UNAPPROVED
THE COURT OF APPEAL

Appeal Number: 2018/178
Neutral Citation Number [2022] IECA 69

Faherty J.
Haughton J.
Murray J.

BETWEEN/

NEIL HEALY

PLAINTIFF/
APPELLANT

- AND –

ULSTER BANK IRELAND LIMITED AND PROMONTORIA (ARAN) LIMITED

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of March 2022

1. In its judgment delivered on 27 November 2020 ("the principal judgment"), the Court determined that the first named respondent ("the Bank") was estopped from offsetting the funds standing in the account of the appellant ("Dr. Healy") which arose from the disposal of his interests in what was described in the principal judgment as the Coole property. As the second respondent ("Promontoria") was the assignee of the loans associated with the Coole property, the Court determined that it followed that Promontoria too was estopped by reason of the Bank's conduct from pursuing Dr. Healy in respect of

the Coole indebtedness. That indebtedness was said by Promontoria to comprise the outstanding balances on the bank accounts specified in paras. 1-5 and 7 of the defence and counterclaim delivered on 22 November 2016.

2. At para. 197 of the judgment, the Court invited the parties to make submissions as to the form of the orders to be made consequent on the judgment and on the issue of costs.

3. Both sides duly made written submissions.

The orders sought by Dr. Healy

4. In light of the judgment of the Court, Dr. Healy requested that the Court make the following orders:

a) That the appeal be allowed and that the order of the High Court (Barrett J.) be set aside;

b) That the Bank and Promontoria are permanently estopped from pursuing Dr. Healy in respect of all sums claimed by them which said sums being the sums claimed on foot of loan account 02385385, loan account 02385112 and overdraft account 02385039, and loan account 02162164 and overdraft account 02162081 (as claimed in Promontoria's counterclaim); and

c) That Dr. Healy recover as against the Bank the sum of US$993,983.03 together with interest on that sum at the Court rate from 13 August 2008 to the date of payment.

5. By letter dated 7 December 2020, Dr. Healy's solicitors wrote to the solicitors for the Bank and Promontoria seeking their consent to the aforesaid orders. No response was received to the said letter.

The response of the Bank and Promontoria to the orders sought by Dr. Healy

6. In their written submissions, the Bank and Promontoria agreed that, in light of its judgment, the proper form of order to be made by the Court was that the Bank and

Promontoria (or their successors in title) are permanently estopped from pursing the sums claimed by Promontoria in its defence and counterclaim.

7. They asserted that since the Bank is the party which applied the set off monies prior to the transfer of the loans to Promontoria, the proper order should be that the Bank should be required to repay the set off monies to Dr. Healy with due allowance to be given for his admitted personal liabilities to the Bank, liabilities which post-dated the representations which were at the heart of the within proceedings.

8. The Bank and Promontoria submitted that:

(a) Dr. Healy incurred personal borrowings in his own name;

(b) There is no claim to the effect that the Bank and Promontoria are or were estopped from seeking repayment of those borrowings; and

(c) Mr. Sean Cotter's evidence that the set off amount was used to clear those borrowings was not challenged.

9. It was submitted that in those circumstances, the Court should make an order that the set off monies be repaid to Dr. Healy with due allowance for the monies applied in satisfaction of his admitted personal borrowings.

10. Following the receipt of the parties' written submissions, the Court requested that the Bank would address the following matters on affidavit:

1. The provisions for set off in any agreement/contract between the Bank and Dr. Healy in the relevant periods;

2. The extent of Dr. Healy's personal indebtedness as of 13 August 2008;

3. The precise treatment by the Bank of Dr. Healy's monies (US$ 993,983.03) which it said it set off on 13 August 2008, including a description of the purpose of the account into which the monies were lodged on 13 August 2008, the precise length of time the monies

remained in the said account and whether or not the account was an interest bearing account, and if so, the interest rates then pertaining in respect of that account;

4. Any note or memorandum as might exist evidencing any request by Dr. Healy on or about 11 August 2008 (or any other date in the relevant period) that the monies seized by the Bank would be applied against his personal indebtedness;

5. The interest rate that would have applied to Dr. Healy's account(s) thereafter had the Bank acceded to his request in August 2008 that insofar as the Bank was contemplating a set off, same should be applied to his then personal overdraft;

6. A description of the dealings the Bank engaged in in or about August 2010 in relation to the set off monies, to include a description of the nature and purpose of the account into which the converted dollar amount was then lodged (as the Court understood the position to be);

7. The nature and extent of Dr. Healy's personal indebtedness between 13 August 2008 and 14 June 2014 including the rate of interest applied by the Bank to that indebtedness (including providing the relevant statements for that period);

8. A concise description of what the Bank did on 14 June 2014 in respect of the set off monies.

11. On 10 December 2021, Ms. Joan Williams, Senior Manager with the Bank, swore an affidavit in answer to the matters raised by the Court. Dr. Healy swore an affidavit in reply on 2 February 2022.

The provision for set off in relation to Dr. Healy's personal indebtedness

12. In summary, Ms. Williams addressed the first matter raised by the Court by exhibiting an extract from an Overdraft Agreement dated 20 December 2007 which, it was said, was subject to the Bank's General Conditions for Business Lending to Individuals Ref. 01/2006 and which provided at clause 11.29 *inter alia* that "the Bank…. may set off

any payment obligation owing by the Borrower to the Bank against any payment obligation owing by the Bank to the Borrower…"

13. In his replying affidavit, Dr. Healy took issue with the Bank's reliance on the Overdraft Agreement of 20 December 2007 contending that that was not the overdraft agreement the subject of the Court's enquiry and that, rather, the salient overdraft agreement (providing an overdraft facility) related to an overdraft facility of €150,000 which was dated 7 July 2008. He averred that neither the 7 July 2008 agreement nor the agreement being relied upon by the Bank referenced or otherwise incorporated the Bank's General Conditions for Business Lending to Individuals Ref. 01/2006.

