

THE HIGH COURT

[2003 No. 9018 P]

BETWEEN

MOORVIEW DEVELOPMENTS LIMITED, SALTHILL PROPERTIES LIMITED, VALEBROOK DEVELOPMENTS LIMITED, AND BY ORDER,
SPRINGSIDE PROPERTIES LIMITED, DRAKE S.C. LIMITED, MALLDRO S.C. LIMITED, THE POPPINTREE MALL LIMITED, BLONDON
PROPERTIES LIMITED
AND
FIRST ACTIVE PLC, RAY JACKSON AND BERNARD DUFFY

PLAINTIFFS
DEFENDANTS

THE HIGH COURT

[2003 No. 9017 P]

BETWEEN

BRIAN CUNNINGHAM
AND
FIRST ACTIVE PLC

PLAINTIFF
DEFENDANTS

THE HIGH COURT

[2003 No. 18785 P]

BETWEEN

POTERRIDGE TRADING LIMITED
AND
FIRST ACTIVE PLC

PLAINTIFF
DEFENDANTS

THE HIGH COURT

[2005 No. 272 S]

BETWEEN
FIRST ACTIVE PLC

AND
BRIAN CUNNINGHAM

PLAINTIFFS
DEFENDANTS

THE HIGH COURT

[2005 No. 1850 P]

BETWEEN

KANWELL DEVELOPMENTS LIMITED

PLAINTIFFS

AND

FIRST ACTIVE PLC AND SALTHILL PROPERTIES LIMITED

DEFENDANTS

THE HIGH COURT

[2005 No. 2463 P]

BETWEEN

BRIAN CUNNINGHAM

PLAINTIFFS

AND

SPRINGSIDE PROPERTIES LIMITED

DEFENDANTS

THE HIGH COURT

[2006 No. 379 SP]

BETWEEN

KANWELL DEVELOPMENTS LIMITED

PLAINTIFFS

AND

SALTHILL PROPERTIES LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on 31st day of May, 2013

1. The issue before the court is in respect of security for costs arising out of seven appeals which are the subject matter of Supreme Court orders.
2. The initial High Court proceedings as brought by the several plaintiffs against the defendants arise out of banking transactions and made the most serious of allegations including fraud against the defendants. Damages in excess of €100m were claimed. The main proceedings culminated in a 170 page judgment after a 65 day hearing wherein the High Court (Clarke J.) found that there was no *prima facie* case made out by the plaintiff's on any of the issues raised, and the plaintiff's were also unsuccessful in the remaining issues arising in associated proceedings. By contrast judgment was entered in favour of the defendant bank against the first to fourth named plaintiff's in sums in the region of €60m each and, in addition, the first named defendant obtained judgment against Brian Cunningham personally in a sum of €2.7m.
3. It is of some significance that the trial judge joined Mr. Brian Cunningham personally to the proceedings where companies with which he was associated were plaintiffs, and made an order for costs against him.
4. All the various judgments of Clarke J. have been appealed to the Supreme Court and a stay placed on the various orders for costs.
5. On applications by the bank and the second named defendant, Ray Jackson, the Supreme Court concluded that security for costs should be ordered in favour of both the bank and Mr. Jackson on the basis that the plaintiffs/appellants and Mr. Cunningham are insolvent and/or impecunious and further, that there were no disclosed or clear arguable grounds of appeal and that the appeal was likely to be of significant length. The Supreme Court directed that the application be remitted to the Master of the High Court to fix the amount of security in respect of the appeals indicating a clear intention that the appellants provide a sum of money by way of security as to costs.
6. The Master of the High Court heard the bank's application together with a similar application on behalf of Mr. Jackson on 29th November, 2012.
7. It is clear that all the appeals are interlinked, but two of the appeals in particular, which involve judgments against Mr. Brian Cunningham personally, are obviously of more relevance to him.
8. The appellants raise a procedural issue that, in effect, this Court has no jurisdiction to hear the appeal in the particular circumstances that arise herein from the ruling of the Master. It is contended on the plaintiff's behalf that the Master unusually in the particular circumstances of this matter acts on behalf of the Supreme Court and any challenge to the measurement of costs by the Master should be submitted to the Supreme Court and not to this Court. The appellants contend that the correct procedure is not explicitly set out in the Rules of the Superior Courts and the appellants, therefore, respectfully submit that in fact this appeal should be referred directly to the Supreme Court.
9. Order 63, r. 9 of the Rules of the Superior Courts provides that "any party aggrieved by an order, including an order as to costs, made by the Master, may, within six days from the perfecting of same...apply to the court to discharge such order or to make the

