THE HIGH COURT

[2024] IEHC 111

Record No: 2016/1839P

BETWEEN

FIRST NAMES TRUST COMPANY (IRELAND) LIMITED

PLAINTIFF

AND

EDWARD KIRK AND JOHN PATRICK DONNAN PRACTICING UNDER THE STYLE AND TITLE OF KIRK & ASSOCIATES

DEFENDANTS

Costs Ruling of Mr. Justice Mark Heslin delivered on the 20th day of February 2024

1. This short ruling on the question of costs must be read in conjunction with the judgment delivered on the 24th January 2024 ("the judgment").

2. I have carefully considered the written submissions provided by the plaintiff and defendants, respectively, dated 7th February 2024. I am very grateful to Counsel for both sides, and their respective instructing solicitors, in that regard.

3. In essence, the plaintiff submits that the "normal rule" should apply, to the effect that "costs" should "follow the event".

4. The plaintiff relies, *inter alia*, on the decision in *Pembroke Equity Partners Ltd v. Corrigan & Anor.* [2022] IECA 142; and the combined effect of s. 169 (1) of the Legal Services Regulation Act, 2015 ("the 2015 Act") and Order 99, Rule 3(1) of the Rules of the Superior Courts ("RSC").

5. At para. 27 of the decision in *Pembroke Equity Partners*, the Court of Appeal stated the following in respect of s.169 of the 2015 Act:-

> "*27. According to Murray J in Daly v Ardstone Capital Limited the effect of this provision is that "at least in a case where the party seeking costs has been entirely successful – it should lean towards ordering costs to follow the event." (para 15(d)). Murray J was specifically addressing the costs of interlocutory applications. I agree with his analysis of the interaction of section 169(1) and Order 99, Rule 3(1) in this context. I would add that there is nothing surprising about a broad presumption – and that is all it is – that a party*

who is "entirely successful" in an interlocutory application should get their costs. That was, after all, the essential position before the enactment of the 2015 Act: Veolia Water UK plc v Fingal County Council (No 1) [2006] IEHC 240, [2007] 2 IR 81, at pages 85-86, especially paras 2.5, 2.6 and 2.8. Nothing in the 2015 Act or in the recast Order 99 suggests any intention to alter that position. On the contrary, Order 99, Rule 2(3) RSC repeats the provisions of former Order 99, Rule 1(4A) - inserted into Order 99 in 2008 - which clearly reflects a policy that costs should generally be determined on the determination of interlocutory applications (subject to the important qualification, discussed further below, that it must be possible to do so "justly"). It appears to me that, if costs are generally to be determined at interlocutory stage, it can only be on the basis of a general rule that the successful party should get their costs."

6. The defendants' attitude to costs is made clear in paras. 3 and 4 of their written submissions wherein it is stated that:

"3. The defendants do not contest the plaintiff's entitlement to an order for the costs of the motion (to be adjudicated in default of agreement).

4.The purpose of the within submissions is to formally request that the Court place a stay on the execution only of the costs order pending the determination of these proceedings."

7. The defendants go on to submit that the placing of a stay on the execution of an order for costs is a matter within the court's discretion. I accept that the court has a discretion to place a stay. As the defendants submit, Order 99 Rules 2 (1) and (5) provide, respectively, that:

"(1) the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively";

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

8. In contending for a stay on an order for costs in the plaintiff's favour, the defendants place particular reliance on para. 53 of the decision of Dignam J. in *Gary Keville Transport Ltd v. MSC [Mediterranean Shipping Company] Ltd* [2022] IEHC 544. The said decision followed on from an earlier judgment in that case ([2022] IEHC 130) wherein Dignam J refused the plaintiff's application for an interlocutory injunction. To understand the context in which the learned judge decided to place a stay on the execution of costs in that case, it is appropriate to cite paras. 52–54:

"*52. In relation to the suggestion that the costs should be made costs in the cause GKT referred to Minihane v Skellig Fish Ltd. In that case, Noonan J on behalf of the Court of Appeal could not accept that on the facts the 'proposition that an order directing costs to be costs in the cause is outside the range of orders reasonably open to the High Court. One might reasonably have thought that if any party had reason to be disappointed about that order, it was the plaintiff, who had after all succeeded in the application where normally, the costs would follow that event.' I accept that it could be said that an order*

making the costs 'costs in the cause' is within the range of orders which is reasonably open to me. However, its effect is, by definition, to deprive MSC, the successful party in this application of their entitlement to their costs. For the reasons discussed above, I do not accept that I should order otherwise than granting MSC their costs including by making them costs in the cause.