14. In truth, nothing much turns on the issue of contention as recited above. In the course of the oral hearing which followed the filing of Ms. Williams' and Dr. Healy's affidavits, counsel for Dr. Healy conceded that on 14 August 2008, in the teeth of the Bank having stated that they were setting off his monies against the Coole indebtedness, Dr. Healy, while taking issue with the propriety of the Bank seeking to apply his monies to the Coole indebtedness, had requested the Bank to include his then personal overdraft (i.e. the overdraft figure then standing in his account no. 01539073) in any purported set off. Counsel, however, asserted, as a matter of principle, that Dr. Healy's personal indebtedness was not at the heart of the present litigation and that the case now being made by the Bank did not flow from the premise under which the Bank had appropriated Dr. Healy's money in August 2008.

The extent of Dr. Healy's personal indebtedness as of 13 August 2008

15. According to Ms. Williams' affidavit, as of 13 August 2008, Dr. Healy's personal indebtedness was €150,038.26. This was broken down as between two accounts, namely €141,364.68 (account no. 01539073) and €8,673.58 (account no. 10030114). Dr. Healy

does not gainsay that he had a personal indebtedness of €150,038.58 in August 2008 which is unaffected by the findings of the Court in the principal judgment.

The precise treatment of the monies alleged by the Bank in August 2008 to have been set off against the Coole indebtedness

16. As recorded at para. 20 of the principal judgment, on 13 August 2008, some twelve months after Dr. Healy lodged his cheque following the representations made by Mr. Leech, the Bank *"allegedly on foot of its rights pursuant to the Guarantee executed by Dr. Healy on 9 August 2006… applied a set off of US$993,983.03, being the balance of the…deposit monies then standing in Dr. Healy's account, against what was asserted by the Bank at the time to be Dr. Healy's liabilities in respect of the Coole project."*

17. The direct evidence of Mr. Cotter of the Bank, which was given on Day 8 of the hearing in the court below, was that immediately following the set off by the Bank on 13 August 2008, the monies went into a "Guarantee Realisation Account". However, it only became clear in the course of Mr. Cotter giving evidence that the Bank had not in fact applied the monies against the Coole indebtedness notwithstanding having advised Dr. Healy in August 2008 that it was doing so. Rather, some six years after it had purportedly appropriated the monies on foot of Dr. Healy's alleged Coole indebtedness, the Bank applied a portion of the seized funds against the costs of the first High Court trial, with the balance applied against the personal liabilities of Dr. Healy. I will return to the actual events of June 2014 in due course

18. Both Dr. Healy's and Ms. Williams's respective affidavits give a more accurate picture of what actually transpired in August 2008 regarding Dr. Healy's two USD accounts. On 7 August 2008, Dr. Healy emailed the Bank in advance of the maturity dates of his USD accounts requesting that the Bank hold them on a daily rate until further notice. A Ms. Fisher of the Bank responded to Dr. Healy on 8 August 2008 advising that he had

US$ 90,184.93 maturing on 14 August 2008 and US$ 901, 794.09 maturing on 15 August 2008 and that, as requested, she would hold the funds overnight until further notice. Up to 15 August 2008, Dr. Healy's funds had attracted a fixed preferential rate of interest. By 13 August 2008, the date of the purported set off against the Coole indebtedness (which never happened), the total dollar amount standing in these accounts was US$993,983.03.

19. As is by now well-rehearsed, the US $993,983.03 was not in fact applied in purported set off against the Coole indebtedness on 13 August 2008. Nor was any part of it applied against Dr. Healy's personal account no. 01539073 notwithstanding that he requested such a set off against his personal indebtedness on 11 and 14 August 2008. While Ms. Williams (in response to the Court's query as to whether there existed any note or memorandum evidencing any request by Dr. Healy on or about 11 August 2008 that the monies seized by the Bank would be applied against his personal indebtedness) averred that she could not locate any such note or memorandum, Dr. Healy's written submissions in this regard refer to his Witness Statement wherein he recites a conversation he had with Mr. Leech on 11 August 2008 in the wake of having received communication from the Bank that he was still indebted to it in respect of the Coole property. He states therein that he said to Mr. Leech "So you are going to leave my account in overdraft collecting interest for Ulster Bank and meanwhile confiscate my monies on deposit". He gave evidence to that effect on Day 1 of the trial.

20. Returning to the events of 13 August 2008. Albeit having seized the monies in Dr. Healy's USD accounts on 13 August 2008, the Bank did not move the monies to any separate account on that date. Rather, as referred to above, following the maturity of the USD accounts the monies remained where they were. The funds were rolled over on a daily interest rate and continued to accrue actual interest (from which DIRT was deducted) from 13 August 2008 to in or about 18 August 2010. They were moved to a non-interest-

bearing account on 26 August 2010. As per the statements exhibited in Dr. Healy's affidavit, as of 18 August 2010 the sum standing in the USD account was US$ 1,012,814.79.

