APPROVED **[2024] IEHC 503**

THE HIGH COURT
CIRCUIT APPEAL

2023 24 CA
2023 25 CA

BETWEEN

PATRICK O'CONNOR
TANYA SHANNON

PLAINTIFFS

AND

LACKABEG LTD
T/A THE ARC BAR & RESTAURANT

DEFENDANT

FRANK TOWEY
KIERAN TOWEY

RESPONDENTS TO THE MOTION

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 August 2024

INTRODUCTION

1. This ruling addresses the incidence of the legal costs of an appeal from the Circuit Court. The appeal was in respect of a motion in aid of execution of two earlier judgments. More specifically, the plaintiffs had applied, by motion on notice, to the Circuit Court for an order that the directors of the defendant company attend

for oral examination before the Circuit Court and make discovery in execution of the two judgments. The Circuit Court had refused the relief sought. The plaintiffs were successful, on appeal, in obtaining the relief sought for the reasons explained in a reserved judgment delivered on 29 April 2024, *O'Connor v. Lackabeg Ltd* [2024] IEHC 244 ("*the principal judgment*").

2. The *provisional* view on costs offered in the principal judgment had been that, in each case, the respective plaintiff, having been entirely successful in the motion, would be entitled to recover their costs of the motion against the two directors personally. The principal judgment went on to state that the proceedings would be listed to hear submissions on the final form of order, including any submissions as to why the proposed costs order should not be made. The parties were subsequently given liberty to file written submissions on costs but neither party sought to avail of this. The costs hearing ultimately took place on 12 July 2024 and judgment was reserved.

SUBMISSIONS ON COSTS

3. Counsel on behalf of the plaintiffs applied for costs on the basis that his clients had been "*entirely successful*" in obtaining the reliefs sought in the motion, citing sections 168 and 169 of the Legal Services Regulation Act 2015, and Order 99 of the Rules of the Superior Courts. More generally, counsel referred to the principles governing the circumstances in which an individual may be made liable for the costs of a corporate litigant. Counsel relied, in particular, upon the decisions in *Pena-Herrera v. Green Label Short Lets Ltd* [2024] IEHC 425 and *Moorview Developments Ltd v. First Active plc* (cited below).

4. Counsel on behalf of the company and the two directors advanced counterarguments under two broad headings as follows. First, it was submitted that any costs order should be against the company alone and should not be addressed to the two directors. Reliance was placed upon the decision of the High Court (Clarke J.) in *Moorview Developments Ltd v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615 (as upheld by the Supreme Court: [2018] IESC 33, [2019] 1 I.R. 417), and upon the discussion of those decisions in *Delany and McGrath on Civil Procedure* (Round Hall, 5th Ed., 2023) (at §§24-263 to 24-268).

5. Secondly, it was submitted that any costs order should be limited in circumstances where the hearing and determination of the appeal had, or so it was said, been prolonged as a result of the belated delivery of an affidavit by the plaintiffs. Counsel submitted that any application to introduce this affidavit should have been made prior to the appeal being allocated a hearing date.

DISCUSSION AND DECISION

6. It is salutary to emphasise the narrowness of the issue which arises for determination in this ruling. The issue is confined to the allocation of the costs of the motions in aid of execution (as incurred before both the Circuit Court and the High Court). The reason that this bears emphasis is that the parties' submissions strayed into arguments on the substantive dispute between them, namely, whether there may have been an attempt to put the assets of the company beyond the reach of the plaintiffs as judgment creditors. No finding whatsoever has yet been made in respect of this substantive dispute and same will only arise

for consideration, if at all, once the process of discovery and the cross-examination of the directors has been completed.

7. It follows that the decisions in *Moorview Developments Ltd v. First Active plc* and *Pena-Herrera v. Green Label Short Lets Ltd* are not on point. Those decisions were concerned with the question of the circumstances in which a non-party, who has funded litigation in the name of a corporate litigant, might be made liable for costs orders made against that corporate litigant.

8. The position in the present proceedings is different. Here, the directors were joined to the proceedings as respondents to the two motions. This joinder had been necessary to ensure fair procedures. The reliefs sought in the motions were ones addressed to the directors personally. It was sought to compel the directors to make discovery and to attend before court for cross-examination. Fair procedures demanded that the directors be afforded an opportunity to be heard before orders, which would affect them personally, could properly be made.

9. The directors could, if they so wished, have agreed to make discovery and to attend for cross-examination. Instead, the directors, as was their right, chose to oppose the motions. The opposition was advanced, in large part, by reference to an argument that the Circuit Court did not have jurisdiction to grant relief of the type sought in the motions. More specifically, the stance adopted by the directors before the Circuit Court—and maintained before the High Court on this appeal—had been that the Circuit Court Rules preclude examination and discovery in aid of execution of a monetary judgment. The directors contended that, in circumstances where the Circuit Court Rules make detailed provision for execution, there is no lacuna in the law which requires to be filled by reliance on

the provisions of the Rules of the Superior Courts. This argument was ultimately resolved against the directors.