53. I will therefore make an Order for the defendants' costs. As indicated above, I will place a stay on the execution of that Order pending conclusion of the proceedings or until further Order. It seems to me that I have a discretion to do so and in exercising that discretion I have had regard to the current general economic circumstances and in particular the high level of energy costs, including the cost of fuel. I did not hear specific evidence as to these general economic conditions, but the courts do not exist in isolation. There was general evidence before the court as to the narrow margins and the costs in the haulage industry and it seems to me that when these are taken together it is appropriate that the execution of the costs be stayed. The point was made on behalf of MSC in the context of the suggestion that the costs should be reserved, or even that MSC's costs only should be reserved to the trial of the action, that the effect of this could mean that MSC would be denied their costs or at least greatly delayed in establishing their entitlement to costs by GKT not prosecuting the proceedings and, it was suggested, the indications are that GKT has no intention of prosecuting the case. The same general point could, of course, be made in respect of a stay on the Order for costs. It seems to me that this risk is mitigated somewhat by the stay being placed on the execution of the costs order rather than on entry and execution because the determination of MSC's entitlement to the costs will not be delayed. Furthermore, in circumstances where the stay will operate until determination of the proceedings or until further Order MSC will be entitled to apply have the stay lifted in the event that the proceedings are not prosecuted with appropriate dispatch by GKT. Of course, MSC will have, in any event, the option of applying to strike out the proceedings if there is a delay or failure to prosecute, thereby, if successful, bringing the proceedings to a determination and causing the stay to come an end.

54. I will, therefore, make an order for MSC's costs (one set of costs) to be adjudicated in default of agreement with a stay on execution pending conclusion of the proceedings or further order of the Court." (emphasis added)

9. As paras. 52-53 illustrate, not only was the context quite different, there was an evidential basis identified and relied upon by the court, when placing a stay. In other words, in exercising discretion to grant a stay, Dignam J had regard to, *inter alia*, high level of energy costs, including the cost of fuel, having heard general evidence as to narrow margins and the costs in the haulage industry.

10. In the present case, the defendants have not pointed to, nor have I been able to identify, any basis, in evidence, as to why a stay is required in the interests of justice.

11. I accept that, as Simons J noted in *McAlister v. Church Estate Agents Ltd* [2023] IEHC 650, it is open to the court to place a stay on a costs order at the interlocutory stage, to facilitate a "netting off" occurring at the conclusion of the proceedings in question, as regards various costs orders in favour of / against the respective parties. I also accept that the granting of a stay does not prevent the adjudication of costs in advance of the determination of the proceedings (see Laffoy J in *Haughey v Sinnott* [2012] IEHC 403). However, there is no question of either decision being authority for the proposition that the court is obliged to place a stay, pending the determination of the proceedings, on all costs orders made in respect of interlocutory applications.

12. The gravamen of the defendants submissions seems to me to be that granting a stay would facilitate a "netting off" exercise in the future, with respect to interlocutory costs orders. They make this argument in circumstances where the plaintiff indicated, by letter dated 28 February 2023, an intention to seek an amendment to the Statement of Claim, which, contend the Defendants, will give rise to costs implications.

13. With regard to the foregoing, whether an application to amend the plaintiff's Statement of Claim is, in fact, brought at a future point remains to be seen. Even if it is safe to assume that such an application is brought in the future, it is impossible and inappropriate to predetermine the outcome including what order, if any, a future court would make as to costs.

14. As to the argument that granting a stay today would facilitate a "netting off" exercise in the future, the specific facts of this case need to be kept in mind. This is not a situation where, for example, the defendants have previously obtained an order for costs following the determination of a substantial interlocutory dispute which costs order has been stayed.

15. On the contrary, and as noted in para. 42 of the judgment, the defendants did not deliver a defence within the time prescribed by the RSC, as a result of which the plaintiff had to issue a motion seeking judgment in default of defence. This culminated in an order made by this court (Cross J.) on 27 November 2017 giving the defendants a further three weeks for the delivery of a Defence and, on consent, the defendants were ordered to pay the plaintiff the costs of the motion, to be taxed in default of agreement. Thus, not only did 11 months elapse between the plaintiff delivering a Statement of Claim and the defendants filing a Defence, the defendants have an order for costs *against* them.

16. Furthermore, as detailed between paras. 56 and 61 of the judgment, the plaintiff had to issue a second motion, in circumstances where the defendants had not replied to particulars. Two months after issuing same, replies were delivered and, by order made on 10 December 2018 (Cross J), the plaintiff's motion was struck out and costs were reserved.

17. Focussing on the question of whether a stay is required in the interests of justice, there is no evidence to the effect that any harm, still less irreparable harm, would arise if a stay is not placed. Nor is there any evidence to the effect that not placing a stay will imperil the fair determination of the underlying proceedings. Nowhere is it suggested that if a stay is not granted the defendants,

who were entirely unsuccessful in the present application, would be unable to fund their defence at trial.