The events of August 2010

21. At some point on a date between 18 and 26 August 2010, the sums on deposit in the USD account was converted to euro at an exchange rate of US$1.3075 to €1, resulting in a sum of €774, 619. These monies were then lodged to a guarantor credit account (account no. 10177485) on 26 August 2010. This account was not an interest-bearing account.

The dispersal of the €774,619

22. The application of the €774,619 from account no. 10177485 took place on 13 June 2014. The sum of €345,731 was applied against Dr. Healy's personal indebtedness in account no. 01539073. As counsel for the Bank acknowledged, Dr. Healy's overdraft "had obviously ballooned" because a penal default rate of 26.8% had been applied to it from 2008 to the date the €345,731 sum was applied to the account. Following the application of €345,731, there remained an indebtedness of €3,006.75 on account no. 01539073. As previously indicated, the balance of the €774,619 was applied by the Bank against a costs account which had resulted from the first High Court hearing.

The award to be made to Dr. Healy

23. Dr. Healy seeks Courts Act interest on the monies he says were wrongfully withheld from him. His argument is that he was deprived of his monies since 15 August 2008. He also emphasises that there is no evidence of any contractual rate of interest for the period in respect of which he was deprived of his monies and that the Bank does not gainsay this. I accept this to be the case for the majority of the period of which Dr. Healy was deprived of his monies albeit, as I have already referred to, there was agreement as of 11 August 2008 that the monies in the USD account would be rolled over at a daily rate from the date of the

maturity of the funds and which in fact occurred until 26 August 2010 when the funds were moved by the Bank to an account to which no interest applied.

24. The Bank disputes Dr. Healy's entitlement to Courts Act interest. It says that the application of Courts Act interest would do violence to achieving a fair outcome between the parties "in light of the unusual circumstances that pertain in this case". It argues that the formula set out at "JW5" equals a fair rate of compounded contractual interest albeit the Bank concedes that there was no agreement between it and Dr. Healy to apply that rate.

25. The Bank also asserts that there is no claim made by Dr. Healy in the proceedings for a contractual rate he would have earned had he had the use of his monies from August 2008. It contends that this absence is explained by the fact that the case made by Dr. Healy in the first High Court hearing was a completely different claim, which was that if he had had access to his monies in August 2008, he would have invested in property in Florida. Thus, the claim in the first High Court hearing was for a specific loss referable to Dr. Healy being unable to pursue property investments in Florida In the course of the first High Court hearing the Bank adduced expert evidence that Dr. Healy would not have made a return on any such investment-evidence that was accepted by McGovern J. Counsel for the Bank submits that Dr. Healy did not appeal that aspect of McGovern J.'s decision. That being the case, it argues that Dr. Healy cannot now seek Courts Act interest.

26. In response to the Bank's argument, counsel for Dr. Healy emphasises that Dr. Healy's claim is for judgment in the amount of US$993,983.03 and payment of that sum as money had and received, in addition to Courts Act interest. Counsel emphasises that while it must be conceded as a matter of pragmatism that Dr. Healy's personal indebtedness of US$204,902 should be deducted from the monies to be paid out to him, one should not lose sight of the fact that the Bank wrongfully appropriated Dr. Healy's monies on the unlawful basis that he continued to have a liability for the Coole indebtedness, which is the claim

litigated by Dr. Healy and in respect of which he succeeded on appeal. Counsel submits that in the second High Court hearing, Dr. Healy did not run a damages case, rather the case which was advanced was for money had and received by the Bank by dint of its unlawful appropriation of Dr. Healy's US$993,983.03. Counsel contends that on foot of the Court's reasoning in the principal judgment, Dr. Healy is entitled to recovery of the entire appropriated sum save the "pragmatic" issue of the deduction therefrom of his personal indebtedness as it stood in August 2008.

Discussion

27. For the reasons set out in the principal judgment, as of 13 August 2008 Dr. Healy had no liability in respect of the Coole indebtedness. This, in my view, is the primary starting point in determining the sum which the Court should direct be paid to Dr. Healy by way of recovery of his personal monies concomitant with a declaration that he has no liability in respect of the Coole indebtedness.

28. As can be seen, albeit that Dr. Healy was deprived access to the US$993,983.03 in his US$ deposit account as and from 13 August 2008, from 15 August 2008 until 26 August 2010, the monies continued to accrue actual daily interest (from which DIRT was deducted). As per the statements sent by the Bank to Dr. Healy, the balance in the USD account as of 18 August 2010 was US$1,012,814.79. This, therefore, is the starting point for establishing the actual award to Dr.Healy.

29. However, from the US$1,012,814.79, there must be deducted Dr.Healy's indebtedness on his personal overdraft account no. 01539073 as it stood on 15 August 2008. Per exhibit "JW5" in Ms. Williams' affidavit, the overdraft balance on the account on 15 August 2008 was €139,114.68, the USD conversion of which amounts to US$204,902.00 (according to the conversion rate used of €1: US$ 1.4729 by Ms. Williams in "JW5"). Dr. Healy continued to use the overdrawn account no. 01539073 until 31

October 2008. During that period, €25,072.64 was paid out of that account. Dr. Healy paid in €19,750, leaving a balance of €5,322.64 (equal to US$7,839.71, applying the conversion rate used by Ms.Williams in "JW5"). Dr. Healy clearly had the benefit of this US$ 7,839.71 sum. So, US$ 7,839.71 must also be deducted from the US$1,012,814.79 amount.

