APPROVED **[2023] IEHC 140**

THE HIGH COURT

2013 No. 353 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

SIMON KAVANAGH
DEIRDRE KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 March 2023

INTRODUCTION

1. This supplemental judgment addresses the allocation of the costs of an application to set aside a final, unappealed judgment and order of the High Court ("***the set aside application***"). The set aside application was refused for the reasons stated in a reserved judgment delivered on 30 January 2023, *Start Mortgages DAC v. Kavanagh* [2023] IEHC 37 ("***the principal judgment***").

2. The provisional view expressed in the principal judgment in respect of costs had been that the plaintiff, having been entirely successful in resisting the application to set aside the judgment and order, would be entitled to the costs of the motion

as against the moving party, i.e. the first named defendant. The parties were given liberty to file written submissions on the question of costs.

3. The moving party filed written submissions dated 11 February 2023 and these were replied to by the plaintiff on 1 March 2023. I have carefully considered the content of both sets of submissions in preparing this ruling on costs.

DISCUSSION AND DECISION

4. A distinction is drawn, for costs purposes, between interlocutory applications and the final determination of the proceedings. The costs of interlocutory applications are regulated, primarily, by the recast Order 99 of the Rules of the Superior Courts. Order 99, rule 2 provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. The implication being that, in certain circumstances, it will be necessary to defer making a decision on the allocation of the costs of an interlocutory application until such time as the ultimate outcome of the proceedings is known. (See, generally, *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 at paragraphs 8 and 9 of the reported judgment).

5. Order 99, rule 3 provides that the High Court, in considering the awarding of the costs of any action or step in any proceedings, shall have regard to the matters set out in Section 169(1) of the Legal Services Regulation Act 2015, where applicable.

6. Where proceedings have been determined, the costs are regulated, primarily, by Section 169 of the Legal Services Regulation Act 2015. The default position is

that the party who is "*entirely successful*" in civil proceedings is entitled to an award of costs against the unsuccessful party. The court enjoys a broad discretion and may depart from the default position. If the court does depart from the default position, it is under a statutory obligation to give reasons for that order.

7. This judgment is concerned with the costs of an application to set aside a final, unappealed judgment and order of the High Court. Although the application was brought by way of a notice of motion, it is not properly characterised as an interlocutory application. This is because these proceedings have long since been determined. The judgment and order were entered on 18 July 2016 and have never been appealed. The substantive merits of the proceedings have thus been finally determined. There is no question, therefore, of deferring the allocation of the costs of the set aside application pending some other event in the proceedings.

8. The default position is that the plaintiff, having been entirely successful in resisting the application to set aside the judgment and order of 18 July 2016, would be entitled to recover its costs. The factors to be taken into account by the court in exercising its discretion to depart from the default position are set out as follows at Section 169 of the Legal Services Regulation Act 2015. The court is to have 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.

9. The written submissions filed on behalf of the moving party do not seek to engage meaningfully with any of these discretionary factors. Instead, the moving party seeks to re-agitate the merits of the set aside application. The moving party rehearses, in some detail, the procedural history leading up to the judgment and order of 18 July 2016. The moving party repeats his allegation that the judgment and order of 18 July 2016 had been obtained without his having been prepared for the hearing. It is alleged, *inter alia*, that there had been a denial of due process, fair procedure, and fundamental constitutional rights.

10. With respect, it is not a proper answer to an application for costs for the losing party to say, in effect, that the underlying decision of the court is incorrect and that the losing party should have been successful: those are matters for an appeal. Rather, the allocation of costs is made on the assumption that the underlying decision is correct. The court will direct its attention to whether the particular nature and circumstances of the case are such that the default position on costs should not apply. Here, there is nothing which would justify denying the successful party its costs. This is not a case where, for example, the losing party

had acted reasonably in pursuing their application nor where the application raised a point of public importance. In truth, the set aside application was misconceived for the reasons explained in the principal judgment. The application which the moving party sought to make was entirely without merit. Whereas the High Court does have an exceptional jurisdiction to set aside a judgment and order, the circumstances of the present case come nowhere close to the threshold which must be met on such an application as described by the Supreme Court in *In the matter of Greendale Developments Ltd (No. 3)* [2000] 2 I.R. 514 and subsequent case law.

11. It is also a cause of concern that the moving party, in his affidavit grounding the set aside motion, conveys a misleading impression of the events at the hearing on 18 July 2016. The moving party did not, for example, disclose that the trial judge had relied on the precedent of *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260. The moving party also incorrectly asserted that his affidavits were not opened to the court at the hearing. A party who seeks to invoke the exceptional jurisdiction to set aside an earlier judgment and order has a duty of candour to the court.

CONCLUSION AND FORM OF ORDER

12. The plaintiff is entitled to recover its costs of the set aside application as against the moving party, i.e. the first named defendant. The plaintiff has been entirely successful in resisting the set aside application and there are no discretionary factors in favour of a different form of costs order. If anything, the conduct of the moving party in pursuing an unmeritorious application on the basis of a

misleading description of the hearing on 18 July 2016 confirms that he should be liable for costs.

13. Accordingly, the following orders will be made. First, the reliefs sought in the notice of motion of 10 November 2022 are refused for the reasons stated in the principal judgment. Secondly, the plaintiff is entitled to recover its costs of, and incidental to, the motion as against the first named defendant. The costs are to include the costs of the written legal submissions of 1 March 2023 in respect of the allocation of costs and are also to include any reserved costs. All such costs to be adjudicated, in default of agreement, under Part 10 of the Legal Services Regulation Act 2015.

Appearances

Rudi Neuman Shanahan for the plaintiff instructed by Lavelle Partners LLP
The first named defendant appeared in person