APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

Record No: 322/2018

Edwards J.
Whelan J.
Ní Raifeartaigh J.

Neutral Citation Number [2023] IECA 97

Between/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

V

KIERAN DOYLE

APPELLANT

JUDGMENT of the Court delivered by Edwards J on the of 28th day of April 2023.

Introduction

1. On the 21st of December 2022, Edwards J. delivered a judgment (bearing neutral citation [2022] IECA 296)on the substantive issues in this appeal (with which both Whelan and Ní Raifeartaigh JJ. concurred). The appeal was against the granting by the High Court of summary judgment in favour of the respondent and against the appellant in the sum of €7,473,348.47, together with the costs of the motion and of the proceedings when taxed and ascertained. There had been nine grounds of appeal in all. Grounds of Appeal nos. 1, 2, 3, 4, 8, and 9 were rejected in their entirety. Grounds of Appeal nos. 5, 6, and 7 were also rejected, saved to the limited extent that a judgment figure of €7,005,283.47 was substituted for the judgment figure of €7,473,348.47 recorded by the High Court in the circumstances as set out in the said judgment; the respondent having successfully obtained leave from the Court of Appeal, in the interval between the conclusion of the proceedings in the High Court and the appeal coming on for hearing before the Court of Appeal, to amend their Summary Summons to claim the sum of €7,005,283.47, rather than the sum of €7,473,348.47 as originally pleaded, and having duly served an amended Summary Summons in advance of the appeal hearing.

2. With respect to the costs of the appeal, the judgment of the 21st of December 2022 indicated that these would be a matter for determination following receipt of submissions. It stated in that regard that if any party or parties wished to apply for their costs of the appeal, or to resist the other side's application in that regard, they were invited to make

short written submissions (maximum 1,500 words) to the Court, within a specified time limit following which the Court would, if necessary, deliver a separate costs ruling.

3. Submissions were received from both the appellant and the respondent within the specified time limit. In those submissions the respondent sought its costs of the appeal as against the appellant, while the appellant asked the Court to make no order in respect of costs.

Submissions on behalf of the respondent

4. The respondent draws to our attention the provisions of s. 169(1) of the Legal Services Regulation Act 2015 (i.e. "the Act of 2015" or "the 2015 Act"), which state as follows:

> *"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 orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including–*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*
>
> *(e) whether a party made a payment into court and the date of that payment,*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
>
> *(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."*

5. We were further asked to note that Order 99, Rules 2 and 3 of the Rules of the Superior Courts ("RSC") provide:

> *"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*

(3) 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 possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.

3. (1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs."

6. The respondent submitted that the default position is that costs should follow the event. Put differently, "*the winning party is to obtain an order for costs to be paid by the other party, unless the court for special cause otherwise directs*" (see: *Cooper-Flynn v. Raidió Teilifís Éireann* [2004] 2 I.R. 72 at 79). In *Veolia Water UK Plc & Ors v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 Clarke J. (as he then was) held, at para. 2.5 of his judgment, that the normal rule could be departed from "*by virtue of special or unusual circumstances*".

7. It was submitted that there are no special circumstances in this appeal which would justify departure from the normal rule.

8. Insofar as the appellant relies *inter alia* on the fact that the judgment sum was reduced as a result of the appeal and – to that limited extent – he obtained a benefit from the appeal, the respondent says that the circumstances in which that reduction came about is not a sufficient basis to justify a departure from the normal rule. It submits that not only did the issue of the amount of the judgment sum occupy little or no court time, the error, as the judgment of the Court of Appeal records (§124), arose due to an "*oversight*" that resulted in a "*miscalculation as to what in fact were [the] just credits and allowances*" (§127). Critically, it says, the judgment of the Court of Appeal records (§125) that the Bank did not dispute that the appellant was entitled to a credit for €270,000 and that it was "*common case*" that judgment was granted for an incorrect figure. Therefore, the costs that were actually incurred by the parties in prosecuting and opposing the appeal were not incurred as a result of the miscalculation in the judgment sum. That could have been corrected by consent, with minimal or no cost. On the contrary, the significant costs

which were actually incurred were incurred by reason of the appellant's decision to advance nine grounds of appeal, each of which was rejected by the Court of Appeal.

9. The respondent has submitted that, in those circumstances, costs ought to follow the event and an order for costs should be made in favour of the respondent (the Bank) as against the appellant.