30. Thus, the foregoing results in the following (in US$):

Starting point	US$1,012,814.79
Less overdraft balance on 15.8.2008	(204,902.00)
Subtotal	807,912.79
Less balance of paid out 15.8.08 to 31.10.08	(7,839.71)
Total	US$ 800,073.08

31. Accordingly, the primary decree against the Bank in favour of Dr. Healy is for US$ 800,073.08. This includes the actual interest on a daily rate which accrued up to 26 August 2010. Thereafter, as already referred to, the monies were converted by the Bank to euro and credited to an account in respect of which no interest was payable and remained in that account until the monies were dispersed on 13 June 2014 as set out above.

32. The Bank does not gainsay that Dr. Healy must be compensated for the loss of his monies. As to how that should occur, at para. 8 of her affidavit, Ms. Williams proposes the Bank's solution, namely the application of interest to what would have remained in Dr. Healy's USD account in August 2008 had his then personal indebtedness of US$204,902 been deducted therefrom. In other words, the Bank proposes to make restitution to Dr. Healy of the monies in respect of which he was wrongfully deprived save for an allowance for his personal indebtedness of US$ 204,902 with an addback by way of interest. As Ms. Williams avers, she was unable to verify the exact interest rates that would have been applied. She therefore calculated the interest by using the wholesale 3-month USD LIBOR market rate (with no margin for the Bank) that was available in the interbank market for

the period. To this end, at "JW5", she exhibits spreadsheets setting out her calculations. The total interest on foot of Ms. Williams' USD LIBOR market rate amounts to US$61, 928. It is not disputed that the compensation proffered by the Bank is an extra contractual figure which already has an internal deduction for DIRT.

33. Notwithstanding the solution being proffered by the Bank, I do not consider that the basis for adding interest suggested by Ms. Williams, namely a notional contractual interest, is the appropriate way to recognise the period of time in respect of which Dr. Healy was deprived of the use of his money. While, as I have said, there was an actual daily interest rate attaching to the monies from August 2008 to at least 18 August 2010, no contractual rate or other interest rate applied after 26 August 2010 once the monies were moved by the Bank.

34. Turning now to the "notional" contractual interest being offered by the Bank. The first of the three-monthly rate rates proffered by Ms. Williams is 2.81%. For the second such period the rate is 2.24%. The third period rate is 1.25%. Thereafter, from 15 May 2009 onwards until 13 March 2017, the three-monthly rates hover between 0.23% and 0.96%. From March 2017 to 13 March 2020, the three-monthly rates range between 1.13% and 2.79%. From 13 March 2020 to 9 December 2021, the three-monthly rates being offered fall between 0.12% and 0.84%. In my view, there is no reality to the idea that Dr.Healy would have left his money on deposit at the low rates (and subject to deduction of DIRT) utilised by Ms.Williams for present purposes.

35. In all the circumstances of this case, I am of the view that compensation for the loss suffered by Dr. Healy by virtue of the unlawful retention of his monies should be addressed by the application of Courts Act interest. I am not persuaded by the Bank's argument that the application of Court Act interest in not appropriate in this case.

36. Notwithstanding that this Court, in the exercise of its discretion, has seen fit to deduct two specific amounts from the monies which require to be paid out to Dr. Healy, that factor does not detract from the overarching principle that what is under consideration here is a specific amount of money which the Court is directing be paid by the Bank to Dr. Healy and which ought properly have been available to him from 13 August 2008. In this regard, the amount is *"clear cut"* in the sense used by O'Donnell J. in *Reaney v. Interlink Ireland Ltd* [2018] IESC 13. Contrary to the Bank's submission, I do not consider that the fact that Dr. Healy ran a claim based on loss of opportunity in the first High Court hearing has any great bearing on the issue that confronts this Court. The fact of the matter is that in his second outing in the High Court, Dr. Healy sought the return of his monies which he alleged the Bank had wrongfully misappropriated. As explained by O'Donnell J. in *Reaney, "[i]t is rudimentary economic theory that money has a time value".* He goes on to state:

> *"Interest is not simply awarded as a remedy against inflation, it reflects the fact that there is a cost in not having the money for a certain period."*

That is the principle in issue here.

37. It is to the appropriate period in respect of which Dr. Healy's US$800,073.08 should attract Courts Act interest that I now turn.

38. Section 22 of the Courts Act 1981provides:

(1) Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840 , on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment.

(2) Nothing in *subsection* (*1*) of this section—

(*a*) shall authorise the giving of interest on interest, or

(*b*) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise, or

(*c*) shall affect any damages recoverable for the dishonour of a bill of exchange, or

(*d*) shall authorise the giving of interest in respect of a period before the passing of this Act, or

(*e*) shall authorise the giving of interest on damages for personal injuries, or in respect of a person's death, in so far as the damages are in respect of—

(i) any loss occurring after the date of the judgment for the damages, or

(ii) any loss (not being pecuniary loss) occurring between the date when the cause of action to which the damages relate accrued and the date of the said judgment.

39. As can be seen, when a court is ordering the payment by any person of a sum of money, s.22 of the Courts Act confers on that court a discretionary power to award interest at the rate for the time being specified under s.26 of the Debtors (Ireland) Act, 1840 "on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgement." The rate so specified during the relevant periods was 8% p.a. up to 31 December 2016, and since then has been 2% (see S.I. 624/2016).