order refused.”

10. The court is defined in Order 125, r. 1 as either the High Court or a High Court Judge or Judges.

11. The Supreme Court referred the matters herein to the Master of the High Court in accordance with normal procedures for him to fix the appropriate level of security for costs. He did so, and gave his decision on 17th January, 2013.

12. In the particular circumstances of this case the defendant/respondents are a party aggrieved by the decision of the Master and, in my view in the normal course of events, are entitled to apply to this Court to discharge the order of the Master in the particular circumstances and to make such order as this Court considers appropriate in the circumstances.

13. Accordingly, I do not consider that there is any procedural abnormality in the appeal taken by First Active Plc and Ray Jackson to this Court from the decision of the Master as made on 17th January, 2013.

14. The approach adopted by the first and second named defendants in respect of the application to the Master of the High Court to have the amount of security for costs fixed takes the same pattern in each case by way of an affidavit of Colin Monaghan, a solicitor. It is in the Court's view of some significance that Mr. Monaghan as the partner dealing with the litigation is in a position to set out the entire background to the various sets of proceedings and, in particular, the very substantial sums of money that are involved, involving judgments against the plaintiff companies in sums in the region of €60m each and against Mr. Brian Cunningham personally in the sum of €2,724,548.00.

15. In particular, Mr. Monaghan is in a position to explain that there were 99 full or part hearing days prior to the commencement of the main trial on 28th April, 2008; that discovery involved 70,000 individual documents; that there were a substantial number of lengthy and detailed witness statements prepared; that there have been over 100 days of hearing since the commencement of the main trial on 28th April, 2008; and further, that there were numerous amendment applications in relation to the nature of the claims being made by the plaintiffs, all of which claims have ultimately been found to be without merit and that as a result First Active have incurred very significant legal costs over the eight years that have involved the proceedings to date, amounting to sums running into millions of euro. It is quite clear that the first named defendant is unlikely to make much headway in recovering any significant sums of money, either pursuant to the judgments as obtained against the plaintiff companies or as against Mr. Cunningham personally, or in respect of the orders for costs which presently are the subject matter of stays.

16. Mr. Monaghan deals specifically with the nature of the appeals and, allowing for the ordinary course of business, he takes the view that it is reasonable to proceed on a basis that collectively the appeals will take in the order of six to seven days in the Supreme Court, and for the purpose of each case he breaks down an estimated duration allocating 1-2 hours to Appeal No. 463/2006, 1-2 hours to Appeal No. 178/2008, 3-4 days to Appeal No. 250/2010, a half day to Appeal No. 251/2010, 1-2 hours in respect of Appeal No. 96/2011, a half day to Appeal No. 252/2010 and a half day to Appeal No. 308/2010. Thus, it is clear that the first named defendants estimate that the main appeal in case No. 250/2010 should take 3-4 days with the remainder of the appeals taking the balance of the 6-7 days.

17. On this basis a report was obtained from Cyril O'Neill Legal Costs Accountants, and they have broken the costs of each particular appeal. In respect of the several appeals as taken against the first named defendant, it is proposed to retain two senior counsel and one junior counsel, and in respect of the appeals as taken against Mr. Jackson, the second named defendant, it is proposed that Mr. Jackson will be represented by one senior counsel and one junior counsel.

