**THE COURT OF APPEAL**

Neutral Citation Number: [2020] IECA 217
**Record Number: 2019/170**

**Whelan J.**
**Faherty J.**
**Binchy J.**

**BETWEEN/**

**MICROSOFT IRELAND OPERATIONS LIMITED**

**RESPONDENT**

**- AND -**

**MONEER OMAR THABIT TRADING EST.**

**APPELLANT**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 31st day of July 2020**

**Introduction**

1. This is an appeal against an order of the High Court made by Noonan J. on 6 February 2019 which lifted a stay on execution of an order previously granted by Haughton J. on 27 July 2015 in the above entitled proceedings.

**Litigation history**

2. The appellant ("Moneer") is a limited liability company having its place of business in the Kingdom of Saudi Arabia. A summary summons was issued on 5 December 2013 pursuant to which Microsoft sought judgment against Moneer in the sum of US$829,720.64. The matter thereafter on 27 July 2015 came on for hearing in the High Court before Haughton J. who granted judgment to the respondent ("Microsoft") in respect of the sum claimed and costs. By the terms of his order Haughton J. placed a stay upon execution of the judgment pending the determination of a counterclaim and set-off contended for by Moneer. Following the order granting the stay, the prosecution of the counterclaim fell somewhat into abeyance and very few steps were taken by Moneer to prosecute this counterclaim and asserted right of set-off to a conclusion during the years 2015, 2016 and 2017.

3. In 2018 Microsoft brought an application seeking to lift the stay on the execution of the judgment and same was heard by Noonan J. at the High Court sitting in Cork on 17 July 2018. At the conclusion of the hearing he delivered an *ex tempore* judgment stating that

the balance of justice at that time favoured leaving the stay in place and instead he convened a case conference on 17 October 2018 in regard to progressing the counterclaim to a conclusion.

4. Thereafter on 20 December 2018 a further motion was issued by Microsoft seeking to lift the stay on execution. The said application came on for hearing before Noonan J. on 30 January 2019. A reserved judgment was delivered on 6 February 2019, which granted the application and lifted the stay with immediate effect.

**Reasoning of Noonan J.**

5. The judgment reviewed the history of dealings between the parties to the litigation noting that they had entered into a written contract on 26 July 2010 being a retail distribution agreement ("RDA") whereby Moneer became a distributor of Microsoft products. He noted that a number of invoices in respect of products had been raised by Microsoft between 27 April 2012 and 21 November 2012 and that the value in respect of same was US$829,720.64 and that none of this was in dispute. The court noted that Moneer had delivered a defence and counterclaim on 31 August 2015 admitting the claim of Microsoft and pleading an equitable set-off of the counterclaim.

6. The judge observed that the counterclaim contended that certain representations had been made by Microsoft to Moneer to induce it to enter into the RDA and in particular that it would become the sole distributor of certain Microsoft products in the Kingdom of Saudi Arabia and that Microsoft would terminate its relationship with its then existing distributor in the Kingdom. It was contended that Moneer acted in reliance on the alleged representations when it entered into the contract and proceeded to invest sums of money in the venture. It was pleaded that Moneer had suffered substantial losses in the region of US$6M in respect of anticipated profits and other heads of special damage.

7. Noonan J. noted in his judgment that an order for discovery was made by the High Court on 19 December 2016 directed to both parties. Notwithstanding an extension of time, Moneer had not complied with the said order in accordance with the time limits provided. It had been against the backdrop of that conduct and the non-compliance with the discovery order that Microsoft issued the initial motion to strike out Moneer's defence and counterclaim or in the alternative, to lift the stay, some sixteen months after the order for discovery had been made by the court.

8. The judge noted that the hearing of the first motion to lift the stay had been fixed for 17 July 2018 and that five days prior to that hearing date on the 12 July 2018 Moneer eventually produced an affidavit of discovery, seventeen months after the date fixed initially by the court for compliance with its original order for discovery.

9. The judgment under appeal notes that at the hearing of the first motion on 17 July 2018 it had been admitted by Mr. Moneer Omar Thabit, on behalf of Moneer, that it had not attended appropriately to its discovery obligations and reasons had been identified by him to the court in regard to same.

10. Recalling the hearing of the first motion and the events that had transpired in court on 17 July 2018, Noonan J. observed at para. 10: -

> "…At that time, I reached the conclusion 'with reluctance' that the balance of justice favoured leaving the stay on execution in place for the time being subject to convening a case conference on the 17th October, 2018. The rationale for so doing was to expedite the hearing of the counterclaim at the earliest moment.

