APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/99

Faherty J.
Pilkington J.
Allen J.

Neutral Citation Number [2024] IECA 269

BETWEEN

SHARON KEOGH

PLAINTIFF/APPELLANT

AND

MARS CAPITAL FINANCE IRELAND DAC, AIDEN MURPHY

AND

MEATH COUNTY COUNCIL

DEFENDANTS/RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 30th day of July, 2024

1. I too have listened carefully to the judgment which has just been delivered by Faherty J. and I too agree with it.

2. Mrs. Keogh's High Court motion and the appeal against the refusal by the High Court of the interlocutory injunctions sought were clearly based on two obvious misconceptions. The first was a misconception of fact, that it was the receiver who was selling the property,

and the second was a misconception of law, that Mars Capital could not sell otherwise than as mortgagee in possession.

3. Mrs. Keogh explained that being unable to afford a solicitor, she took advice from someone who knew the law better than she did. Not for the first time, it is quite clear to me that whoever it was held himself or herself out as being able to help Mrs. Keogh knew little about the law and did not understand what little he or she knew. It was of no assistance to Mrs. Keogh that she was given false hope and run into great expense.

4. The second limb to Mrs. Keogh's appeal was an appeal against the costs order which was made by the High Court. This was not addressed in either Mrs. Keogh's or the defendants' written submissions on the appeal but in her oral presentation Mrs. Keogh submitted that the amount of the costs was extremely high and that it would be unfair if the costs were taken out of the proceeds of any sale of the house. In response, counsel for the defendants indicated that he was not standing over the order for costs – which he had invited the High Court judge to make – and proposed that in lieu of the order for payment of a measured sum for costs, there should be an order for the adjudication of the defendants' costs of the High Court motion. This effectively conceded Mrs. Keogh's appeal against the costs order but for reasons to which I will come, I think that I need to say something more about this.

5. In the High Court, having successfully seen off Mrs. Keogh's motion, counsel for the defendants applied for an order for costs. That was a perfectly routine application. However, counsel immediately went on to ask the judge to measure the costs. The sale – it was said – was likely to complete in the next couple of weeks and it would be better – it was said – that everyone who had *"burdens over [the property]"* should have certainty *"rather than leaving an extant unascertained liability that's captured by the mortgage."*

6. The sale price was €225,000. Mrs. Keogh – by reference to her prescribed financial statement – was said to have total debtors of approximately €160,000, which would leave what was described as a gap – but would be a surplus – of approximately €65,000. The defendants' solicitor – it was said – had done a back of the envelope calculation estimate of the total cost. Given that this was an application made on short notice, that the affidavit had to be turned over in the Easter vacation, and that the entire process from initiation to determination had taken two weeks, a figure of €35,000 plus VAT was proposed.

7. Mrs. Keogh did not really address the application. She said that she did not care about the money and only wanted to keep her house. She said that she would appeal. She did point out that the house belonged to her husband as well.

8. I pause here to say that there was some discussion in the High Court as to the division of the surplus after the liability secured by the first charge in favour of Mars Capital was discharged. It appears to have been assumed by counsel for the defendants – and accepted by the judge – that the costs payable by Mrs. Keogh would be captured by the charge. If that were so, Mr. Keogh would be fixed with a liability in respect of the costs of proceedings of which it was said by Mrs. Keogh that he was aware but to which he was not party; and his share of the equity in the house would be depleted. In effect, Mr. Keogh would find himself paying costs which he was not ordered to pay. As I read the transcript, that struck me as surprising. Moreover, to my mind, it was by no means clear that the defendants would be entitled to priority for their costs even in respect of Mrs. Keogh's interest in the property.

9. There was talk also in the High Court that all of Mrs. Keogh's debts might be paid out of the surplus. That, it seems to me, fails to take account of the fact that of Mrs. Keogh's creditors, only Bank of Ireland had a charge over the property; which was a judgment mortgage against her interest only. At first glance, it seemed to me that the application of the surplus in the way suggested would ignore the rights of Mr. Keogh and Bank of Ireland.

10. In the end, the judge measured the defendants' costs at €27,000 plus VAT. This, she said, gave to Ms. Keogh *"... a ghost of a chance that [she] had not earned for herself ..."*. From this I infer that the judge thought that the defendants' costs, if adjudicated, might come in at a higher figure.

11. The costs order is dealt with in ground No. 11 of the grounds of appeal where it is said that:-

> *"The trial judge was wholly disproportionate in relation to the awarding of measured costs in the amount of €27,500 plus VAT at the behest of the first named respondent."*

12. The reference to €27,500 plus VAT was clearly an error but, as Mrs. Keogh was correct in saying that it made no difference.

