UNAPPROVED

THE COURT OF APPEAL

Record No.: 2020/182

Whelan J.
Donnelly J.
Ní Raifeartaigh J.

BETWEEN/

ALLIED IRISH BANK PLC

PLAINTIFF/RESPONDENT

-and-

BALFORD CONSTRUCTION LIMITED

DEFENDANT/APPELLANT

RULING of the Court delivered on the 30th day of July, 2021

Introduction

1. In a judgment delivered on the 9th day of June, 2021 by Donnelly J. with which Whelan and Ní Raifeartaigh JJ. agreed, this Court, for the reasons set out in the judgment, made the following orders or proposed orders:

a) Striking out the Bank's claim in respect of a bank guarantee to Roscommon County Council as set out in paragraphs 4, 5, 6 and 7 of the summary summons and also striking out as much of paragraph 8 as refers to the sum of €167,000 in respect of that bank guarantee to the Council.

b) Dismissing the Company's appeal in respect of the remaining claims in the summary summons.

c) Granting the Company the full High Court costs of the motion for summary judgment.

d) Subject to the parties contesting this view on costs, granting the Company 50% of the costs of this appeal and reserving 50% of the costs of this appeal to the determination of the action in the High Court.

2. The full reasons for reaching those conclusions were set out in the judgment and it is unnecessary to repeat them here.

3. Following that decision, the Bank/respondent filed submissions in which they accepted the substance of the proposed order on costs but sought a stay on the orders for High Court and Court of Appeal costs "until the final determination of the proceedings."

4. In response to those submissions, the solicitor for the Company/appellant filed submissions to the effect that the Company "has been denied a Fair Hearing in the within Appeal" in four particular circumstances which are summarised in the conclusions to the submissions as follows: "The recording of evidence in the Judgement of the Court of Appeal which does not reflect the evidence sworn, accepting submissions from Senior Counsel for which there was no sworn evidence, making findings in respect of a claim which the Plaintiff/Respondent had withdrawn and misrepresenting the Appellant's appeal". The Company claims that these "are all unjust, deny the Appellant a fair hearing and will prejudice these and other related proceedings".

5. The Company has not filed any motion to seek to review. The jurisdiction to review a judgment is exceptional, and the circumstances in which it may be exercised were summarised in *Launceston Property Finance DAC v Wright* [2020] IECA 146 in light of the jurisprudence of the Supreme Court as follows:

"In summary, the jurisdiction:-

(i) is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

(iii) requires the applicant to discharge a very heavy onus;

(iv) is not for the purpose of revisiting the merits of the decision;

(v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) cannot be invoked on the basis of the discovery of new evidence;

(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;

(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."

6. This Court has considered the appellant's submissions. The Court is satisfied that it does not require the Bank to respond to these submissions as to do so would increase the costs for the Bank entirely unnecessarily. The Court is satisfied that the issues raised do not meet the threshold for review applications. Accordingly, the court refuses the appellant's application to review its judgment.

7. The Company made separate submissions opposing the Bank's application for a stay. The Company did not contend for any substantive change to the costs order.

8. This Court will therefore make the costs order as set out at paragraphs (c) and (d) in paragraph 1 above. We will now proceed to consider the question of whether there should be a stay on that order.

Application for a Stay on the Order for Costs

Submissions

9. The Bank submitted that the Court has the jurisdiction to grant a stay whereby judgment in part has been delivered. This jurisdiction is pursuant to Order 37, rule 8 of the Rules of the Superior Courts, 1986 (as amended) ("the RSC") (on costs as the Court may think fit) and the court's own inherent jurisdiction.

10. Order 37, rule 8 permits an order to be made (on costs) "subject to such terms, if any… as the Court may think fit". It is submitted that the use of the phrase *"subject to such terms, if any […] as the Court may think fit"* does include the imposition of a stay on a costs order made prior to the final determination of the action and such orders are common course before the Courts.

11. The Bank submitted that the test for when a stay should be placed on a costs order was identified by the Court of Appeal in *Permanent TSB Group Holdings v. Skoczylas* [2020] IECA 216 at para. 44 as follows:-

> *"Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so…."*

12. Further, this test was recently affirmed by the Court of Appeal (Donnelly, Faherty and Haughton JJ.) in the context of a challenge to a preliminary judgment on costs in *AIB v. O'Brien* [2020] IECA 259. Faherty J. stated at para. 8:-

> *"…a stay should only be granted where the opposing party satisfies the court that it is in the interest of justice to do so"*

13. The Bank however distinguishes the facts of *AIB v. O'Brien* where a stay was refused on the basis that unlike that case, the Company was not entirely successful and that this was not a situation where the Company had to defend an appeal.