40. In the exercise of the Court's discretion (including as to the period for which Courts Act interest should be payable) in awarding Courts Act interest, I am of the view that that the Court should take the following factors into account. It is common case that between 15 August 2008 and 26 August 2010, Dr. Healy's monies were earning, if not exactly agreed

interest, then interest approaching "interest...payable as of right whether by virtue of any agreement or otherwise…" (per s.22(2)(b) of the Court Act 1981). I also take note of the fact that had Dr. Healy had possession of his funds as of 15 August 2008, as a matter of probability he could have expected an interest rate substantially less than the 8% Courts Act interest that obtained until 31 December 2016. Another factor of note is that had Dr. Healy succeeded in the first High Court hearing (where his argument was based on loss of investment opportunity as a result of being deprived of his monies), his award would be in damages, without recourse to the 1981 Act. Furthermore, the Court must take some cognisance of the fact that between 15 August 2008 and 13 June 2014 no actual set off was made by the Bank. However, on 13 June 2014, in the unlawful exercise of the claimed right of set-off it first asserted *vis a vis* the Coole indebtedness in August 2008, and in respect of which Dr. Healy had immediately challenged by the launch of the within proceedings in October 2008, the euro holding guarantor deposit account was emptied by the Bank. The emptying of the guarantor deposit account was in the teeth of the appeal of the decision of McGovern J. that Dr. Healy lodged in 2009 and which was still pending before the Supreme Court as of June 2014.

41. In the exercise of its discretion and taking account of all the circumstances in this case, including the factors just referred to, the Court considers 14 June 2014 as the just and equitable date from which Courts Act interest should run by way, in the words of O'Donnell J. in *Reaney*, of *"fair compensation"* for the loss suffered by Dr. Healy by virtue of having been deprived of his monies since 13 August 2008.

42. Accordingly, the decree in favour of Dr. Healy will be against the Bank for US$ 800,073.08 together with Courts Act interest at the applicable rates on the said sum of US$ 800,073.08 from 14 June 2014 to the date of perfection of the order of the Court.

Costs

43. As set out in the principal judgment, these proceedings have a long and complex history. In the first High Court trial, McGovern J. in his judgment of 17 July 2009 held that the representations Dr. Healy said were made by Mr. Leech had not been made. By Order dated 21 June 2009, Dr. Healy's claim was dismissed with an order for costs against Dr. Healy. There was an order that the Bank recover €1,693,014.87 on foot of its counterclaim with no order as to costs of the counterclaim. Dr. Healy's application for a stay was refused.

44. The decision of McGovern J. was overturned by the Supreme Court in a judgment delivered on 21 December 2015. The Supreme Court remitted the matter to the High Court for rehearing. By Order dated 19 July 2016, the Supreme Court granted Dr. Healy the costs of the appeal and refused to stay that order. The Supreme Court reserved the costs of the proceedings in the High Court pending the final determination of the proceedings.

45. Following the retrial, Barrett J. delivered judgment on 16 January 2018. While he held in favour of Dr. Healy on the representations issue, he determined that for the reasons set out in his judgment Dr. Healy could not rely on and had not established promissory estoppel in relation to the Coole liability. Moreover, he found that Dr. Healy had not made out a case in contract for the discharge of that liability. He went on to find that Promontoria had established that it had acquired the Coole loans and securities.

46. Consequent on his findings, by Order of 9 March 2018, Barrett J. dismissed Dr. Healy's proceedings against the Bank and Promontoria and granted judgment to Promontoria in respect of its counterclaim for €1,634,132.16, with Dr. Healy to pay the Bank's and Promontoria's costs in the action to include the claim and counterclaim. He duly stayed the costs order.

47. At para. 82 of the principal judgment, this Court identified three issues for determination in the appeal, namely:

(i) Whether the trial judge erred in finding that there was no concluded contract between Dr. Healy and the Bank that Dr. Healy had no liability in respect of the Coole indebtedness;

(ii) Whether the trial judge erred in failing to find that the Bank was permanently estopped in equity from enforcing its rights against Dr. Healy;

(iii) Whether the trial judge fairly and properly concluded that Promontoria had acquired the loans in issue in these proceedings.

48. As can be seen from the principal judgment, Dr. Healy was unsuccessful in relation to issues (i) and (iii) but succeeded in relation to issue (ii).

49. It is in the context of the foregoing procedural and substantive history that the issue of costs now falls to be determined. In their respective submissions, the parties addressed the issue of costs by reference to the Legal Services Regulation Act 2015 ("the 2015 Act"). This being the case, and because I do not discern any obvious material difference between the old and new costs regimes relevant to the issues that present themselves here, I will proceed with reference to the 2015 Act. Before addressing the parties' submissions, it is apposite to refer to s. 169 of the 2015 Act which provides:

> "169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
>
> (a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or

(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

(5) Nothing in this Part shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011."

Dr. Healy's submissions

50. Dr. Healy maintains that as the "entirely successful" party in the proceedings he is entitled to his costs. Accordingly, he seeks the costs of the appeal and the costs of the action, both claim and counterclaim to include reserved costs including, for the avoidance of doubt, the reserved costs of the first trial in the commercial court and stenographer costs, all to be adjudicated in default of agreement.

51. It is submitted that Dr. Healy was successful before Barrett J. on the issue of whether the representations were in fact made, a matter which took up eight days in the High Court. The findings of Barrett J. on that issue were not appealed by the Bank. Moreover, before this Court Dr. Healy fully succeeded on the promissory estoppel effect of the representations. While he was unsuccessful on the transfer point, it is submitted that that failed to benefit Promontoria in any way in the proceedings.

