



THE COURT OF APPEAL

APPROVED

Record Number: C.A. No. 49 of 2022

Noonan J.

Neutral Citation Number [2023] IECA 8

Haughton J.

Allen J.

COSTS RULING IN THE MATTER

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/APPELLANT

-AND-

OLIVER MOLONEY

DEFENDANT/RESPONDENT

RULING OF THE COURT delivered electronically on 20th day of January 2023

1. In a judgment delivered by Allen J. on 14 December 2022 (Noonan and Haughton JJ. concurring) [2022] IECA 287 the application of Mr. Neil Maloney brought by notice of motion dated 14 October 2022 (“*the motion*”), for “*liberty to appear and be heard in lieu and on behalf of*” his father Mr. Oliver Moloney, the respondent in this appeal, was refused. At para. 82 of his judgment Allen J. stated:

“On the evidence, the respondent’s circumstances are not unusual, still less exceptional. Mr. [Neil] Maloney has not shown that the jurisdiction which he invokes has been engaged and his application must be refused.”

2. This Ruling relates to the costs of the motion.
3. In the said judgment it was stated at para. 83:

“As to the question of costs, my provisional view is that the appellant has been entirely successful on this application and is entitled to an order that its costs should be paid by Mr. Maloney as the unsuccessful party. If Mr. Maloney wishes to contend for any other order as to costs, he may, within twenty one days of the electronic delivery of this judgment, file with the Court of Appeal office and serve on the appellant’s solicitors a short written submission, not to exceed 1,000 words. In that event, the appellant will have fourteen days within which to file and serve a written submission in response, not to exceed 1,000 words. My expectation is that the court will be able to deal with any argument on costs by way of a written ruling but if a further oral hearing is required, the parties will be informed.”

4. The court received as an attachment to an email from Mr. Neil Maloney on 6 January, 2023 a short document which the court is treating as a submission on costs. A reply submission was filed on behalf of the appellant on 18 January, 2023. Having read these the court considers that no further oral hearing is required.
5. In his short document Mr. Maloney states in relation to costs:

“However, ahead of the new legal term beginning on Monday morning, it must be recalled, this issue was already mutually agreed upon by both sides before Costello J. on the 21st day of October last year. Whereby, the costs of my simple application were to go with the overall costs of the Appeal, it made perfect sense and was fair enough, especially so, whilst the named Respondent had irrevocably and unconditionally to undertake to indemnify” me, at condition 3(b) of the Power of Attorney,

‘against all actions, proceedings, claims, costs, expenses and liabilities of every description arising from the exercise or purported exercise in good faith of any of the powers conferred by the Power of Attorney.’”

The suggestion appears to be that there was agreement between the parties in the directions list on 21 October 2022, which was the first return date of the motion, that costs of the motion would be reserved to be dealt with when the costs of the appeal fell to be addressed.

6. It appears that on 21 October 2022, Costello J. merely adjourned the hearing of the motion to the 8 November 2022, the date on which the appeal was listed for hearing, and reserved to 8 November 2022 any costs arising on 21 October 2022. On 8 November 2022, the motion and appeal were listed for hearing by this court. In the event this court decided to hear and determine the motion first, and to adjourn the appeal for hearing on a later date.
7. In their replying submission the appellant and its legal advisors say they are strangers to Mr. Maloney’s allegation of an agreement, and that they were “*never party or witness to any such agreement*”. As the appellant’s legal advisors owe solemn duties to the court not to mislead it in any way, the court takes this submission most seriously.
8. No evidence has been adduced to support any such agreement as is alleged by Mr. Maloney. In so far as Costello J. adjourned the hearing of the motion to the date on which the appeal, and now the motion, were listed for hearing, that did not have the effect of making any determination in relation to the costs of the motion heard on 8 November 2022 by this court; Costello J. was simply reserving to this court any costs that may have arisen from the return date hearing before her on 21 October 2022.
9. Furthermore O.99 r.2(3) of the Rules of the Superior Courts provides :

“The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possibly justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

The motion is in the nature of an interlocutory application – it is a preliminary and stand-alone application between Mr. Neil Maloney, who is not a party to the appeal, and the appellant, concerning representation of the respondent at the appeal. This is not an instance in which the outcome of the appeal will have any bearing on where the costs of the motion should fall, or where it could be said that it is not possible to justly adjudicate upon liability for costs of the motion at this stage.

10. Accordingly, the court considers that it should decide the costs of the motion in this ruling and that it would not be appropriate to reserve them until after the appeal is heard.
11. Mr. Neil Maloney appears to rely on the indemnity provision in clause 3(b) in the Power of Attorney quoted in his submission (see above) to support a contention that he should not have to pay costs, or perhaps that costs should be reserved. This Power of Attorney was relied upon in the motion to support the contention that Mr. Neil Maloney was authorised by the respondent to advocate on his behalf. Allen J. stated:

“78. For completeness, I should refer to the fact that during the course of the hearing of this application, although not on affidavit, Mr. Maloney relied on the fact that he had obtained a written power of attorney from his father which purported to authorise him, inter alia, to speak on his father’s behalf in court. This document was, perhaps surprisingly, drafted by a solicitor and executed in his presence by the defendant. The court agreed to examine the document de bene esse and when the court noted that it was no longer in date as it was for a period certain, Mr. Maloney advised the court that it had been renewed several times before the same solicitor. For the avoidance of any doubt, I would emphasise that such a document cannot confer a right of audience in court on any party, that being a matter solely for the court as I have explained – see in that regard Walsh v Minister for Justice [2016] IEHC 323.”

12. It follows from this that the Power of Attorney also cannot not be relied upon to confer on Mr. Neil Maloney any entitlement to costs, or to avoid an order for costs against him, or to defer the

decision on costs to hearing of the appeal. The Power of Attorney is a document governing relations between his father the respondent and a non-party Mr. Neil Maloney, and sets out, as a matter of private law, what acts Mr. Neil Maloney is authorised to carry out on behalf of the respondent. Whether Mr. Neil Maloney is entitled to recover, on foot of the indemnity in clause 3(b), any costs awarded against him personally in these proceedings is a matter entirely as between him and the respondent.

13. The appellant seeks its costs of the motion against Mr. Neil Maloney. Under O.99 r.2(1) the court has a discretion in relation to costs subject to ss.168 and 169 of the Legal Services Regulation Act, 2015. O.99 r.3(1) of the R.S.C. provides that the “*Court of Appeal in considering the awarding of costs of any appeal or step in any appeal, ...shall have regard to the matter set out in section 169(1) of the 2015 Act, where applicable.*” The relevant part of s.169(1) reads –

“169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court otherwise orders having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including...”

– and the subsection then sets out a series of factors (a) – (g).

14. In this interlocutory motion the appellant has been entirely successful. There is no circumstance, or aspect of the conduct of the motion, or any factor set in (a) – (g), that is relied on by Mr. Neil Maloney or that would persuade this court to decide otherwise. The costs of the motion should therefore ‘*follow the event*’, being the refusal of the motion by the court.

15. The court will therefore award to the appellant against Mr. Neil Maloney the costs of the motion, to include the appellant’s costs of preparing the submission on costs, such costs to be adjudicated by a legal costs adjudicator in default of agreement.

