Neutral Citation Number: [2010] IEHC 119

**THE HIGH COURT**

**COMMERCIAL**

**2009 4213 S**

**BETWEEN**

**DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK**

**PLAINTIFFS**

**AND**

**NIALL MCFADDEN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Clarke delivered the 27th of April, 2010**

**1. Introduction**

1.1 This judgment is supplemental to the principal judgment in these proceedings delivered on the 20th April last ("the principal judgment"). Terminology is used in this judgment in the same way as it is used in the principal judgment. For the reasons set out in the principal judgment I was satisfied that Mr. McFadden remained liable to NIB on the guarantee which is the subject of these proceedings.

1.2 As noted at para. 7.3 of the principal judgment, I requested counsel to provide up to date figures for the purposes of the order. When the matter was mentioned on Thursday last, the 22nd April, it was agreed between counsel that the appropriate sum for inclusion in the order as of that day was €6,455,467.19 and that interest was continuing at a daily rate of €512.31. On that basis, given that five further days have elapsed, the sum as of today's date is €6,458,028.74.

1.3 It is agreed that, in the light of my judgment, the appropriate order is that judgment be entered against Mr. McFadden in the sum of €6,458,028.74 together with costs to be taxed in default of agreement. However, the issue which has now arisen between the parties is as to whether there should be a stay on that order pending appeal. Counsel for Mr. McFadden argued in favour of such a stay. Counsel for NIB opposed same. This judgment is directed to that issue. I turn firstly, to the relevant legal principles.

**2. Legal Principles**

2.1 It is clear from both *Redmond v. Ireland & Anor* [1992] 2 I.R. 362 and *Irish Press Plc v. Ingersoll Irish Publications Limited* [1995] 1 I.L.R.M. 117 that, in general terms, two broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court.

2.2 The first issue is that, in order that a stay might be considered, any such appeal must be *bona fide*. For example, McCarthy J. in *Redmond* noted that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than *bona fide* reasons.

2.3 However, this issue does not arise in the current application. Counsel for NIB quite properly accepted that any appeal which might be brought in the circumstances of this case would be *bona fide* (while, of course, asserting that it would ultimately fail). Indeed, counsel himself drew attention to the fact that, on the issue of construction on which Mr. McFadden ultimately failed (despite succeeding on other issues), I had used the phrase "on balance" as a means of describing my view on relevant question. I am, therefore, satisfied that counsel was quite correct in characterising this as a case where, in the event of an appeal, any such appeal would be a genuine appeal with genuine issues to be determined by the Supreme Court. Indeed it is entirely possible that NIB might itself wish to cross appeal on the issues on which it was unsuccessful.

2.4 Where the appeal is genuine, it seems clear from *Ingersoll* that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser extent and again with greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in *Redmond* the court is, in those circumstances, required to "maintain a balance so that justice will not be denied to either party".

2.5 To those considerations I would add one further matter. In the context of the interlocutory injunction jurisprudence, I expressed the view in *Evans v. I.R.F.B. Services (Ireland) Limited* [2005] IEHC 107, that, in a case where there was significant potential detriment on both sides, it seemed to me "that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties". It seems to me that an analogous principle applies in the context of a stay. It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds. Against those general principles I turn to the facts of this case.

**3. Application to the Facts of this Case**

3.1 So far as Mr. McFadden is concerned, the principal argument raised on his behalf was that a judgment without a stay rendered him liable to all potential forms of enforcement including bankruptcy. It was pointed out that bankruptcy, or an application in relation to it, could cause irreversible consequences for Mr. McFadden.

3.2 So far as NIB is concerned, the issues raised are ones with which the Commercial Court is increasingly and unfortunately familiar.

There are many persons who, until two or three years ago, had very substantial assets with significant borrowings. Many such persons no longer have ready net equity in their assets which can be made available to pay liabilities determined by the court. In those circumstances the question of whether a successful plaintiff will actually recover any sums awarded by the court has become problematic. There is, at least in those circumstances, a significant extent to which the chances of recovery may be dependent on timing. Many forms of actual recovery of damages are time dependent as to priorities.

3.3 To take the simplest and most straightforward example, a judgment mortgage ranks in priority as to the date of its registration. A party who succeeds in getting an early judgment and registers it as a judgment mortgage has obviously a greater chance of being paid than a party who is further down the queue. NIB, therefore, points out that there is a real risk that, in the event that a stay is placed on the order in this case, others may pass out NIB in the queue.