14. The Company did not take issue with these legal principles in its submissions so this Court will proceed on the basis that it has jurisdiction to grant a stay and that it should only do so if it is in the interests of justice so to do.

15. The Bank's primary contention is that it is in the interests of justice to place a stay on the costs order of this Honourable Court in circumstances where the Company remains a defaulting borrower subject to the remainder of the action which has been transferred to plenary hearing.

16. The Bank submits that the imposition of a costs order without a stay, prior to the final determination of the proceedings is clearly prejudicial to the Bank, whereby the ultimate costs order of the substantive action may be made in its favour. The Bank submits that the Company is subject to considerable litigation before the Court in a number of proceedings, both related to, and independent of this action. Therefore, an ultimate costs order in favour of the Plaintiff may prove difficult to enforce. The Bank also says that although it may ultimately succeed in the substantive action, in the absence of a stay on the costs order *in quo*, the Company may prove to be the only actual beneficiary of a costs order in this action. The Bank would be deprived of its ability to seek a set-off of costs in the absence of a stay.

17. The Bank also submits that there is no prejudice suffered by the Company in having a stay placed on the costs order of this Court as the costs are yet to be determined and adjudicated upon. A stay therefore puts the Company at no loss and it does not suffer any prejudice and the balance of justice lies in favour of awaiting until the outcome of the substantive proceedings before such costs order comes into effect. The Bank also submits that it has delivered a Statement of Claim on or about the 14th April, 2020 to which no defence has been forthcoming. Therefore, the expeditious resolve of this action rests with the Company.

18. By way of response the Company rehearses the pleadings in the special indorsement of claim and highlights the application to amend that indorsement to include an allegation that the

value received in respect of the loan agreement was "forbearance and a restructure of an existing facility in the amount of €211,619.00, in substitution for an existing facility that the Defendant held with the Plaintiff". The amendment also included a statement that that benefit of the restructuring agreement was applied to a particular account number.

19. The submissions repeat the assertion that the Company has maintained throughout the proceedings that it did not enter the agreement alleged at para. 2 of the Special Indorsement of Claim and that Nancy McNicholas did not sign any letter of sanction for a loan account in the amount of €211,619.00 and that the Company did not drawdown that amount as alleged.

20. The Company's submissions then refer to the plea in respect of a bank guarantee and the subsequent averment in an affidavit on behalf of the Bank that it no longer wishes to make the claim that there was a bank guarantee or that the Bank advanced money to Roscommon County Council accordingly. The submissions point to the Bank's submissions on the substantive issue before the Court to the effect that it no longer wished to pursue the bond/bank guarantee credit agreement in favour of Roscommon Council of the 12th August, 2010 element of the claim against the defendant. The Company submits that the only document dated 12th August, 2010 which was exhibited was the letter of sanction from the Bank to the Company offering a new banking facility to the Company. The Company submits that the proposition being advanced by the plaintiff that they believed that the County Council could have sued on foot of that letter is not credible.

21. The submissions then state that in circumstances where the Bank is no longer pursuing its claims that:

a) In consideration for the defendant receiving an advance of €211,619 on the 27th April, 2010 the defendant agreed to pay the Plaintiff €214,435.66 on the 30th July, 2010; and

b) By bank guarantee in favour of Roscommon County Council made on the 12th August, 2010 the defendant agreed to pay the plaintiff €167,600 if and when the Plaintiff advanced the same sum to Roscommon County Council

the Bank should be refused its application for a stay in respect of the costs awarded.

22. The submissions then state that the Company is a small company in Swinford, Co. Mayo that has had to maintain a defence to the claims in the Special Indorsement of Claim "even though those claims were untrue". The Company points out that the Bank is a large financial institution which has not been granted leave to amend its indorsement of claim (the matter is before Meenan J.). The Company refers to the inexcusable and inordinate delay in bringing the claim which is entirely the responsibility of the Bank. The Company also refers to the unsubstantiated claim of the Bank that there is considerable litigation before the Court in a number of proceedings both related to and independent of this action.

Decision

23. As stated above, the interest of justice is the overriding consideration of whether a stay should be granted on an order for costs.

24. In the present case there are competing interests at stake. The Bank maintains its claim that the Company is in default in relation to its borrowings while the Company has maintained that it did not enter into the agreement as alleged in the Bank's pleadings. The Bank has now sought to amend its pleadings.

25. This Court does not nor did not enter into a determination of the merits of the claim in respect of the (claimed) loan agreement or indeed the application to amend the pleadings. Those issues are to be determined in the High Court. In relation to the claim concerning the bank guarantee this Court has also not opined that there was such a guarantee; but has expressed concern that clearly incorrect averments were made in relation to it, especially one stating that an advancement had been made by the Bank when no such advancement had been made. The

Court made clear its views on this issue by making the proposed costs orders that it did. The issue of the stay, although clearly closely related, is an independent issue to be determined.