52. The gravamen of Dr. Healy's submission is that neither the Bank nor Promontoria are in a position to convince the Court that the justice of the case demands that the general

rule be departed from. He asserts that none of the factors set out at (a) – (g) of s. 169(1) of the 2015 Act can avail the Bank or Promontoria.

53. He asserts that there are no countervailing circumstances which benefit the Bank or Promontoria such that it could seriously be argued that he is not entitled to his costs and that the Bank and Promontoria have failed to adduce any compelling arguments to meet the burden placed on them that the general rule in relation to costs should be departed from.

54. He further submits that even if the Court does not accept the proposition that he was entirely successful in his claim, the Court can have regard to the provisions of s.168(2)(d) of the 2015 Act which state:

> "(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—
>
> …
>
> (d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, …"

55. Dr. Healy also points out that it is of relevance that the Bank and Promontoria sought and were granted the costs of the action, including the claim and counterclaim, by the trial judge, which Dr. Healy has now successfully appealed.

The submissions of the Bank and Promontoria

56. The Bank and Promontoria agree that Dr. Healy has succeeded in the central issue in the proceedings, i.e. that the Bank made the representations contended for and that those representations had the effect of absolving Dr. Healy of all the disputed Coole liabilities to the Bank and its successor in title Promontoria. Nevertheless, they submit that on any analysis, whether approached from the perspective of the Court's discretion, or in light of the provisions of s.169(1)(a), (b), (c) and (d) of the 2015 Act, Dr. Healy should not be awarded 100 percent of his costs.

57. The Bank and Promontoria further assert that the following factors are relevant to the issue of costs:

- Dr. Healy was unsuccessful in all of the arguments made by him in relation to the assignment of the loans from the Bank to Promontoria. That was a completely stand-alone issue which significantly extended the hearing in the High Court and before this Court.
- Dr Healy made a number of other claims that were unsuccessful. He claimed that the Bank acted as his advisor/broker in placing the monies on deposit, that there was a wealth management contract between him and the Bank and that there was a contract on foot of which he was released from the debt. He was unsuccessful in relation to all of those claims.
- The basis on which Dr. Healy ultimately succeeded was not pleaded by him and was no more than mentioned in the court below and was not the subject of any factual analysis of findings by the trial judge. Had Dr. Healy applied to amend his pleadings to include a claim that the detriment relied upon him was that he would have taken action against Dr. Cullen, there would have been a consequential costs order in favour of the Bank and Promontoria.
- Regard should have regard to Dr. Healy's admitted conduct prior to the commencement of the proceedings.

Discussion

58. In relation to the question of whether Dr. Healy can be said to have been "entirely successful" in the action and the appeal, the following factors are relevant. Firstly, Dr. Healy was successful before Barrett J. on the representations issue having successfully appealed McGovern J.'s rejection of his case in the first trial. Secondly, Barrett J.'s findings in this regard were not appealed by the Bank or Promontoria. Moreover, the other

principal issue before Barrett J. (the estoppel issue) has been determined by this Court in favour of Dr. Healy.

59. While the trial judge found Dr. Healy's claim that he entered into a commercial contract with the Bank on 1 August 2007 and that a letter of 15 October 2007 set out the terms of the contract to be without foundation, I do not believe there is any basis for the Bank and Promontoria to contend that Dr. Healy's contract claim took up any substantial time or argument at the trial of the action in the court below. Indeed, in the principal judgment this Court has found that Dr. Healy's focus at trial was on the issue of promissory estoppel and not on a contract having been concluded between him and the Bank on 1 August 2007 (see para. 98). Moreover, in opening the case at trial, counsel for Dr. Healy advised the trial judge that he was not going to dwell on the pleading in the Amended Statement of Claim in respect of the provision by the Bank of a Wealth Management service to Dr. Healy as grounding a claim in contract, a move that was probably very wise since in any event the trial judge found that the extent of the services provided by the Bank to Dr. Healy on 15 October 2007 was that he take out a pension. It is the case that at the hearing of the appeal, counsel for Dr. Healy pursued the issue of Dr. Healy's discharge from the Coole liabilities as arising in contract, in respect of which Dr. Healy was unsuccessful.

60. A further question that arises is whether the fact that Dr. Healy was unsuccessful (both in the court below and on appeal) on the issue of the assignment/transfer by the Bank of the Coole indebtedness and security to Promontoria should lead to a conclusion that he cannot be said to have been "entirely successful" in the proceedings. While Promontoria successfully defended the transfer in the court below and in this Court, my overarching view is that that success cannot be said to have assisted Promontoria to any significant extent since consequent on this Court's ruling on the estoppel issue, its counterclaim failed.

61. Thus, while Dr. Healy did not succeed on two of the three issues identified by the Court at para. 82 as arising for consideration, (namely the contract issue and the transfer issue), the findings of this Court in Dr. Healy's favour in relation to issue (ii) are such that that the findings against him on the other two issues either in the court below or this Court are of no real benefit to either the Bank or Promontoria. I agree with Dr. Healy's submission that in the overall context of this case, the Bank and Promontoria cannot claim "success" in the real sense that "success" means in litigation. The core issues in the case were whether the representations were made and if so, whether they had the effect contended for by Dr. Healy. The Bank and Promontoria failed on both fronts. While, to borrow the words of Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 227, Dr. Healy did not leave with everything he sought to achieve in the action, as I have said, the relative success achieved by the Bank and Promontoria in the proceedings cannot at the end of the day garner any benefit in respect of the Coole indebtedness, the issue which was at the heart of Promontoria's counterclaim.

