THE COURT OF APPEAL

UNAPPROVED
Court of Appeal Record Number: 2019/ 95

Murray J.
Collins J.
Whelan J.

Neutral Citation Number [2023] IECA 319

BETWEEN/

MARIA KEENA

APPELLANT

- AND –

THOMAS COUGHLAN AND RAYMOND DONOVAN AND MICHAEL DEMPSEY AND PROMONTORIA (ARAN) LIMITED AND LUKE CHARLETON AND BY ORDER SEAMUS WALSH AND BY FURTHER ORDER KILKENNY WALSH LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Whelan delivered on the 21st day of December 2023

Introduction

1. This judgment is directed towards whether a stay ought to be granted to the respondents in respect of an order for costs being made against them in favour of the appellant arising from the judgment [2023] IECA 249 delivered in this Court allowing the appellant's appeal. This Court set aside the order of the High Court brought on foot of an application by the fourth to seventh respondents which had successfully sought dismissal of

her proceedings by direction on the basis that she had failed to establish a *prima facie* case. This Court directed that the trial resume and proceed at the convenience of the High Court.

2. This Court's provisional view was that the appellant, having been entirely successful in her appeal, was entitled to the costs of her appeal in this Court. With regard to the costs incurred to date in respect of the unsuccessful application to the High Court, this Court expressed the view that such costs ought to be determined by the judge in the High Court at the conclusion of the hearing and no order was proposed to be made in respect of same.

Position of fourth and fifth respondents

3. The fourth and fifth respondents do not take issue with the provisional view of this court that the appellant is entitled to her costs of the appeal. It is submitted, however, that the said order should be stayed pending the determination of the substantive proceedings before the High Court *"…or, at the very least, stayed as to execution"*. Three specific bases were identified in support of the stay application. Firstly, since the substantive action now has to resume before the High Court and its ultimate conclusion is uncertain, the various potential outcomes include the possibility that the appellant's proceedings might be dismissed with an order for costs against her. In such a scenario the order for costs in her favour this appeal would *"… properly be set off against the costs of the appeal"*. Thus, it was contended, it would be both premature and unfair that she obtain payment of her costs in respect of this appeal prior to the conclusion of same. Reliance was placed on the decisions of this court in *BGB Property Holdings Ltd. v. Tifco Ltd.* [2021] IECA 181 and *Promontoria (Oyster) DAC v. Kean* [2023] IECA 181.

4. Secondly, these respondents place reliance on the fact that this action was admitted into and will proceed in the Commercial List of the High Court. The general practice in that court is to grant stays on costs orders made in respect of applications brought during the course of the litigation. The approach is exemplified by the decision in *HKR Middle East*

Architects Engineering LLC v. English [2021] IEHC 376 where, having made an order for costs in favour of the party who had successful resisted an interlocutory application, McDonald J. granted a stay on same *"...pending the ultimate determination of these proceedings"*. It was emphasised that the matter is listed in the Commercial List and has a prospect of been dealt with expeditiously. This was said to represent *"a powerful consideration"* in favour of a stay.

5. Thirdly, it was emphasised that the appellant is not suggested to be impecunious. She had refused to accept the return of a money draft originally handed over by her. It was said to follow that in the circumstances it would be both just and convenient to place a stay on the appellant's order for costs of this appeal. Reliance was placed on the decision of Laffoy J. in *Haughey v. Synnott* [2012] IEHC 403 and also the decision of Humphrey J. in *Havbell DAC v. Harris* [2020] IEHC 147.

6. Reliance was also placed on the decision of the Supreme Court in *Cantrell v. Allied Irish Banks plc* [2021] IESC 13 where the issue of a stay was said to have been influenced by the relevant proximity of the trial date.

Position of sixth and seventh respondents

7. The sixth and seventh respondents likewise seek a stay of the costs order until after the conclusion of the High Court proceedings. They acknowledge the extensive recent jurisprudence and the import in same which confirms the principle that costs orders are generally immediately enforceable unless it is demonstrated to be in the interests of justice to grant a stay on execution of same. Where, as here, the final outcome of the substantive proceedings is not yet known it was urged that this court should seek to identify *"a regime which minimises the overall risk of injustice"*, placing reliance on the Supreme Court decision in *Okunade v. Minister for Justice & Another* [2012] 3 IR 152.

