



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 192

Record Number: 2019/160

**Whelan J.
Noonan J.
Power J.**

BETWEEN/

DANSKE BANK A/S TRADING AS DANSKE BANK

RESPONDENT

- AND -

PAUL O'SHEA

APPELLANT

JUDGMENT of Ms. Justice Power delivered on the 15th day of July 2020

Background

1. The appellant ('Mr. O'Shea') brought an appeal in the above matter which was heard by this Court on 24 February 2020.
2. Having considered the parties' written and oral submissions, judgment was delivered on 11 May 2020 ([2020] IECA 134).
3. In its judgment, the Court dismissed Mr. O'Shea's appeal and affirmed the decision of the High Court which was made on 21 February 2019 wherein Pilkington J. had dismissed Mr. O'Shea's application to show cause pursuant to s. 16 of the Bankruptcy Act 1988, as amended, (hereinafter 'the Act').
4. In view of the COVID-19 pandemic and in accordance with the recent direction of the Chief Justice and the President of the Court of Appeal, the judgment was sent to the parties, electronically, by way of email on the date it was delivered, that is, on 11 May 2020.

Costs

5. Having regard to the Notice posted on the Courts Service website, the parties were invited to communicate, electronically, with the Court in respect of issues, if any, arising from the Court's judgment, including, the matter of costs. If such issues arose and

agreement thereon was not reached, the parties were permitted to file, electronically, concise written submissions with the Office of the Court of Appeal within 14 days of the delivery of the judgment, subject to any other direction given in the judgment.

6. By email from the Office of the Court dated 28 May 2020, the parties were reminded that, in the absence of agreement between them as to the form of the final order, including the order on costs, any written submissions were to be furnished by return email, no later than close of business on 10 June 2020.
7. By email dated 2 June 2020 the solicitors for the respondent ('the bank') wrote to Mr. O'Shea seeking his agreement on the precise form of the substantive order and on the issue of costs. They proposed:
 1. an order dismissing the appeal and affirming the order of the High Court made on 21 February 2019; and
 2. an order for costs in favour of the bank.
8. By further email dated 8 June 2020 the bank's solicitors wrote to Mr. O'Shea referring to the email sent on 2 June 2020 requesting that Mr. O'Shea indicate whether he is in agreement with the form of order, as proposed.
9. On 9 June 2020, Mr. O'Shea replied by email to the bank's solicitors (copied to the Court of Appeal Office) stating that he did not agree with the form of order proposed, nor did he agree to the award of costs. He indicated that he would be appealing the decision to the Supreme Court and that costs should not be determined until the matter is resolved in the Supreme Court.

Decision

10. I am satisfied that it is both possible and appropriate to adjudicate on the question of costs in respect of the dismissal of Mr. O'Shea's appeal. It is a well-established principle of law that, as a general rule, costs follow the event, unless, for special or unusual circumstances, the court considers it appropriate to direct otherwise. This principle was set out in the former Order 99, r. 1 of the Rules of the Superior Courts (S.I. No. 15 of 1986.) The provisions therein were considered by Clarke J. (as he then was) in *Veolia Water UK plc v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81. He described the approach to costs following the event in the following terms:

"Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."

11. The general principle has been recast, slightly, by the introduction of Section 169 of the Legal Services Regulation Act 2015. Section 169(1) confirms that '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'. However, the court may 'order otherwise', that is, depart from the general rule, '*having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties'*'. That provision came into force on 7 October 2019.

12. That provision is reflected within the revised Order 99 of the Rules of the Superior Courts which took effect from 3 December 2019 (S.I. No. 584 of 2019).
13. Order 99, r. 2 provides as follows:
 - "2. *Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*
 - (1) *The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*
14. Having regard to the findings made in the judgment of 11 May 2020, I am satisfied that there is nothing to justify the exercise of the Court's discretion such as would constitute a departure from the general rule that costs should follow the event. This Court agreed with the findings of the High Court judge and rejected all grounds of Mr. O'Shea's appeal. The bank was, therefore, 'entirely successful' in its defence of the appeal proceedings. In these circumstances it is, *prima facie*, entitled to recover the costs incurred in this regard.
15. The Court will, therefore, make an order dismissing the appeal and affirming the order of the High Court made on 21 February 2019.
16. The Court will further make an order for costs in favour of the bank, such costs to be adjudicated in default of agreement.
17. Insofar as Mr. O'Shea has submitted in his email of 9 June 2020 that he will be '*appealing this matter to the Supreme Court*' and that '*costs should not be determined until the matter is resolved in the Supreme Court*', the Court is prepared to consider that this constitutes, albeit indirectly, an application that any order for costs made against Mr. O'Shea would be stayed pending the outcome of his appeal.
18. The Court will, therefore, direct a stay on the execution of its order for costs pending the lodgment of an application seeking leave to appeal to the Supreme Court within the time permitted under the Rules (21 days from the date of perfection of the order). In the event of the lodgment of such an application, the stay will continue pending the determination by the Supreme Court of that application seeking leave to appeal. If Mr. O'Shea's application seeking leave to appeal is granted, then the stay will continue pending the final determination of his appeal by the Supreme Court or pending the making, in the meantime, of any further order by the Supreme Court.

Whelan and Noonan JJ. have confirmed that they are in agreement with this judgment.