13. What happened in this case bears a striking resemblance to what happened in *Landers v. Dixon* [2015] 1 I.R. 707. In that case the successful plaintiff asked for an order for costs, to be taxed in default of agreement. Counsel had mentioned *en passant* that a bill of costs had been drawn by a legal costs accountant which put the costs at €47,000. The defendant suggested a figure of €8,000. The High Court judge measured the costs at €20,000, inclusive of VAT. The plaintiff appealed.

14. This Court allowed the appeal and substituted an order for taxation of the plaintiff's costs. Hogan J. (with whom Peart and Irvine JJ. agreed) held that the power to measure costs was one which had to be exercised judicially and that it was implicit that before measuring costs a judge should have some evidential or otherwise objectively defensible basis for the manner in which costs were measured. He also said – the law reporter appears to have thought that it was *obiter* but I do not believe that it was – that where a judge was inclined to measure costs the parties, in particular the party most likely to be affected by a departure

from the normal order, should be afforded an opportunity to make brief submissions and place before the court any material relevant to the exercise of the discretion.

15. This case is different to *Landers* in that it was relatively straightforward but just as the judge in *Landers* did not have the bill of costs to which counsel had referred – or any indication as to where the defendant's figure of €8,000 had come from – the judge in this case did not even have the envelope – which may very well have been a metaphorical envelope – on which the calculation of €35,000 plus VAT had been made.

16. It is true – as counsel for the defendants submitted to the High Court – that the motion had been dealt with speedily and in the Easter vacation but it was, from the defendants' point of view, perfectly straightforward. The premise of Mrs. Keogh's application was that the property was being sold by the receiver. The substance of the answer was that it was not. As it was put in the affidavit of Mr. Ronan Hopkins filed on behalf of the defendants, the plaintiff's entire claim was based on the incorrect assumption that it was the receiver who was to sell the property. That – as he said – was simply incorrect.

17. At the risk of falling into the same trap as the judge was led – having a stab at what the figure should be – I cannot forbear to observe that the sum claimed – and the sum allowed – looks very high.

18. Mrs. Keogh had and has no answer to the defendants' application for an order that she should pay the costs of the motion she brought in the High Court. However, the defendants did not put before the High Court any material which would have enabled the making of an appropriate assessment of their costs.

19. While conceding that the order measuring the defendants' costs at €27,000 plus VAT could not stand, counsel stood over the position which he had taken in the High Court as to the priority of the costs. He pointed to clause 3.1 of the mortgage by which *"the Borrower"* – defined in the schedule as both Mr. and Mrs Keogh – charged the property with payment of

the *"Total Debt"* – which was in turn defined in clause 4.1 as the loan and *"(ii) all costs and expenses incurred by EBS in accordance with the terms of this Mortgage and/or the Offer Letter, and all other costs expenses and charges payable by the Borrower under this Mortgage and/or the Offer Letter."* From there, counsel moved to clause 4.3 of the mortgage conditions which provide that:-

> *"4.3 If payments on the Loan go into arrears or other parts of the Total Debt are not repaid when they fall due EBS may incur costs and expenses in collecting these arrears and/or realising its security. All such costs and expenses will be payable by the Borrower. These costs and expenses will include –*
>
> *(a) Outlay by EBS on legal or other professional fees, and*
>
> *(b) Administrative expenses incurred internally by EBS.*
>
> *Estimates of such costs and expenses will, if possible, be sent to the Borrower before commencement of any action by EBS which would give rise to them."*

20. It is clear – it was said, and it is – that the loan has gone into arrears. The premise of the position taken by Mars Capital in the High Court, and which it maintains, is that the costs which it – and the receiver – incurred in successfully seeing off Mrs. Keogh's attempt to prevent or postpone the sale are *"costs and expenses in … realising its security."* That may or may not be so, but the question is one of immediate concern to Mr. Keogh and at least potentially concerns Bank of Ireland – which has a judgment mortgage against Mrs. Keogh's interest – and Mrs. Keogh's unsecured creditors with whom – if the costs are not captured by the mortgage – Mars Capital would rank rateably.

21. While arguing his client's case confidently, counsel was compelled to concede that the entitlement of Mars Capital to retain its costs from the proceeds of sale was arguable. This potentially puts Mars Capital in a somewhat invidious position. As a matter of law, it would hold any surplus on trust for the person next entitled but it seems to me that it could

not say what the surplus would be without first establishing its entitlement to priority in respect of the costs. The issue was not argued either in the High Court or in this Court and I am not to be taken as deciding it one way or the other. I would say, however, that Mars Capital needs to be very careful as to how it proceeds.

22. The only order which needs to be made is to allow Mrs. Keogh's appeal against so much of the order of the High Court as measured the first and second defendants' costs at €27,000 plus VAT and substitute an order for the adjudication of those costs.

[Faherty and Pilkington JJ. agreed.]