10. For the reasons which follow, it is in the interests of justice that the plaintiffs should be entitled to recover the costs of the motion and appeal as against the directors personally. Order 42, rule 38 of the Rules of the Superior Courts provides, *inter alia*, that the costs of any application under rule 36 and 37 or either of them and of any proceedings arising from or incidental thereto shall be in the discretion of the court. In exercising this discretion, the court will apply, by analogy, the general principles prescribed under Order 99 RSC and under sections 168 and 169 of the Legal Services Regulation Act 2015.

11. The starting point for the costs analysis is that the directors chose to oppose the reliefs sought against them personally, and that this opposition was ultimately unsuccessful. The default position is that costs follow the event, i.e. the losing party is liable to pay the successful party's costs. This default position is not confined to the substantive outcome of legal proceedings but extends, in principle, to the outcome of an interlocutory application. Of course, there will be certain circumstances in which a court will not be able to adjudicate justly on the costs of an interlocutory motion. This will occur where, for example, some or all of the issues decided on the interlocutory motion will be revisited at the trial of the action. It might not be possible, therefore, to say which party was right or wrong until the trial of the action. No such considerations arise in respect of these appeal proceedings. The outcome of the motions turned on an issue of statutory interpretation in relation to the Circuit Court Rules and this is not an issue which will be revisited. The substantive dispute, which remains outstanding between the parties, is in respect of entirely different issues, relating to whether there may

have been an attempt to put the assets of the defendant company beyond the reach of the plaintiffs as judgment creditors.

12. No reason has been advanced in argument which would justify a departure from the default position, i.e. that costs follow the event. This is not to detract in any way from the careful and comprehensive submissions made on behalf of the directors. The simple fact of the matter is that the directors, as is their right, chose to oppose the reliefs sought in the motions and to oppose the appeal. This will have resulted in the plaintiffs incurring legal costs, and in circumstances where the directors have been unsuccessful in their opposition, they should be liable to discharge the plaintiffs' reasonable costs. This is not a case where the officers of a company are being made liable for costs incurred by a corporate litigant. The motion was addressed to the directors, and it is the directors, not the company, who caused costs to be incurred by the successful party.

13. There is some force in the submission that the costs should be limited. It is correct to say, as counsel for the directors does, that special leave to file additional affidavit evidence should have been sought earlier. This would not, however, have obviated the need to adjourn the hearing on 18 December 2023. The reason for the adjournment had been that the court required the filing of written legal submissions. The second adjournment, on 26 February 2024, was related to the late affidavit: the hearing had to be adjourned to afford the directors an opportunity to file an affidavit in response. The directors ultimately decided not to file any affidavit.

14. In all the circumstances, the costs associated with the hearing of the appeal are to be measured on the basis of a single hearing of one hour's duration on 18 December 2023. No costs will be allowed in respect of the second and third

listings (26 February 2024 and 9 April 2024). The plaintiffs are, however, entitled to the costs incurred prior to 18 December 2023; the costs of the "*for mention*" listing on 14 May 2024; and the costs of the costs hearing on 12 July 2024. The plaintiffs are also to be allowed the costs of their written legal submissions.

CONCLUSION AND FORM OF ORDER

15. For the reasons explained in the principal judgment, it is appropriate to order examination and discovery in aid of execution. Accordingly, the Circuit Court order of 1 February 2023 will be set aside, and orders in terms of paragraphs (1), (2) and (3) of the notice of motion issued on 9 September 2022 will be substituted in lieu thereof. The plaintiffs are entitled to the discovery sought and to pursue their examination, before the Circuit Court, of the two directors of the defendant company.

16. For the reasons explained in this supplemental judgment, the following costs orders will be made. In each of the two sets of proceedings, the respective plaintiff is entitled to a costs order against the defendant company's two directors personally. The costs orders include all of the costs of the motion before the Circuit Court and the following costs of the appeal before the High Court. The costs associated with the hearing of the appeal are to be measured on the basis of a single hearing of one hour's duration on 18 December 2023. No costs will be allowed in respect of the second and third listings (26 February 2024 and 9 April 2024). The plaintiffs are, however, entitled to the costs incurred prior to 18 December 2023; the costs of the "*for mention*" listing on 14 May 2024; and the costs of the costs hearing on 12 July 2024. The plaintiffs are to be allowed

the costs of their written legal submissions. The plaintiffs are entitled to all reserved costs (save in respect of the listings expressly excluded above); the costs of the notice of appeal; and the costs associated with all of the affidavits filed on their behalf.

17. All such costs to be taxed, in default of agreement, pursuant to Order 61 of the Rules of the Superior Courts.

18. The parties have liberty to apply if and insofar as the directions of the High Court might be necessary in respect of the logistics of having the matter re-listed before the Circuit Court for the purpose of the compelled attendance and oral examination of the two directors, Frank Towey and Kieran Towey.

19. If this has not already been done, the written legal submissions dated 30 January 2024 and 19 February 2024, respectively, should be filed in the Central Office of the High Court in accordance with Practice Direction HC 101.

Appearances

Ruadhán Ó Ciaráin for the plaintiffs instructed by Eugene Smartt Solicitors
Sarah Kearney for the company and the directors instructed by Brannigan Cosgrove Finnegan LLP