26. This case is unlike the *AIB v. O'Brien* case for a number of reasons. As indicated in the substantive judgment, it was unusual in so far as the Company brought and maintained the appeal in circumstances where the matter had been sent for plenary hearing. The relief sought by the Company in the appeal in respect of the claim for the loan agreement was refused. The claim in respect of the bank guarantee was withdrawn and was withdrawn before the appeal hearing.

27. This Court identified in *AIB v. O'Brien* at para. 16 various factors as relevant to the finding that the plaintiff in that case had not discharged the onus in respect of a stay, as follows. It is a useful exercise to contrast those factors with the position here:

> "*(1) The defendants were entirely successful in the appeal*"

The Company was not entirely successful in the instant appeal;

> "*(2) The defendants were required to defend the appeal. Had they not done so, the appeal, if successful, would have undermined their counterclaim*"

The Bank was required to defend this appeal in circumstances where they had already indicated an intention to withdraw one of the two substantive elements of the case prior to the hearing of the appeal;

> "*(3) An important ground pursued by the plaintiffs at the appeal stage was that forbearance to sue was the consideration for the 2010 Facilities. This was not a ground pleaded in the summary summons or argued by the plaintiffs in the High Court*"

This relates to the pursuit by the plaintiff of a ground not raised in the court below. The Bank here did not raise further arguments;

> "(*4) The within appeal was brought in circumstances where irrespective of the outcome thereof the matter was destined for plenary hearing*"

This is not identical here as the Company was seeking to end the proceedings in totality if successful in the appeal. It is noted that the Company had already achieved plenary hearing but failed in its attempt to end the proceedings in totality;

> "*(5) The purpose of the plaintiffs' appeal was to strike down part of the defendants' defence to the plaintiffs' claim. Rather than appealing in the manner they did, this objective could have been pursued in the aftermath of the trial judge's remittal of the matter to plenary hearing and the exchange of pleadings that presumably would have followed had there been no appeal. The pleadings would have drawn the battle lines on the consideration and forebearance (sic) to sue issues. If the plaintiffs believed that a defence was raised that on the facts pleaded, and taken at their high point, did not disclose a defence known to law, then it would have been open to the plaintiffs to bring an application to strike out that particular ground of defence.*"

This was fact specific to *AIB v. O'Brien*.

> "*(6) Had the plaintiffs pleaded their claim adequately in the summary summons in the manner that Bank of Ireland Mortgage Bank v. O'Malley [2019] IESC 84 requires a plaintiff to do, consideration would have been pleaded along with forbearance to sue. Those issues might then conceivably have been capable of being resolved by Binchy J. at the summary stage (and if necessary on appeal before this Court) but, as found by this Court, the summary summons contained no such pleas*".

This has some superficial similarities with the present case but the difference here is that the Company had achieved "success" in resisting the summary judgment (although it objected to

the matter going to plenary hearing). The Bank pursued the application to amend the summons before the High Court and that matter is still outstanding.

> "*(7) Whatever way one looks at it, the appeal was a 'stand alone' matter. No outcome of the plenary trial can result in overturning this Court's decision on costs*".

The appeal was stand-alone but the Company lost on the substantive ground.

> "*(8) There is likely to be a considerable delay before the trial -particularly as there is likely to be extensive discovery. In this context, the relative impecuniosity of the defendants is a weighty matter. Their legal teams are entitled to be paid regardless of whether a stay is granted. It may reasonably be assumed that the defendants are not in a position to pay then legal teams - or at least not the full costs. If a stay is granted this may well put the defendants at a litigious disadvantage. On the other hand, refusal of a stay and the immediate obligation to discharge the costs will not disadvantage the plaintiffs who are established financial institutions.*"

While there may be a delay in matters, especially in light of the application to amend the Special Indorsement of Claim, the Company has not pleaded impecuniosity, the furthest it has gone is to say that it is a "small company".

28. This Court must weigh in the balance the claim by the Bank as against the Company. We do not take into account the other litigation referred to in submissions by the Bank. We note however that the claim is for an amount larger than the costs of the motion and appeal could be. If the Bank is successful it will, presumably, but not necessarily, be entitled to its costs of the hearing. It would in the usual course have an entitlement to set off costs. Costs of the plenary hearing are likely to be greater than the costs of the appeal.

29. It is a matter for both parties to ensure that the proceedings are brought to a conclusion as soon as reasonably possible.

30. In all the circumstances we are satisfied that there should be a stay granted on the costs awards made by this Court.

31. The Court will make no order for the costs of this application for a stay on the award of costs in respect of the substantive appeal.