THE HIGH COURT

2017 No. 203 S

Between:

PROFI WELDERS s.r.o.

Plaintiff

– and –

R&R MECHANICAL LIMITED

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 5th March, 2019.

1. This is an application for costs and for a stay on the orders of this Court pending the possibility of an appeal that may or may not be brought following on the court's decision in *Profi Welders s.p.o. v. R&R Mechanical Ltd* [2019] IEHC 36.

2. Costs of plenary hearing. It is not disputed that Profi Welders should receive the costs of the plenary hearing.

3. Costs of summary hearing. The costs of the summary hearing were reserved to the trial judge to decide. Profi maintains that this is a case in which facts asserted at the summary hearing as providing an arguable defence were almost entirely rejected by the court at plenary hearing, and that this is therefore a case in which, having succeeded at the plenary hearing, the costs of the summary hearing ought to be ordered in its favour. R&R maintains that it was clear from the form of the defence raised at the summary stage that this was never a case that was going to be decided summarily and that much of the costs of the summary proceedings could have been avoided if Profi had but agreed for the matter to go to plenary hearing.

4. Although the court has some sympathy for the position advanced by R&R, it cannot ignore the fact that the facts asserted at the summary hearing as providing an arguable defence were almost entirely rejected by the court at plenary hearing. In this regard, the court is mindful of the following observation of Clarke J. in *ACC Bank plc v. Hanrahan* [2014] IESC 40, para.3.6:

> *"In many cases a defendant puts forward evidence of facts which, if…established at trial, might…provide an arguable defence. But when the case goes to trial that evidence may…be rejected after careful analysis by the trial court….[I]t may well not be just that a defendant should get the costs of a summary judgment motion (even if it was clear, on the basis of the affidavit evidence, that the matter would have to go to plenary hearing) if, with the benefit of hindsight after trial, it was clear that the facts asserted as providing a defence [here the great majority of such facts] were not correct."*

5. Here, the court has the benefit of such post-trial hindsight and, having regard to the factors just identified, considers that this is a case in which the costs of the summary hearing ought also to be ordered in favour of Profi.

6. Stay on Order of the Court. No decision has yet been made as to whether R&R wishes to bring an appeal against the court's original judgment. R&R has, of course, a right of appeal, an aspect of matters to which the court gives no little weight. However, the court is mindful that no basis for any such appeal has been identified to it. And there is the fact too that this is a case in which the court's adjudication on the facts determined the outcome, with next to no law being brought to bear: the facts indicated how the oral contract between the parties operated. In this regard, the court is mindful of the following observation of Finlay CJ in his dissenting judgment in *Redmond v. Ireland* [1992] 2 IR 362, 364 (the observation is but trite law and excited no comment on the part of other members of the Supreme Court):

> "[T]*he defendants' appeal on liability is in substance an appeal against the acceptance by the…trial judge of the truth of the account of the accident given by the plaintiff and his witnesses which the defendants say was false and fabricated*…. [W]*hilst technically it is possible that such a finding of primary fact could be held by this Court to be so unsupported by evidence as to require to be set aside, that is an unlikely event*."

7. Turning to the factors identified by McCarthy J. in his (binding) judgment for the Supreme Court in Redmond, at 366, as factors to be brought to bear in an application for a stay of execution upon the whole or part of an award of damages (there for personal injury; however, the principles also apply, *mutatis mutandis*, in the context of contract law), he identifies those factors in the following terms:

> "*(1) Liability is genuinely in issue*". Here the claim and the amount of same are not truly disputed. There was a counterclaim which has been rejected on the factual evidence, not on some issue of law.
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> "*(2) A heavy responsibility lies upon the legal advisers of those seeking a stay of execution to assist the Court on the reality of the appeal on liability*". No decision has yet been taken as to whether an appeal will be brought. More pertinently, no basis for such appeal has been advanced before this Court.
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> "*(3) The Court should not be trying the appeal*". Noted. This observation, it seems to this Court, applies with even greater rigour to it as a trial court.
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> "*(4) The issue is raised upon an argument that findings of fact are unsupported by any credible evidence".* This has not even been contended in this case.
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> "*(5) There may be cases in which monies paid on foot of a decree might not be recoverable*". R&R contends that Profi is from Slovakia, a far-away country with a different legal system where recovery of dissipated damages (if dissipated) might prove difficult. There is a certain irony in a case in which a Slovakian company has had to sue, and has sued successfully, in Ireland (a far-away country for Slovakian people and one with a different legal system from theirs) that the distance and different legal system of Slovakia should be raised against Profi. Be that as it may, it is important, in any event, not to exaggerate in this regard: both Ireland and Slovakia are fellow member states of the European Union and in each country the rule of law holds good. There is too the fact that, as counsel for R&R fairly acknowledged, Profi appears to be a not insubstantial concern.

"*(6) The bringing of an appeal can be, of itself, damaging to an injured person"*. Here, the bringing of an appeal is likely to see a delay of in or about two years more before an appeal comes on for hearing.

"*(7) Appeals have been brought and may be brought again, not as bona fide appeals with any legitimate chance of success, but as a bargaining weapon*". Here there has been no decision as to whether to bring an appeal. Were such an appeal to be brought, the court has no reason to doubt the good faith of R&R in so proceeding. However, it cannot but note again that no basis for such an appeal has been advanced; and it is heedful too of the above-quoted observations of Finlay CJ in *Redmond*, given that this is a case where the findings of fact effectively determined its judgment.

"*(8) The length of time between accident and trial and the prospective length of time between trial and the hearing of the appeal*". See observation at (6).

"*(9) The absence of any application for a stay at the trial*." Here, application has been made.

8. Having regard to the various factors considered above, the court – not without some hesitation, given that a right of appeal presents – considers nonetheless that, on balance, those factors point to this being a case in which it should not order any stay on its orders.