11. In reaching that conclusion, I indicated that I would expect to see the defendant make 'dramatic progress' with the counterclaim and directed that the matter should be 'expedited with all possible speed'…"

**Exchange of Expert Reports**

12. The issue of the exchange of expert reports between the parties was a subject of directions by Noonan J. on 17 October 2018 and same were due to be exchanged by 28 November 2018. On 28 November 2018 the High Court gave liberty to Moneer to bring a motion for discovery and adjourned the case conference to 5 December 2018. On 4 December 2018 solicitors for Moneer indicated that they were unable to comply with the direction of the High Court concerning the exchange of expert reports. Further, Moneer failed to bring a motion for discovery as had been directed.

13. On 17 January 2019 Moneer provided its expert report which the judgment noted at para. 14 was "almost three and a half years after its counterclaim seeking some $6 million in damages was delivered, a claim which itself was intimated initially as far back as July 2014."

14. On 4 December 2018 - almost five years after the institution of the proceedings - the defendants proposed to seek to amend the defence and counterclaim which had been originally delivered on 31 August 2015.

15. The High Court judgment noted that Mr. Mullen, in an affidavit sworn on behalf of Microsoft, had averred to significant prejudice accruing to Microsoft as a result of being unable to obtain the benefit of the judgment and order for costs which it had obtained some three and a half years previously.

16. The judge noted the reasons advanced on behalf of Moneer for the delay in exchanging reports, including the fact that Moneer is located in Saudi Arabia. Further, it was contended that Moneer was consenting to a modular trial of the issue of liability in the first instance, which was not consistent with the contention of Microsoft that Moneer was desirous of delaying matters.

17. Noonan J. observed at para. 18: -

> "It seems to me that what all this amounts to is that since July 2018, not only has the defendant's counterclaim not advanced to any significant degree but if anything, it might be said that it has reversed. As counsel for the plaintiff submits, following the delivery of the amended defence and counterclaim, there will be a

> requirement for further pleading by way of an amended reply and defence to the counterclaim, and perhaps even further pleadings after that, together with unresolved issues in relation to discovery. All of these matters have yet to be attended to and when one looks at the timeline of the rate at which this case has advanced since its inception, now over five years ago, it seems to me that there is very little cause for optimism that the trial can take place anytime soon. I am satisfied that none of the delays that have to date taken place are the fault of the plaintiff…"

The trial judge also observed at para. 21: –

> "…I am satisfied that it would be quite unjust to the plaintiff to continue the stay in place, even in the absence of its inability to recover interest on the judgment which to my mind copper-fastens the position. Furthermore, there is no suggestion by the defendant that if the stay is lifted and it ultimately succeeds with its counterclaim, that it will not recover fully from the Plaintiff, a long established multinational conglomerate which it is not disputed is a mark for damages."

He ordered the lifting of the stay with immediate effect.

**Hearing of the Counterclaim**

18. The litigation proceeded thereafter. Moneer delivered an amended defence and counterclaim dated 21 February 2019. Microsoft's amended reply and defence to counterclaim is dated 22 March 2019. On 1 May 2019 the High Court fixed 14 January 2020 for the hearing of the counterclaim. Therefore, Moneer had over eight months prior notice of the hearing date of its counterclaim. Moneer's solicitors came off record on 20 November 2019 and the defence and the counterclaim came on for hearing in the High Court on 14 January 2020.

19. Moneer elected not to appear at the hearing of its defence and counterclaim. Instead an email was sent by Mr. Hatem M. Degheady. It stated "Dear Sirs, Kindly see the attached and forward to the Mr. Justice in charge of the above mentioned case for the session planned today @ 10;45 am in Court no. 6, High Court, Four Courts, Inns Quay, Dublin 7, Ireland. Best regards, Hatem M. Degheady CEO". Attached to that email was a letter, the subject line of which read "Request for postponement and court assistance". This letter is Exhibit TM4 in the affidavit of Tom Mullen sworn on 10 June 2020. The email was brought to the attention of the High Court judge.

20. The court (Meenan J.) made an order dismissing the counterclaim and granting costs of the proceedings to Microsoft to be adjudicated in default of agreement. It is noteworthy that no appeal was brought against the order of the High Court made on 14 January 2020 dismissing the counterclaim. Hence the counterclaim litigation has wholly concluded before the High Court.

21. On 30 January 2020 Hatem M. Degheady CEO emailed the Central Office of the High Court stating, *inter alia*, "Kindly update us on the outcome of the session held on January

14th 2020 and your recommended course of action, in response to our letter dated the same". I am satisfied that the Central Office had no function in providing a "recommended course of action" of any kind.