3.4 In that context, it was suggested by counsel for NIB that there is a significant (eight figure) judgment against Mr. McFadden in favour of another financial institution which is already in being and which has not been satisfied. Counsel for Mr. McFadden accepted that that was so, but suggested that the relevant judgment was in favour of a financial institution which continued to do business with Mr. McFadden's group of companies viz Boundary. Be that as it may, there must be a real risk that, in the event that NIB is precluded, by a stay, from taking any steps to protect its position, it will lose out in priorities to others who may seek to recover damages against Mr. McFadden and may thus, at the end of the day, lose out in a permanent way.

3.5 It follows that, like in *Evans*, there is a real risk of detriment on both sides. In those circumstances, it seems to me that it is appropriate to see if there is any form of order which might minimise the risk of detriment to both parties. As in *Evans*, I have come to the view that there is. Provided that certain undertakings are put in place, I have come to the view that there should be no stay.

3.6 First, I am of the view that NIB should give an undertaking not to seek to have Mr. McFadden made bankrupt. With such an undertaking in place, then Mr. McFadden will be protected from the most severe form of enforcement. While it is entirely possible that NIB may, in the intervening period, be able to enforce the judgment to some extent either in the form of actually recovering funds, or in securing priority in respect of any such funds or assets over competing potential creditors, and while any such action is undoubtedly likely to act to Mr. McFadden's detriment, same would not, in my view, be a permanent detriment. NIB is clearly a mark to repay any funds obtained.

3.7 Second, and in those circumstances, it also seems to me to be appropriate that NIB should give an undertaking, analogous to an undertaking as to damages, that in the event that Mr. McFadden succeeds on appeal in circumstances where funds had already been recovered or other actions taken to Mr. McFadden's detriment, NIB would pay any damages reasonably arising in such circumstances. Again, NIB would be a mark for any such claim. It follows that any detriment to Mr. McFadden would be short term and would be compensated in damages.

3.8 Third, it seems to me that Mr. McFadden should give an undertaking to the effect that he will not, pending appeal, deal with his assets in any way which would impair or interfere with NIB's entitlement to recovery.

3.9 In those circumstances, so far as NIB is concerned, it seems to me that imposing an obligation to give the two undertakings to which I have referred, as the price of avoiding a stay, does not significantly reduce or cause detriment to NIB's position. The jurisprudence in relation to the exercise by this Court of its winding up jurisdiction in respect of corporate entities makes it clear that the court will not direct a winding up where there is a dispute as to the debt which forms the basis of the petitioner's application. While the position is not exactly the same after judgment or in the case of personal insolvency, nonetheless where, as here, I am satisfied that any appeal which might be prosecuted by Mr. McFadden would be *bona fide*, it would not seem appropriate that Mr. McFadden should be rendered bankrupt by virtue of the order in this case while it is under appeal. For the avoidance of doubt I should make clear that it is does not seem to me that NIB should be debarred from placing reliance on the order in this case in a bankruptcy or creditor arrangement process relating to Mr. McFadden which is commenced by some other party. What is required is that NIB undertake that NIB will not be the instigators of any such process. For the reasons which I have sought to analyse, it does not seem to me that such a limitation is a significant imposition on NIB in all the circumstances of the case. To do otherwise, would be to allow for the possibility that the absence of a stay could render Mr. McFadden bankrupt in circumstances where there is a realistic prospect that he might succeed on appeal and thus be found never to have owed the money in the first place.

3.10 Likewise, it seems to me that the imposition of an undertaking analogous to an undertaking as to damages does not place a very significant burden on NIB in all the circumstances of the case. Parties in a position such as NIB cannot have their cake and eat it. If they want an order which is enforceable while under appeal, then they must recognise that that can have consequences which may turn out, in the event that the appeal is successful, to be unfair. Such parties must be prepared to meet any reasonable claims which might arise in those circumstances.

3.11 The availability of an undertaking from Mr. McFadden to preserve assets would give added comfort to NIB.

3.12 It follows that an order of the type which I have noted significantly reduces, in my view, the detriment on both sides. In those circumstances it seems to me to be an order best calculated to provide the balance of which McCarthy J. spoke in *Redmond.*

**4. Conclusions**

4.1 Therefore, subject to NIB giving an undertaking not to seek to have Mr. McFadden placed in bankruptcy as a result of this order, and a further undertaking analogous to an undertaking as to damages in injunction proceedings designed to cover any losses which Mr. McFadden might suffer as a result of acts of execution by NIB pending appeal and in the event that Mr. McFadden should succeed on appeal but subject also to an undertaking by Mr. McFadden to preserve assets, it seems to me that I should refuse a stay.

4.2 If some or all of the undertakings which I have identified are not forthcoming, I will consider making an order imposing terms on the parties pending appeal.