8. Reliance was also placed on the decision of this Court in *McDonald v. Conroy* [2020] IECA 336, in circumstances where the matter was remitted to the High Court for rehearing, for the reasons stated in the judgment of Collins J. (with which the other members of the court concurred). A stay on execution of the costs order was granted pending conclusion of the retrial before the High Court which this court had directed.

9. These respondents urge that it is in the interests of justice to grant a stay of execution on execution of the costs order in respect of the appeal pending conclusion of the High Court proceedings. It was urged that the facts and circumstances in this case are analogous to those which obtained in *McDonald v. Conroy*.

Arguments on behalf of the appellant

10. It was contended that no reason was identified to warrant imposing a stay on costs. Accordingly, that the normal rules should apply and that costs follow the event.

11. The appellant contests whether it can be said with any certainty that the litigation now remitted to the High Court will be resolved in early course, pointing out that there may be an appeal from the ultimate decision of the High Court in the proceedings. It is asserted that she is entitled to be reimbursed for the costs of the appeal now, rather than having to await the conclusion of the substantive hearing.

12. It is argued that this was not in substance an interlocutory application but rather a *"terminal application"*. As such it was disputed that it could fall within the category of cases encompassed by the decision in *Haughey v. Synnott* (*supra*). Weight was attached to the fact that it had not been asserted on behalf of the respondents that the appellant is impecunious and hence *"...there is no reason for any concern in relation to any potential costs orders upon the conclusion of the proceedings which themselves may be the subject of an appeal"*. It was argued that the grant of a stay in respect of the costs of the appeal would be unjust in all the circumstances.

Analysis

13. The respondents, sensibly, do not contest the making of the proposed costs order, save that they seek a stay, at the minimum, on execution of the order against them pending the conclusion of the hearing in the High Court.

14. Of course, the appellant is correct that, had her appeal been unsuccessful, that outcome would have been existential in its implications for her and terminal for the litigation, subject to her limited right to seek leave to appeal further to the Supreme Court. Notwithstanding that, it is appropriate to deal with this application on the basis that the applications brought by the fourth to seventh respondents inclusive that the plaintiff's case be dismissed on the grounds that she failed to make out a *prima facie* case, ought to be treated as interlocutory in nature, at least from the point of view of the issue of costs.

15. Order 99, r.2(3) provides that *"...(3) ...the Court of Appeal... upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

16. In *Delany & McGrath on Civil Procedure* (4th ed., Round Hall, 2018), the authors trace the origins of that rule, observing at 24-78;

> "*Traditionally, there was a tendency for judges not to make an adjudication upon the costs of interlocutory applications and to make an order reserving those costs to the full trial of the action where they almost invariably awarded them to the winning party without any further consideration. This was an unsatisfactory approach, not least because it encouraged the bringing of unmeritorious interlocutory applications and failed to provide any costs penalty, or at least any immediate costs penalty, if a party acted unreasonably in either bringing or resisting such an application. In Veolia Water UK plc v Fingal County Council (No.2), Clarke J noted that interlocutory applications were assuming an increasing importance in proceedings, particularly in*

complex cases, and that such applications were frequently required to be listed in a manner similar to the listing of full hearings. He, therefore, advocated treating each such application as an 'event' with the costs of the applications assessed as a stand alone item on that basis."