**Conduct of the appeal in this court**

22. Moneer's notice of appeal against the order and judgment of Noonan J. is dated 8 April 2019. It was listed for a directions hearing in this court on 17 May 2019 and an order was made directing the delivery of written submissions in support of the appeal within 12 weeks. Moneer failed to comply with the directions of the court.

23. On 25 February 2020 this appeal was listed for further directions before Costello J. in this court. The court, *inter alia*, directed that short written submissions be filed by Microsoft in support of their application to dismiss the appeal arising from the dismissal of the counterclaim which occurred on 14 January 2020. Microsoft point out that the counterclaim has now been dismissed and is at an end. It follows that any stay pending that counterclaim lapses with it. There is no ongoing purpose in, or reality to, the appeal. It is further argued that the appeal was at its inception misconceived and that Noonan J. was entirely correct in lifting the stay as is clear from the tenor of his judgment.

**Discussion**

24. It is noteworthy that no notice of appeal has been lodged against the orders made in the High Court on 14 January 2020 by Meenan J. dismissing the counterclaim. It is clear that Moneer was fully aware that the hearing of its counterclaim was scheduled for 14 January 2020, nevertheless it did not appear to prosecute the counterclaim and call appropriate witnesses to support the claim.

25. There is no suggestion that Moneer was oblivious to the hearing date or had been precluded by any act or omission on the part of Microsoft from attending same. It had ample notice of the hearing date. Its decision therefore to suffer a dismissal of the counterclaim in circumstances where it knew the trial date well in advance means that it is bound by the consequences. The order of Meenan J. is in full force and effect. Since 14 January 2020 no application was moved on any basis to have the order of Meenan J. set aside.

26. Mr. Hatem M. Degheady at the hearing of this appeal asserted that Moneer was not made aware by the High Court of the order of Meenan J. dismissing the counterclaim. The High Court had no function in making the company aware of the order.

27. As correctly asserted on behalf of Microsoft, having been notified that the hearing of its counterclaim in the High Court proceedings would proceed on 14 January 2020 (as had been fixed for hearing over six months earlier on 1 May 2019), and having made no appearance at the hearing of its counterclaim, it was entirely a matter for Moneer to inform itself of the outcome of the hearing of its counterclaim on 14 January 2020.

28. Matheson on behalf of Microsoft served a copy of the High Court's order of 14 January 2020 on Moneer following its perfection on 25 February 2020.

29. Mr. Hatem M. Degheady informed this court on 22 June 2020 that he had checked the High Court website subsequent to the High Court hearing on 14 January 2020 and had noted that a 'Non-Jury' order had been made on that date. Moneer could quite readily have obtained further details or indeed a copy of the order through a request for same to the Central Office of the High Court. Plain copy orders are available on request to parties in proceedings and are provided by the Central Office of the High Court in soft copy by email (for no fee).

30. If Moneer wishes now to appeal the order dismissing the counterclaim it would first have to seek an extension of time to lodge an appeal and it would be necessary to retain lawyers to conduct that application given Moneer's corporate status. It is only if such an application were successful (a matter on which I express no view) that an appeal could be proceeded with. However, in the meantime the order of Meenan J. stands and is binding.

31. The stay obtained in the High Court from Haughton J. on 27 July 2015 was necessarily contingent on the *lis* or claim encompassed in the counterclaim subsisting and being litigated to a successful conclusion. The order of Meenan J. terminated the counterclaim and brought the stay, which had subsisted for almost four and a half years, to an immediate end.

32. There is no suggestion in the instant case that Moneer's absence from the hearing of the counterclaim arose by virtue of a mischance or accident. Moneer claims that it was dissatisfied with certain advices obtained from legal representatives and advisors. That is a wholly immaterial fact in circumstances where it was open to Moneer to seek alternative advices should it wish to do so.

33. Mr. Hatem M. Degheady informed the court on 22 June 2020 that from November 2019 onwards no step was taken to instruct another firm of solicitors to come on record and act for Moneer either in the conduct of the counterclaim or in the conduct of this appeal.

34. This application must be dealt with on the basis that there is, as of the date of hearing this appeal, no appeal before this court arising from the dismissal of Moneer's counterclaim proceedings. Any such appeal would clearly be out of time and in that regard it bears emphasis that there is equally no application before this court to extend time within which to appeal.

35. The company in effect disregarded the opportunity of appearing at and participating in the trial, having dispensed with its legal representatives in advance, and as such is bound by the decision of Meenan J. The order to dismiss the counterclaim was regularly obtained.