18. The total amount claimed on behalf of the first named defendants in respect of security for costs is €310,000.00 and VAT, and in respect of Mr. Jackson €113,160.00 together with VAT.

19. In his affidavit as sworn on 15th November, 2012, Mr. Cunningham effectively contends that there was no good reason why he should be ordered to lodge security for costs at all in the form of money in these proceedings. He criticises extensively the actions of First Active Plc and of the receiver, Mr. Jackson, and makes a reference to First Active Plc and Mr. Jackson incurring costs for luxurious litigation and makes extensive reference to the possibility of being bankrupted by the bank in the particular circumstances. In the view of this Court no realistic basis is set out to contest the views as expressed by Mr. Monaghan or Cyril O'Neill & Co.

20. Mr. Cunningham in an affidavit as sworn on 15th March, 2013, avers that his affidavit is on his own behalf and on behalf of the corporate respondents. He effectively sets out that the content of the affidavits of Mr. Monaghan and the reports of Cyril O'Neill & Co, demonstrate no comprehensive basis as to how the figures suggested were reached or could be justified. Mr. Cunningham contends that there is no analysis as to the reasonableness of the figures suggested or how the various costs incurred came to be estimated. He says the figures appear to be extraordinarily large and that it is simply not good enough for the applicants to suggest in litigation of this significance and in matters that impact upon his constitutional and human rights that it is appropriate that a set of figures be produced on behalf of the applicants without any justification or supporting analysis. He considers the level of representation in the High Court, as retained on the defendants behalf, to be excessive. Further, he accepts the ruling of the Master as a comprehensive and fair analysis of the matter and he contends that when the matter is reopened in this Court, he would seek a reduction in the level of security that was fixed.

21. In this regard neither Mr. Cunningham or the corporate respondents put forward for consideration by this Court any affidavit from a solicitor contending that Mr. Monaghan's view that the appeals in the their entirety should take 6 to 7 days is inappropriate and I shall refer further on in this judgment to this aspect. Furthermore, no contra indication as regards the level of fees that may be appropriate is contended for or advanced on Mr. Cunningham or on the corporate entities behalf other than Mr. Cunningham's own personal views in the matter.

22. In the Master of the High Court's decision on 17th January, 2013, he took the view that he was free to come up with his own figures regardless of what the parties have suggested on affidavit or in submissions. He further took the view that it was open to him to decide himself the length of time that the appeals would take, and he took the view that the one hundred grounds of appeal were ancillary to or illustrative of the main grounds and a few of them, in his view, were duplicated. He was of the view that there were probably twelve or perhaps sixteen specified grounds which were substantial and that these aspects would probably focus the mind of the Supreme Court and occupy most of the hearing time. He was of the view that in the notices of appeal in the six connected appeals he counted a further sixty grounds of appeal and in his view, ten or perhaps twelve of these might be thought of as substantial in justifying a time allocation. The Master then proceeded in his decision at para. 52 thereof to randomly allocate half an hour to each appeal on the basis of twelve minutes for the appellants counsel, four minutes for intervention from the bench, eight minutes for the respondents counsel, three minutes for a rebuttal and three minutes down time to access and open relevant documents, and he took the view that these appeals would probably take fourteen hours of court time in total.

23. He went on to come to a conclusion that the appeals are unlikely to last more than four days in total. The Master refers to attempting to guess how long each appeal would take if heard alone and refers to Mr. Monaghan in his affidavit advising that the figures are premised on the assumption that all of the appeals will be heard and that in the event that that is not the case for whatever reason, the allocation of time as proposed by Mr. Monaghan might have to be revisited.