18. That the defendants insisted on bringing the present application, on notice of the fact that the plaintiff called on the defendants to withdraw the motion on the basis that each side would be responsible for their own costs, also seems to me to be a factor which weighs against a stay being required in the interests of justice. In the manner dealt with at para. 154 of the judgment, the plaintiff's solicitors wrote to the defendants' solicitors on 9 August 2022, stating, inter alia:

> *"We would invite you to confirm that you will not proceed with your application. In the event that you do not provide such confirmation we will have no option but to file a replying affidavit to same which is needlessly going to add to the costs of the case. Our client will also rely on the terms of this letter to fix your client with the costs of defending such application."* (emphasis added)

19. Para. 155 of the judgment stated the following in relation to this invitation by the plaintiff to the defendants:-

> "*155. In the foregoing manner, the defendants were put 'squarely' on notice of the fact that, if they insisted on pressing their dismissal application, it would "needlessly" add to the costs of the case and, in those circumstances, the plaintiff would be seeking its costs. For the reasons set out in this judgment, I entirely share the view that proceeding with this application has added, unnecessarily, to the costs of these proceedings. It has, of itself, created unnecessary and entirely avoidable delay.*"

20. In short, the defendants insistence on pressing ahead with their application gave rise to the necessity for the plaintiff to deliver a response, on affidavit, and incur costs in opposing the motion.

21. Although, for understandable reasons, I was not made aware of the following until after delivering judgment, well over a year after the plaintiff's letter dated 9 August 2022, by letter dated 9 November 2023, headed "*without prejudice save as to costs*", the defendants' solicitors proposed to the plaintiff's solicitors that the defendants' motion (which was to be heard a matter of days later, on 16 November 2023) be struck out with no order as to costs. Unsurprisingly, the plaintiff's solicitors replied, by letter dated 10 November 2023, to state that if the plaintiff's motion was to be struck out at that stage, the plaintiff would clearly be entitled to its costs. This was not acceptable to the defendants who proceeded with their application. In my view, there was nothing at all unreasonable about the stance adopted by the plaintiff as of 10 November 2023. By contrast, it seems to me that it was entirely unreasonable for the defendants (who had, by their insistence on bringing the application, caused the plaintiff to incur costs) not to agree to meet the plaintiff's costs when the defendant made an '11th hour' proposal to strike out the motion. The foregoing certainly adds no weight in favour of the contended-for stay.

22. The fact that the defendants failed to meet any of the 3 limbs of the *Primor* 'test' and, in my view, could not have believed that anything approaching moderate prejudice arose (the 3rd limb)

also seems to me to weigh against a stay being granted. I say this in light of the public interest in deterring the bringing of interlocutory applications which lack merit but which make significant demands of limited resources. For the sake of convenience, the issue was addressed as follows in the judgment:

> "*242. This decision did not come down to 'fine margins'. For the reasons set out in this judgment, I am satisfied that the defendants have failed to meet all 3 limbs of the Primor test. Furthermore, whatever about believing that inordinate or inexcusable delay might be established, the defendants could not have believed that they were in any way prejudiced in the defence of these proceedings. Despite this, they spurned an opportunity to withdraw the motion on the basis that each side bear their own costs and insisted on running this motion which, in addition to making demands on necessarily scarce court resources (Courtroom; Registrar; and Judge) has required very considerable work by the court post the hearing to produce this decision. Greater care needs to be taken by defendants before insisting on this course. Why? Because every defendant will be aware, in advance of issuing such an application, that Primor is a 3-part test with the burden of proof resting on the defendant to establish all 3 limbs. In the present case, I fail to see how the Defendants could have believed that the 3rd limb of Primor was met. I am fortified in this view by the appropriate concession made during the hearing that there was no question of fair trial prejudice (despite averments made on behalf of the defendants that there was such prejudice). Thus, before the hearing, with the bald assertion of fair trail prejudice having fallen away, the 'sum total' of the prejudice asserted was the vaguest of averments in relation to effect on reputation and insurance which, in truth, invited the court to presume prejudice where none was made out*."

23. It is now known that, as of 9 November 2023, the defendants were willing to strike out their motion. This seems to me to gives rise to a reasonable inference that, as of 9 November 2023 and at all material times thereafter, the defendants understood that theirs was an application without a reasonable prospect of success. This fortifies me in the views expressed in the judgment and, in my view, weighs against a stay being necessary in the interests of justice.

24. Applying the principles articulated by the Court of Appeal in *Permanent TSB Group plc v Skocyzlas* [2020] IECA 152 (see, in particular, paras. 44; 54; and 55), the onus rested on the plaintiff to satisfy this court that a stay was required in the interests of justice. Having considered all the circumstances, I am satisfied that the plaintiff has not discharged that burden in the present case. For the reasons set out, I take the view that the greater risk of injustice arises if a stay were to be granted.

25. It may well be inconvenient for the defendants to be required to discharge this order for costs, as opposed to waiting until the final determination of the proceedings. However, it was within the power of the defendants to ensure that no costs arose. Unfortunately, they chose a different course.

26. To draw this ruling to a conclusion, I am satisfied that only the following limited stay is required in the interests of justice, namely, a stay, in the event of an appeal against this court's judgement, to expire on the first return date before the Court of Appeal. At that point, it will be for the defendants/appellant to make an application to the higher court for any further stay.
A final order reflecting the above should be provided within 7 days.