**No legal representatives for appellant company**

36. The Supreme Court confirmed in *Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49, [2019] 1 I.R. 517 the proposition which had appeared to be the law since *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252, which is to the effect that a corporation cannot self-represent save in exceptional circumstances. That decision is binding on this

court as indeed as has subsequently been acknowledged in decisions such as *Munster Wireless Ltd. v. A Judge of the District Court* [2019] IECA 286.

**Mootness**

37. The Supreme Court in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274 at para. 82 identified the *indicia* of an issue which has become moot as follows: -

> "(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;
>
> (ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a *lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined…"

38. Charleton J. in the Supreme Court in *X.X. v. Minister for Justice and Equality* [2019] IESC 59 observed, citing Hardiman J. in *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M. 1. (quoting *US Parole Commission v. Geraghty* (1980) 445 US 388, in turn quoting *Hall v. Beals* (1969) 396 US 45) with approval:-

> "A case is moot, and hence not justiciable if the passage of time has caused it completely to lose 'its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions on abstract propositions of law'".

39. In *Irwin v. Deasy* [2010] IESC 35 Murray C.J. explained the rationale behind the law at paras. 11 and 12, citing *Hall v. Beals*, thus:-

> "The general practice of this court is to decline, in principle, to decide moot cases. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the court may, in the interests of the due and proper administration of justice determine such a question.
>
> However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard. Exceptions may only arise where there is a question of exceptional public importance at issue and there are special reasons in the public interest for hearing the appeal."

40. Charleton J. in *X.X. v. Minister for Justice* observed: –

> "16. Where, as between the parties to litigation, proceedings have been rendered moot by the time an appeal comes on for hearing, as a general principle, an appellate court should decline to proceed to hear and to determine the matter; *Murphy v. Roche* [1987] I.R. 106, see the judgment of Finlay C.J. at 110."

No argument has been advanced to this court on behalf of Moneer that any exceptional circumstance arises or that it has a material interest in a decision on a point of law of exceptional public importance in the context of this appeal.

41. Counsel for Microsoft during the hearing confirmed that Moneer had been notified by Matheson of the fact that its counterclaim had been dismissed by the High Court by letter dated 19 February 2020 (at Exhibit TM5). By further letter from Matheson to Moneer dated 7 April 2020 (at Exhibit TM8), Moneer was subsequently furnished with an attested copy of the (corrected) High Court order of 14 January 2020 (as perfected on 25 February 2020), along with Microsoft's legal submissions in respect of Moneer's appeal in this matter.

**Affidavit of Moneer Omar Thabit**

42. Subsequent to the hearing of this application to strike out the appeal an affidavit sworn by Mr. Moneer Omar Thabit on 21 June 2020 came to hand. It deposes, *inter alia*, at para. 17 that "the judgment to lift the stay that is the subject of this appeal is not lawfully nor adequately justified to MOT, as explained in MOT's legal submissions". It also contends at para. 8 that it was not represented at the High Court on 14 January 2020 "due to inability beyond MOT'S control to have legal representation, in spite of the several trials to do so…".

43. The contents of this affidavit and matters therein asserted may well be of relevance if Moneer is advised to apply to seek to set aside the orders of 14 January 2020 or if an application is brought in the appropriate manner and in accordance with the relevant Rules to extend time for an appeal to this court against the said order. However, nothing in this affidavit affords an answer to the application of Microsoft to strike out this appeal as being moot.

**Conclusion**

44. The stay was only warranted in the first instance in July 2015 to facilitate the prosecution of a counterclaim and to pursue a claim of set-off by Moneer. The *lis* encompassed in the counterclaim as delivered has been disposed of and reached its final conclusion in the High Court on foot of the orders made by Meenan J. on 14 January 2020.

45. Significant forbearance had been accorded by Noonan J. from time to time to Moneer to facilitate it in prosecuting the counterclaim it wished to advance before the High Court. No reasonable or adequate explanations were advanced for the missed deadlines and the continued and frequent breaches of directions of Noonan J. over time. In circumstances wherein Moneer's counterclaim was dismissed on 14 January 2020 the issues framed within the notice of appeal are now wholly moot.

46. No evidence was adduced before this court of "exceptional circumstances" such as would warrant the non-application of the rule in *Battle v. Irish Art Promotion Centre Ltd.* to permit Mr. Moneer Omar Thabit or Mr. Hatem M. Degheady to conduct the appeal on behalf of the appellant company.

47. This does not affect the right of Moneer in taking whatever step it may be advised regarding extending time to set aside or appeal the orders of 14 January 2020 if evidence or relevant facts exist to warrant such an application.

48. I would accordingly strike out the appeal on grounds of mootness.

Since this judgment is being delivered electronically, Faherty J. and Binchy J. have authorised me to record their agreement with the terms of same.