Submissions on behalf of the appellant

10. The appellant argues that although nine grounds of appeal were advanced, what he characterises as "*the primary ground of appeal*" was that the liability of the appellant should be reduced based on the application of s. 17(2) of the Civil Liability Act 1961 (i.e. "*the Act of 1961*"). This was the subject matter of Ground of Appeal No. 4, which was, as stated already in the introduction to this judgment, rejected by us in its entirety. The appellant says that the arguments took up the majority of the time before the Court of Appeal and a significant portion of the written submissions made to this Court. While the Court of Appeal rejected the appellant's argument, it did so on the basis of the judgment which had served to clarify the law on satisfaction and accord, and as to the correct interpretation of s. 17(2) of the Act of 1961, namely *Ulster Bank Ireland DAC & Ors v. McDonagh & Ors* [2022] IECA 87, which was not available at the time of the appeal hearing in this case. The *McDonagh* judgment was only delivered after judgment in the present case had been reserved, and accordingly at the time at which the appeal hearing in this case took place there was a legitimate legal controversy to be litigated in circumstances where there were conflicting High Court authorities.

11. The appellant notes that this Court held in McDonagh that s. 17(2) of the Act of 1961 did not apply to debt claims, but that even if it did it would not benefit the defendants in those proceedings, where the Court found that the "*damage*" in a summary judgment claim could not be the same damage as that which might be claimed against a negligent estate agent who valued secured property. The appellant submits that the latter finding did not serve to bolster the respondent's position in the present case where all alleged concurrent wrongdoers breached the same loan agreement with the respondent.

12. Further, he has submitted that, at para. 67 of the judgment of the 21st of December 2022 in this case, this Court accepted that the issue of whether s. 17 of the Act of 1961 applied to debt claims was uncertain at the time of the hearing of the appeal, and that the judgment further identified a number of conflicting authorities. He makes the point that only one of the cases identified supported the position of the respondent, namely the decision in *Histon v. Shannon Foynes Port Company* [2006] IEHC 190. Moreover, he says, as in the *McDonagh* case, the defendant also sought to equate damages for negligence with the failure to repay a debt.

13. The appellant has submitted that in the circumstances, at the time of the hearing of the appeal, the contention by the respondent that two debtors who failed to repay the same debt were not concurrent wrongdoers for the purposes of s. 17 of the Act of 1961, was one which was entirely novel as a matter of Irish law. Indeed, he says, it was a

contention that was "*directly contradicted by all Irish case law, as existed at the time of the hearing, which was directly on point*".

14. The appellant asserts that the respondent only adopted the position that s. 17 of the Act of 1961 did not apply to an action for recovery of a debt during the course of the appeal, and that in the High Court counsel for the respondent had been prepared to accept that the position in law was to the contrary. He says that in those circumstances it was entirely reasonable for him to have pressed on appeal a contention that his liability should be reduced based on the application of s. 17(2) of the Act of 1961. That being so, he submits that it is appropriate for the Court to depart from the principle that costs should follow the event, and in that instead it should make no order in respect of costs.

15. It was also submitted that, when one considers the applicable test for summary judgment, the appellant acted reasonably in pursuing this appeal. The bar required to be reached in order for a defendant to successfully seek to have a matter remitted for plenary hearing is a low one. It is settled law that where complex issues of law arise, summary procedure is not appropriate, in order to do justice as between the parties. It was again reiterated that the appellant's actions must be adjudged to have been reasonable in circumstances where this Court acknowledged in its judgment that the issue as to whether s. 17 of the Act of 1961 could apply to an action to recover a debt was uncertain as of the time of the hearing of the appeal.

16. Finally, it was said that the submission that there should be no order as to costs was further bolstered by the fact that it is common case that at the time of the issuing of the appeal, the respondent had failed to properly plead its case and that the amount ordered by the High Court was required to be reduced by this Court. Addressing the respondent's contention that the incorrect value of the judgement could have been corrected by a consent order, the appellant makes the point that no such order was ever proposed by the respondent, and the appellant required the judgment of this Court in order to remedy the error. It was submitted that in a situation where a consent order was not proposed, it was appropriate that there be no order for costs in respect of the appeal.

Decision on Costs

17. We have considered the legislation, both primary and secondary, and the caselaw to which we have been referred. The respondent was unquestionably substantially successful in resisting the appeal brought by the appellant. However, because the High Court order had not been corrected on a consent basis, and required to be varied by order of the Court of Appeal, so as to reduce the amount for which the High Court had given judgment by close on half a million euro (the precise reduction was €468,065), it cannot be contended by the respondent that it was entirely successful in resisting the appeal. Strictly speaking therefore s. 169(1) of the Act of 2015 does not apply.

18. Rather, in a situation where the applicant for a costs order (in this instance the respondent) was not entirely successful, it is a matter for the court's discretion, guided by relevant jurisprudence (such as the *Cooper-Flynn* and *Veolia Water UK Plc* cases previously referenced), as to what order for costs (if any) it should make. That having

been said, the factors listed in s. 169(1) as being potentially relevant in situations to which the section applies, are sensible matters to which a court may still have regard and which it may take into account in a situation where the section does not apply and the court is required to exercise its residual discretion on costs.