62. Turning now to the question of whether Dr. Healy can be said to have been "entirely successful" for the purposes of costs and whether any of the matters set out at (a) – (g) of s. 169(1) of the 2015 Act ought to deprive him of his costs (or portion thereof) of the action including the counterclaim, or of his costs in the appeal. The Bank and Promontoria invoke s. 169(1)(a), (b), (c) and (d) in aid of their argument that Dr. Healy should not be awarded his full costs.

63. With regard to s.169(1)(a), the Bank and Promontoria assert that regard should be had to Dr. Healy's admitted conduct prior to the commencement of the proceedings in covertly recording conversations in which he sought to extract favourable admissions from employees of the Bank. They submit that it is a relevant fact that one of those covert

recordings took place on the occasion of Mr. Leech visiting Dr. Healy's medical practice with his ill son.

64. Dr. Healy asserts that the Bank and Promontoria mischaracterise the circumstances of the recordings he made of the Bank's employees. While Dr. Healy admits that he recorded a conversation with Mr. Leech and a conversation with another witness called by the Bank, Mr. Peter Lynch, he says, however, that it is not correct that Mr. Leech was recorded on an occasion when he visited with his ill son. As was confirmed by counsel for the Bank and Promontoria during the hearing in the court below, the recordings of the meetings with Mr. Leech and Mr. Lynch were not made in the course of a medical consultation albeit that the recorded conversation with Mr. Lynch took place after Dr. Healy had had a medical consultation with Mr. Lynch's adult son.

65. Dr. Healy submits that the Bank called Mr. Lynch as a witness solely for the purposes of introducing the fact that a conversation was recorded. He points to the fact that in his evidence, Mr. Lynch admitted he had nothing of assistance to offer the trial court in relation to whether an assurance had been given by Mr. Leech to Dr. Healy in respect of the Coole liabilities. Mr. Lynch had stated, however, that he was deeply aggrieved by the fact that his conversation with Dr. Healy was recorded. It is contended that Mr. Lynch was called by the Bank as a witness solely with the objective of discrediting Dr. Healy. It is submitted that the trial judge did not take any issue with Dr. Healy's actions in recording the meetings he had with Mr. Leech and Mr. Lynch.

66. Dr. Healy's position is that it is the *Bank's* conduct that is impugned in this case and not any conduct on his part. This, he maintains, as evidenced by para. 162 of the principal judgment of the Court where it was found that *"[t]he unconscionability in this case rests with the Bank…"*.

67. Dr. Healy also points out that the Bank never in fact applied the seized funds to any Coole borrowings. Rather, it kept his funds in a deposit account for a number of years before applying same against the costs of the first High Court trial and against overdraft facilities of Dr. Healy's to which it had already applied penal interest rates in the intervening years. It is also submitted that the Bank sought to bankrupt Dr. Healy.

68. Dr. Healy also relies the fact that his appeal from the first High Court trial and judgment was allowed and a retrial ordered. He further points out that following the second trial, Barrett J. found the Bank's witness Mr. Leech to be "wanting in credibility" and "the evidence of Dr. Healy, and particularly Ms. Healy, [on the representations issue] greatly to be preferred".

69. Overall, I am not persuaded that there is any conduct on the part of Dr. Healy, either pre or post the commencement of the proceedings, to which the Court ought to have regard in determining costs.

70. With regard to s.169(1)(b) and (c) of the 2015 Act, Dr. Healy submits that if the question of costs is to be determined having regard to those subsections, then it must be in a manner adverse to the Bank and Promontoria. He submits that this must be so in circumstances where the documentary evidence established that the Bank was unreasonable in contesting the issue of the making of representations. He further asserts that if the Bank had truly believed that the representations could not have had the legal effect contended for, it could simply have admitted that they were made by Mr. Leech. He argues that, more fundamentally, the finding of the trial judge that the representation contended for by Dr. Healy had in fact been made to him by Mr. Leech was not appealed by the Bank or Promontoria notwithstanding that approximately eight days in the High Court were spent on that matter. Dr. Healy further points to the fact that, as noted by this Court in the principal judgment at para. 134:

> *"It was never pleaded by the Bank (nor advanced at the trial or on appeal) that Dr. Healy could not have relied on the assurances given by Mr. Leech on the basis that they were gratuitous or that they were incapable of having the legal effect contended for by Dr. Healy."*

71. While there is some force in Dr. Healy's submission that s.169(1)(b) and s. 169(1)(c) should not be invoked adverse to his interests, the Bank's and Promontoria's argument is that Dr. Healy unreasonably pursued the transfer issue. As I have already opined, the Bank's and Promontoria's success on this issue in the court below, and before this Court, cannot assist them to any great extent in the overall scheme of things. In my view, there is no suggestion that the trial of the action and the counterclaim was unreasonably prolonged or beset with Dr. Healy's pursuit of the transfer issue: the bulk of the trial was taken up with the representations issue in respect of which Dr. Healy prevailed before the trial judge whose finding was not appealed to this Court by the Bank or Promontoria, and the estoppel issue which (ultimately) was determined in Dr. Healy's favour by this Court. Indeed, insofar as there was criticism of how the transfer issue was pursued in the court below, the criticism of the trial judge was levelled at both the late application by Promontoria to admit additional evidence and the approach being taken by Promontoria as to how the additional documents evidencing the transfer should be presented, as is clear from the observations of the trial judge on Day 8 of the trial (pp. 144 (lines 18-29) and 145(line 1) of the transcript), and his remarks on Day 9 to the effect that the protraction of the trial by reason of his having to rule that certain documents be furnished to the court by Promontoria "may fall ultimately to be reflected in any order as to costs that issues from the Court" (p. 6, lines 27-29 and p. 7, lines 1-2 of the transcript). That being said, it is a fact that Dr. Healy pursued the transfer issue on appeal, a matter to which I shall shortly return.