24. The Master then proceeded to apply his own breakdown in respect of the costs and came to a conclusion that in respect of what he viewed as the three less complicated minor appeals, the solicitors fees were to be the same as junior counsels brief and there was no necessity for a senior counsel and that if security was provided for the principal appeal, the three minor appeals in the same action can proceed at a reduced cost which he proposed to fix at a nominal figure of €1,000 plus VAT in each case, and that in respect of the costs of Mr. Jackson, he fixed a total of €46,000 together with VAT. Insofar as some of the appeals involve Mr. Cunningham as a personal litigant, the Master took the view that accordingly the one third rule would apply.

25. I cannot agree with the result as arrived at by the Master because the exercise of discretion has to be on the basis of facts before the court or, in this instance, before the Master. The Supreme Court order of 23rd February, 2012, is quite clear in stating that the plaintiffs do furnish security for the defendants costs of the appeal and that the matter be remitted to the Master of the High Court to fix the amount for such security and that the amount having been determined by the Master, the plaintiffs do provide such security within two months from the said date and that the prosecution of the appeal be stayed pending the furnishing of such security and that the plaintiffs do pay to the defendants the costs of the motion when taxed and ascertained and the execution of said costs order to be stayed pending further orders.

26. The affidavit of Colin Monaghan as sworn in each of the cases is clear and reasoned and there is no clear or reasoned factual evidence submitted to this Court that in any way would undermine the views as expressed by Mr. Monaghan or by Cyril O'Neill & Company, and it is difficult to understand the basis upon which the Master can have indicated that he had very little to go on or that the analysis was meagre to enable him to fix security. The Master had very little to go on from the plaintiff/appellants perspective and their analysis was certainly very meagre, but this Court would have to reject the criticism as set out by the Master in his decision of Mr. Monaghan and Cyril O'Neill & Company. To fortify this view, initially Mr. Cunningham was of the view that the appeal in the Supreme Court would take much longer than the six to seven days as outlined by Mr. Monaghan and subsequently when the matter was heard before this Court, counsel for the plaintiffs was more than happy to rest their case in agreeing with Mr. Monaghan that the case would take some 6 to 7 days.

27. No reasoned basis is made on the plaintiffs' behalf to dispute the figures as set out by Cyril O'Neill & Company, and in circumstances where this Court is of the view that the costs structure as outlined by Cyril O'Neill & Company appears to be reasonable, it is proposed in the absence of any meaningful alternative view not to interfere with those figures. This Court would not be prepared to reduce the figures in respect of what the Master considered to be relatively minor appeals to a figure of €1,000 together with VAT.

28. It is the court's view that in the particular circumstances the costs as proposed by Cyril O'Neill & Company are to be accepted, save only that this Court would not be satisfied on the basis of the information available to come to a decision that for the purposes of this application Mr. Cunningham's proceedings as a non-corporate litigant are being conducted in an oppressive manner and accordingly, the usual one third rule will be applied in the cases where Mr. Cunningham is a non-corporate litigant.

29. It appears that there may have been some minor discrepancies in respect of the precise amounts of the costs involved and clearly an amendment has to be made in respect of the one third rule applying in the appeals where Mr. Cunningham is a non-corporate litigant. Furthermore, I reach the same conclusions in the matter where the second named defendant, Ray Jackson, seeks security for costs and that security shall be in the sum as advanced by Ms. Eve Mulconry and Cyril O'Neill & Company. It is also necessary to clarify the amount due in respect of VAT. Subject to clarification of the appropriate amounts due in respect of these issues, I shall direct the amount of security for costs to be lodged in accordance with the Supreme Court orders, and my findings as herein set out.

30. The parties have agreed the amount of the relevant figures based on the findings herein and allowing for VAT and adjustments as follows:-

Appeal No.	Figure
463/2006	€16,951.60
178/2008	€16,951.60
250/2010	€224,248.20
251/2010	€32,472.49
252/2010	€32,472.49
308/2010	€10,824.16
96/2011	€5,650.53
Total in respect of First Active	€339,571.07
Total in respect of Ray Jackson	€124,500.00

Costs of the appeal to the defendants with a stay pending the conclusion of the appeal.