At para 24-79, the authors note;

"This rule extends to all proceedings the approach provided for by Order 63A, rule 30 in respect of proceedings entered into the Commercial List. In Allied Irish Banks plc v Diamond, Clarke J identified the underlying rationale of the rule as being:

> *to discourage parties from bringing unnecessary or inappropriate interlocutory applications or indeed from defending such applications when they are brought, or perhaps even at an earlier stage, from creating the circumstances which necessitate the bringing of those applications in the first place. That is the reason why the Court should attempt, where possible, to decide if it is safe to award costs at that stage for the fact that parties may be exposed to the costs of interlocutory applications should they be unsuccessful must be a factor in concentrating the minds of parties as to whether those applications should be brought".*

At para 24-80 they note;

"It is clear from the use of the word 'shall' in rule 1(4A) that the effect of the rule is that a court is required to adjudicate upon and make a costs order in respect of an interlocutory application rather than to reserve the costs of the application. However, the court retains a wide discretion in deciding what costs order to make in respect of the application…"

17. The default position was outlined in this Court in *Permanent TSB v. Skoczylas* [2020] IECA 152 where it was emphasised that unless it is not in the interests of justice to do so, a costs order should be immediately enforceable:

> *"44. The principles discussed in Godsil applying 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."* (emphasis in original)

The interests of justice

18. The burden rests with the respondents to establish on the balance of probabilities that it is in the interests of justice that a stay of execution of the costs order of this appeal be granted pending conclusion of the proceedings before the High Court. Several authorities being relied upon are directed towards the proposition that interlocutory awards of costs are routinely stayed until the conclusion of the hearing of a matter.

19. A fundamental distinction of substance has to be drawn between the granting of a stay in a costs order where interlocutory orders are granted or refused in the High Court and where same remain unappealed against on the one hand and, cases where consequential costs orders are made by appellate courts when, as here, the interlocutory order is the subject of a successful appeal. Several of the authorities been relied on by the fourth and fifth

respondents concern determinations in the High Court in respect of interlocutory matters rather than the determination of a successful appeal against a decision of an interlocutory application in the High Court. The former category is clearly distinguishable from the latter.

20. This court in *The Minister for Communications, Energy & Natural Resources & Or. v. Wymes* [2020] IECA 274, Faherty J. considered the appellant's arguments that a stay on the order as to costs in respect of the appeal should be granted, noting at para. 44:

> *"…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. I accept that stays are frequently granted pending appeal. However, I am not persuaded that it would be in the interests of justice to put a stay on costs, having regard to the protracted history of this case."* (para. 12)

21. With regard to the overall risk of injustice, the respondents assert in this case that since the matter is listed in the Commercial List it will be dealt with *"expeditiously"*. However, in light of the evidence the following factors I find to be germane:

(a) The appellant has been entirely successful in her appeal.

(b) The respondents comprehensively contested the appeal on all grounds.

(c) Many years have elapsed since the appellant presented herself at the offices of EY in Dublin and handed over the "*non-refundable deposit of €160,000*" giving rise to the within proceedings

(d) The respondents have yet to go into evidence

(e) There is no evidence of anticipated hardship if the costs order is to be enforceable now.

22. The respondents have not established or advanced any cogent evidence to support the contention that it is either "*premature"* or *"unfair"* that the order for costs be executed, should the appellant elect to do so, pending the trial of the action.

23. If the possibility that the successful appellant might ultimately be unsuccessful in the substantive hearing before the High Court is to be an decisive factor in determining whether to grant a stay on an order for costs in favour of a successful appellant, then such stays would be the norm in this Court since the outcome of an interlocutory appeal does not offer a reliable indication of the ultimate outcome of the litigation at the end of the hearing.

24. Although the fourth and fifth respondents rely on *BGG Property Holdings Ltd. v. Tifco Ltd.* (*supra*), in that case it is to be recalled that the issue of the stay was not the subject of any argument nor does the judgment record any application being advanced for a stay on any basis. In that case the proposed order for costs, the subject matter of the stay, had been made against Tifco, the unsuccessful appellant.

25. In *BGB Property Holdings Limited v. Tifco Ltd.* and *Promontoria (Oyster) DAC v. Kean* (*supra*), relied on by the respondents, the view expressed with regard to the stay in the judgment represented the preliminary view of the court and it was open to either party to advance submissions contending for different terms with respect to the order for costs as would ultimately be made by the court. It is not clear whether the final order as to costs made in either appeal included a stay on execution on any terms.