19. Further, although the appellant was ultimately unsuccessful in his reliance upon Ground of Appeal No. 4, there is some validity in his points that (a) there were conflicting authorities concerning the correct interpretation and scope of application of s. 17(2) of the Act of 1961 at the time of the hearing of the appeal, and; (b) that although that uncertainty was subsequently resolved by this Court in the *McDonagh* decision, the judgment in that case had not been delivered at the time at which the appeal in the present case was being heard. Accordingly, we do consider that there are special and unusual circumstances in this case. That having been said, however, we think it is a considerable overstatement on the part of the appellant to maintain, as he has done in his written submissions, that the s. 17(2) point was his "*primary ground of appeal*." It formed one of a number of grounds of appeal upon which substantial reliance was placed, but it certainly did not dominate the appeal hearing in the way that a characterisation of it as being the "*primary ground of appeal*" suggests. We have had the benefit of a transcript of the hearing and having reviewed same, and the written submissions filed in advance of the appeal, our initial impression in that regard is confirmed. There were substantial oral arguments concerning Ground of Appeal No. 9 and the impact of the decision in *Bank of Ireland v. O'Malley* [2020] I.L.R.M. 423. Further, substantial oral argument was advanced concerning the contention that the respondent had induced the co-debtors to breach the joint venture agreement by entering into a debt resolution agreement with the bank. And, there was also substantial oral argument concerning whether or not the High Court has a discretion to refuse to allow cross examination in summary judgment applications and, if so, how should such discretion be exercised.

20. Accordingly, it is our estimation that argument concerning the s. 17 point took up no more than about one third of the actual appeal hearing. Moreover, in circumstances where there were another eight points of appeal, none of which were abandoned, and all of which were addressed in the written submissions filed with the Court of Appeal (albeit that not all of them were the subject of detailed oral argument), and accordingly required to be dealt with in the Court's judgment, the s. 17 point could in no sense be regarded by the court as the "*primary ground of appeal*". Nothing was said to the Court to suggest that anything other than full reliance was being placed on the other grounds of appeal, or to suggest that the other points were to be regarded as being subsidiary, or secondary, in some way to a core or dominant case based on Ground of Appeal No. 4.

21. While we accept the appellant's case that it was reasonable for him to have argued the s. 17 point in circumstances where there were conflicting authorities as to how the provision should be interpreted and applied, and that some level of departure from the normal rule that costs follow the event may be justified on that account, we do not agree that we would be justified making no order as to costs as the appellant proposes. That argument did not dominate the appeal and, in any case, sight must not be lost of the fact that,

although it might have been reasonable for the appellant to have argued the point on appeal having regard to the uncertain state of the law, and also the position taken by the respondent on the issue in the High Court, he ultimately lost comprehensively on that point.

22. We have considered the factors which are identified in s. 169(1) of the Act of 2015 as being potentially relevant in considering a possible departure from the long-standing principle that costs should follow the event. While we estimate that approximately one third of the appeal hearing was occupied with argument concerning the s. 17 point, we consider that overall, taking into account time spent by the court in pre-reading, deliberation and judgment writing, as well as the appeal hearing, the issue occupied somewhat less than one third of the court's time. To take account of that, and also of the fact that the appellant ultimately lost resoundingly on the issue, while at the same time acknowledging that it was not wholly unreasonable for him to have sought to litigate that aspect of the case given the uncertain state of the law at the time, we think that the justice of the case requires the making of a costs order in favour of the respondent limited to 75% of the costs of the appeal, either as may be agreed or ascertained in default of agreement.

Application for a Stay

23. The appellant also seeks a stay on the order of this Court, pending a possible further appeal to the Supreme Court, and points to the terms upon which a stay on the order of the High Court was agreed. The appellant says that the granting of a further stay would maintain the status quo and reduce the risk of injustice being suffered by either side.

24. From the respondent's perspective, it is a matter for the Court.

25. The Court is prepared in principle to grant a stay to the appellant on both its substantive order and on the order for costs as provided for in this judgment, on the following terms:

- Said stay to lapse after 21 days from perfection of this Court's final order, unless the appellant has within the said 21-day period filed an application with the Supreme Court office for leave to appeal to the Supreme Court;

- in the event that an application to the Supreme Court is filed within the said 21-day period, said stay to continue until the determination by the Supreme Court of the application for leave to appeal;

- in the event of the Supreme Court issuing a determination granting leave to the appellant to appeal to the Supreme Court, it will then be a matter for the appellant to apply to that Honourable Court for the purpose of seeking any further continuation of the said stay that he might desire, pending the conclusion of those appeal proceedings, and;

- said stay to be on similar terms to those agreed between the parties as applying to the High Court's order pending the appellant's appeal to the Court of Appeal, a copy of which was annexed to the appellant's written submissions dated the 4th of

January 2023. For the avoidance of doubt, any reference in that document to the Court of Appeal shall be construed, in the context of the further stay now being granted, as referring to the Supreme Court.