



# THE SUPREME COURT

S:AP:IE:2020:00038

2019 No. 60 CA

Clarke C.J.  
O'Donnell J.  
MacMenamin J.  
Dunne J.  
Baker J.

**BETWEEN/**

**BANK OF IRELAND MORTGAGE BANK**

**Plaintiff/Appellant**

**- AND -**

**PETER CODY**

**Defendant**

**- AND -**

**HEATHER CODY**

**Defendant/Respondent**

**COSTS RULING delivered on 28th day of July, 2021**

1. This is the Court's ruling on the costs of the appeal of Bank of Ireland Mortgage Bank ("the Bank") against the order of Simons J.: see [2021] IESC 26.

2. The Bank's appeal concerned the jurisdiction to grant summary judgment in possession cases. Judgment was delivered by this Court on 14 April 2021 as a result of which the order of Simons J. in the Circuit Appeal was vacated, the appeal was allowed and the proceedings were remitted to the High Court for plenary hearing under Part IV of the Courts of Justice Act 1936, with consequential orders as to pleadings

### **The costs**

3. Before the hearing of the appeal the Bank committed to discharging Ms. Cody's costs of the appeal to this Court on a party and party basis, so that what is now in issue are the costs of the Circuit Appeal and the costs of the Circuit Court.

4. Ms. Cody was self-represented and the High Court made orders in favour of Ms. Cody for her costs and expenses in the Circuit Appeal and the Circuit Court, and vacated the costs order against her made in the Circuit Court.

5. As to the costs of the Circuit Appeal, Ms. Cody argues that these costs should be awarded to her as the result of that appeal was that the Circuit Court order for summary possession was set aside and that aspect of the order of Simons J. was not upset by the order of this Court.

6. The Bank contends that Ms. Cody was not successful in her appeal to the High Court, and the effect of the order of this Court is that the High Court must now hear the case on oral evidence and not summarily.

7. As to the costs of the Circuit Court, Ms. Cody argues that these should be costs in the cause.

8. The Bank submits that the High Court order should be vacated in its entirety (including the order as to costs) and that the costs of the Circuit Appeal up to and including the date of the order of Simons J. on 28 February 2020 should be reserved to the plenary action.

### **Case law**

9. How a court should deal with the costs of a “hard fought summary judgment application” where the proceedings are remitted to plenary hearing was considered in the judgment of Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] IESC 40, [2014] 1 IR 1. That defendant had argued that he had succeeded in the appeal as the court found that the proceedings were not suitable for summary disposal, and the High Court judge had awarded the costs of the motion against the plaintiff bank, which Clarke J. considered to be an error in principle. Clarke J. said that in the majority of cases, where the result of a summary judgment motion is that the proceedings are remitted to plenary hearing, the costs should either be reserved or become the costs in the cause. See also the recent decision of Murray J. in the Court of Appeal in *Allied Irish Bank Plc v. Griffin* [2020] IECA 339.

10. Clarke J. thought that somewhat different considerations applied to the identification of an “event” in a motion for summary judgment, as some of the issues are likely to arise again at the trial, at least in some form. In such a case it may not be possible to justly determine the costs at motion stage, as some of the issues which led to the matter being found not suitable for summary disposal would come to be weighed and tested at the plenary hearing.

11. Because O. 99, r. 1(4A) of the Rules of the Superior Courts require the court to deal separately on the costs of an interlocutory application, unless it was “not possible to adjudicate in a just fashion the liability for costs at that stage.” Clarke J. took the view that an order providing that costs be the costs in the cause would be the more likely result, unless it was considered that the detail in which the trial judge determines the ultimate issue could have a bearing on the justice of where costs would lie.

12. However, he recognised an exception to that general principle, that in certain cases where a motion for summary judgment is remitted to plenary hearing the court may decide that

the correct order is to award costs of the motion when it is satisfied that “a plaintiff has acted in a particularly unreasonable manner in not agreeing to the matter going to plenary hearing”.

13. The provisions of Part 11 of the Legal Services Regulation Act 2015 (“the Act of 2015”) do not materially impact on the decision of the Court on the costs, save as is hereafter mentioned.

### **Discussion and conclusion**

14. In the light of s. 169(1)(b) of the Act of 2015 regard may be had to the reasonableness of the parties in raising, pursuing or contesting one or more issues in the appeal. It cannot be said that the Bank acted unreasonably in appealing the order of Simons J., and indeed it was successful to a large extent in reversing the ultimate conclusion to which Simons J. came, albeit the question of whether possession should be granted, which is the ultimate cause of action, remains to be determined. Ms. Cody had been entirely successful in the Circuit Appeal and had to meet the issues raised in the appeal.

15. The net effect of the order of this Court is to remit the entire possession action to plenary hearing by way of Circuit Appeal. The action therefore remains live.

16. On that basis the approach of Clarke J. in *ACC Bank Plc v. Hanrahan* commends itself. *Prima facie*, then, the costs of the High Court appeal should be the costs in the cause. An approach that looked to the “event” might, at first glance, mean that the Bank got its costs of the Circuit Appeal as its proceedings were not dismissed, but that would not correctly reflect the true “event” which was that summary disposal was not appropriate. Equally Ms. Cody was not successful in the appeal as she did not retain the full benefit of the Circuit Appeal order, albeit the Circuit Court order was shown to be wrong.

17. However, in recognition of the fact that the Bank could have, but did not, concede that the matter was suitable for summary disposal and that this resulted in hearings before Simons J. and on appeal to this Court, neither of which has brought the issues to final determination,

nor limited the range of issues to be tried, a just result is achieved by making only Ms. Cody's costs of the Circuit Appeal cost in the cause.

**18.** The costs of the Circuit Court itself should be costs in the cause.

**19.** The ultimate determination of the plenary hearing of the Circuit Appeal will not be concerned with the orders made by either in the summary motion, or with the affidavit evidence adduced by each side, and the reservation of the costs to be determined by the judge who hears the plenary action is therefore not appropriate