72. The Bank and Promontoria seek to invoke s. 169(1)(d) of the 2015 Act in asserting that Dr. Healy exaggerated his claim. In this regard, they point to the findings made at paras. 26 – 28 of McGovern J.'s judgment following the first High Court trial, the costs of which Dr. Healy now seeks to recover. They argue that effect of McGovern J.'s findings is that it is an established fact that Dr. Healy exaggerated his claim, particularly in respect of evidence he gave in related to an intended purchase of a property in Florida USA for the sum of US$900,000 the benefit of which Dr. Healy alleged was lost to him due to the actions of the Bank. The Bank and Promontoria point to the fact that in assessing the evidence of witnesses called by Dr. Healy and the Bank in relation to the issue, McGovern J. preferred the evidence of the Bank's witness to the effect that the property in issue ultimately sold in 2008 for a sum US$750,000 and in the circumstances, Dr. Healy had suffered no loss by not proceeding with the deal.

73. The Bank and Promontoria also point to the concession made by Dr. Healy in the first trial (as acknowledged by him under cross-examination in the trial before Barrett J.) that he lied to Mr. Leech in the secretly recorded meeting when he told him he had paid a US$90,000 deposit for the Florida property and had lost that deposit. Furthermore, Dr. Healy conceded in the course of the trial that he knew the property had been sold in December 2008 for around US$750,000 and that had he bought if for US$900,000, he would have suffered a loss.

74. In his replying submissions, Dr. Healy points to the failure on the part of the Bank and Promontoria to make any reference to his Supplemental Witness Statement in which he withdrew the claims he had made in respect of the Florida property.

75. While Dr. Healy's claims regarding the Florida property featured in the trial before Barrett J., it appears that this was at the behest of the Bank and Promontoria, in circumstances where Dr. Healy had expressly resiled from this claim in his Supplemental

Witness Statement. That being the case, for the purposes of the trial before Barrett J., I do not believe that the Bank and Promontoria can fairly maintain that the provisions of s.169(1)(d) should operate against Dr. Healy's costs application.

76. At para. 9.3 of their submissions on costs, the Bank and Promontoria assert that the basis on which Dr. Healy ultimately succeeded was not pleaded by him and was no more than mentioned in the court below and was not the subject of any factual analysis of findings by the trial judge. They say that had Dr. Healy applied to amend his pleadings to include a claim that the detriment relied upon him was that he would have taken action against Dr. Cullen if he knew that he was still considered to have a liability in respect of the Coole property, there would have been a consequential costs order in favour of the Bank and Promontoria.

77. Notwithstanding the Bank's submissions in this regard, at para. 143 of the principal judgment, this Court found that Dr. Healy had in fact made the case in the court below that his reliance on Mr. Leech's representations had resulted in his loss of opportunity in early course in August 2007 to manage his relationship with Dr. Cullen by reverting to his solicitor with the aim of remediating the risk of his still being indebted to the Bank for the Coole property indebtedness.

78. To return now to Dr. Healy's pursuit of the transfer issue in this Court in respect of which he was unsuccessful. It seems to me that there is some merit in the respondents' contention that Dr. Healy unreasonably pursued this issue on appeal in the face of clear findings made by the trial judge, where this Court did not find any breach of the principles of fairness and where Dr. Healy's substantive argument on the issue did not find favour with this Court. Undoubtedly, time was taken up at the appeal with the pursuit of this issue. Thus, the expenditure of time on the issue in the appeal must, in my view, be reflected in the award to Dr. Healy of his costs in the appeal.

79. In summary therefore, by reason of the findings I have set out above, having taken due regard to the submissions of the parties, I find no reason why Dr. Healy should not be awarded the entirety of his costs of the action (to include the claim and the counterclaim and including the costs of the first trial which were reserved pending the determination of the proceedings). As for the costs of the appeal, it seems to me that the appropriate order is that Dr. Healy be awarded 90% of his costs, the 10% deduction to reflect what was an unreasonable pursuit of the transfer issue. All costs to be adjudicated in default of agreement.

Summary

80. In summary, there will be:

(1) A declaration in favour of Dr. Healy that he stands discharged from all liability in respect of the Coole indebtedness and that the Bank and Promontoria and their successors in title are permanently estopped from pursuing Dr. Healy in respect of all sums claimed by them being the sums claimed on foot of loan account 02385385, loan account 02385112 and overdraft account 02385039, and loan account 02162164 and overdraft account 02162081 (as claimed in Promontoria's counterclaim);

(2) An Order against the Bank for payment by the Bank to Dr. Healy of the sum of US$800,073.08 together with Courts Act interest (at the applicable rates) on that sum from 14 June 2014 to the date of the perfection of the Order of this Court;

(3) An Order that Dr. Healy recover from the Bank and Promontoria the entirety of his costs of the action (to include the claim and the counterclaim and including the costs of the first trial which were reserved pending the determination of the proceedings) and to include all reserved costs; and

(4) An Order that Dr. Healy recover from the Bank and Promontoria 90% of his costs relating to the appeal;

(5) All costs to be adjudicated in default of agreement.