights under the lease *vis-à-vis* the plaintiff bank. Therefore, Ms. Daly intervened in the proceedings, she was allowed to do so. Ms. Daly has formally been accorded the status of a notice party, and as such she is amenable to this court's costs jurisdiction. Ms. Daly, with respect, cannot have it both ways; she cannot insist on being heard in these proceedings, and then, when it comes to account for the costs, to say that she is not a party.

10. I also attach significance to the fact that the issue of costs was clearly flagged by counsel on behalf of the plaintiff bank as early as 30 November 2020. This arose specifically in the context of an application by Ms. Daly to take up a copy of the digital audio recording or "DAR" of the hearing before me on 9 March 2020. At that stage, i.e. 30 November 2020, Ms. Daly was a litigant in person, and I directed that the DAR be taken up at the Courts Service's expense, but indicated that ultimately one side or the other would have to pay those costs. Counsel for the plaintiff recalls the court describing the submissions on costs which he made on 30 November 2020 as his side laying down a "marker" in relation to costs. At all events, it cannot have been lost on Ms. Daly that by pursuing the application that she did she was on hazard in relation to costs.

CONCLUSION AND FORM OF ORDER

11. Therefore, I propose to make an order for costs in favour of the plaintiff as against Ms. Daly. Those costs relate to all of the applications made, and all of the costs incurred, since her intervention in the proceedings. For the avoidance of doubt, the order will include all reserved costs, and the costs of the various written legal submissions and affidavits filed. The costs will obviously include the costs of the hearing before me on 15 March 2021 and today's costs. The costs also include the costs of taking up a transcript of the DAR for 9 March 2020. I will, of course, place a stay on the costs order. The stay on execution of the costs order will remain in being pending the determination of any appeal to the Court of Appeal.

12. Finally, a matter of housekeeping (literally) arises in that Ms. Daly has certain personal effects in the mortgaged property. Although not averred to on affidavit, it is the position, as I understand it, that the person presently in occupation of the premises is there as a licensee under a caretaker's agreement. He or she, therefore, does not have any particular rights which need to be considered in the balance in determining whether or not to grant a stay. Ms. Daly is of course entitled to recover her personal possessions from the property if she so wishes to do. I suggest that that should be done by arrangement with the plaintiff within the next 28 days. Thereafter, the position in relation to a stay falls to be dealt with by the Court of Appeal at the first return date.

13. If either side has any difficulty in relation to this, or, indeed, any other aspect of my order, I will give them liberty to apply on four working days' notice to the other side to have the matter re-entered before me to deal with such issues that may arise.

Appearances

Roland Rowen for the plaintiff bank instructed by A.C. Forde & Co. Solicitors
Tim Dixon for the notice party instructed by Herbert Kilcline Solicitor

Approved Garrett Simons