26. There is force in the appellant's concerns regarding the delays she has experienced to date with the within litigation and it is surely the case that though the balance of the hearing may be processed expeditiously before the High Court, the decision of that Court may not necessarily bring a conclusion to the litigation.

27. Delay is a significant and material factor. The appellant is a private individual who not unreasonably asserts that she should not be made to wait any longer for the payment of her costs and the execution of the order proposed.

28. The fourth and fifth respondents acknowledge at para. 10 of their submissions that the appellant is not impecunious *"…there is no suggestion that Plaintiff/Appellant is*

impecunious…". That cuts both ways and undermines the reliance by these respondents on the decision of the Supreme Court in *Cantrell v. Allied Irish Banks plc* (*supra*) where the question of a stay was influenced, *inter alia,* by the relevant proximity of the trial date and also by a consideration that *"It would be unjust if the respondents were to succeed in the High Court but find themselves unable to recover costs, even though they had previously paid costs to the same parties."* (para. 7) No suggestion whatsoever has been advanced that such a scenario is in prospect in the instant case and the submissions at para. 10 of these respondents implicitly acknowledges that. The facts in *Cantrell* were materially different in that respect.

29. In my view, it is significant that the respondents have identified any material risk of injustice as might be visited upon them by a refusal of the stay beyond the inevitable routine inconvenience of having to satisfy an order for costs validly made.

30. It is undoubtedly that case that the court in determining whether to grant or refuse a stay pending the conclusion of the resumed hearing should have regard, where appropriate, to ensuring that the operation of the order as to costs accords with *"…a regime which minimises the overall risk of injustice"* as referred to by Clarke J. (as he then was) in *Okunade v. Minister for Justice & Another* (*supra*) at para. 67.

31. That principle as reiterated by the Supreme Court in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 IR 576 has been adopted and applied in this court in *McDonald v. Conroy* (*supra*) at para. 50. That case involved a rehearing of the substantive action which had already concluded in the High Court. For the reason stated in the substantive judgment of Collins J. in *McDonald v. Conroy,* that is a material distinction with the circumstances in the instant case where the matter has been remitted and will resume expeditiously and where the respondents will have the opportunity to adduce the evidence and call witnesses who

anticipated testimony has been put to the appellants and her witnesses in cross-examination in the High Court.

32. The relevant means and circumstances of the parties in *McDonald v. Conroy* was undoubtedly a material factor in the decision to grant a stay in that case. Furthermore, the court was satisfied on evidence before it that the greater risk of injustice arose for Ms. McDonald should the stay on the order for costs be made against her be refused pending determination of the substantive hearing. It will be recalled that the practical consequences of refusing the stay were in substance identified by Collins J. at para. 55 of the judgment where he observed:

> *"...it would not be in the interests of justice for the Court now to make an order for costs in terms that would have the effect of preventing such a rehearing or that would give rise to a real risk of that outcome. The issues raised in these proceedings are, in my view, too important to be decided by default."*

He was accordingly satisfied that the balance of justice *"clearly weighs in favour of the granting of a stay in the circumstances here."*

33. Those facts stand in stark contrast to the position of the respondents in the instant case. There is no suggestion of impecuniosity on the part of the respondents or any of them nor is it asserted that the refusal of a stay would compromise or adversely impact on their respective ability to defend the proceedings in accordance with the defences delivered on their behalf and in accordance with the evidence extensively referred to in the course of the cross-examination of the appellant and her witnesses as being intended to be adduced on their behalf at the resumption of the hearing.

Conclusion

34. Having carefully reviewed the comprehensive written submissions and the authorities I am satisfied that in light of s.168 and 169 of the Legal Services Regulation Act, 2015, and

the Rules of the Superior Courts, including O.99, r.2(3), the appellant is entitled to her costs of this appeal and no valid basis has been identified by the respondents for the granting of a stay in respect of same and the Court so orders and the stay sought is refused.

35. Murray and Collins JJ. have authorised me to confirm their concurrence with this judgment.