

*Unapproved*

*No further redaction needed*



**THE COURT OF APPEAL**

**CIVIL**

**Neutral Citation Number [2021] IECA 51**

**Court of Appeal Record Nos 2018/324**

**Collins J**

**Binchy J**

**Pilkington J**

**IN THE MATTER OF THE M/V “LADY MAGDA”**

**BETWEEN**

**ATLAS BALTIC OÜ**

*Plaintiff/Appellant*

**AND**

**THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN**

**THE M/V “LADY MAGDA”**

*Defendants/Respondents*

**JUDGMENT of Mr Justice Maurice Collins delivered on 18 February 2021**

1. This judgment is concerned with the costs of this appeal. It should be read with my earlier judgment of 7 January 2021 (with which Binchy and Pilkington JJ agreed): [2021] IECA 7. That judgment sets out in detail why the Agents' appeal was unsuccessful.
2. At the conclusion of that judgment, I expressed the view that it appeared to follow from the failure of the Agents' appeal that the Owners were entitled to the costs of the appeal. However, the Agents were afforded an opportunity to seek a brief supplemental hearing in the event that they wished to contend for a different order. The Agents did not seek such a hearing and instead furnished a written submission to the Court on the issue of costs. That was not in accordance with the Court's directions. However, as the Owners have now had an opportunity to respond, the Court has decided to proceed to a determination on the basis of the written submissions, without any further hearing.
3. The Owners have been "*entirely successful*" in the appeal and, accordingly, are *prima facie* entitled to their costs: section 169(1) of the Legal Services Regulation Act 2015 ("*the 2015 Act*"). That is the default or presumptive position.
4. However, it is said on behalf of the Agents that in all the circumstances it was reasonable for them to bring an appeal to this Court and they rely on section 169(1)(b) of the 2015 as providing a basis on which the Court should "*order otherwise*".
5. Section 169(1)(b) directs the Court to consider "*whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.*" Thus, if the Owners

had unreasonably pursued or contested any issue in the appeal, section 169(1)(b) might warrant some departure from the default position arising under section 169(1). However, there is no suggestion of that here. The argument is not that the conduct of the *Owners*, including their conduct in the appeal, was in any way unreasonable. Rather, what is said is that the *Agents* acted reasonably in pursuing their appeal and that this justifies a departure from the default rule identified above.

6. I do not agree. Whatever the precise scope and effect of section 169(1)(b), it does not in my view permit the Court to set aside the fundamental principles governing the award of costs – as to which, in addition to the provisions of the 2015 Act, see *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535 at paras 19 and 20 – and to substitute for those rules an amorphous test of reasonableness such as is contended for here. No doubt the great majority of appellants to this Court – if not, indeed, all of them – consider their appeals to be reasonably brought and reasonably based. The Court’s function, however, is to determine whether such appeals are well-founded. The *Agents’* appeal here was not well-founded. No issue was decided in their favour. Considerations of the *bona fides* of the appeal and/or the reasonableness of the *Agents’* belief as to the merit of the appeal are, in these circumstances, *nihil ad rem*. The *Owners* are not to be deprived of their costs even if (as I have no reason to doubt) the *Agents’* appeal here was brought in good faith and with a fervent (if misplaced) conviction that it should succeed.
7. The *Agents’* argument faces a further difficulty on the facts here. In March 2020, this Court gave judgment in *The Almirante Storni* [2020] IECA 58. As is evident from my earlier judgment, the *Agents’* appeal raised essentially the same issues as were raised

and determined in *The Almirante Storni*. In June 2020, the Supreme Court refused leave to appeal from this Court's decision. The Agents nonetheless persisted with their appeal here. That significantly undermines the Agents' assertion that it was "reasonable" for them to proceed with their appeal, certainly after March 2020. That is further reinforced by the fact that on 16 September 2020 the Owners' solicitors sent a *Calderbank* letter referring to the outcome of *The Almirante Storni* and suggesting that the appeal should be withdrawn. The appeal was not withdrawn and in the circumstances there is no basis for relieving the Agents of the consequences that ordinarily follow from their decision to proceed with it.

8. It is also said – though faintly – that the Court should exercise the discretion recognised in cases such as *Roche v Roche* [2010] IESC 10 to depart from the normal costs rules in cases of general importance. This is not such a case. Interesting as the issues in this appeal may have been, they arose in a contractual claim for debt brought by the Agents and entirely lacked the "singular public importance" of the issues in *Roche v Roche*. As for the suggestion that the Court might exercise the discretion said to be frequently exercised in landlord and tenant and probate cases to make no order for costs, it should hardly be necessary to observe that this is not such a case and, accordingly, whatever the practice may be in such cases, it does not avail the Agents here.
9. There is, in short, no basis for depriving the Owners of their *prima facie* entitlement to the costs of the appeal. Those costs should include any additional costs incurred by the Owners in addressing the costs issue. The costs order made in the High Court must also

be affirmed. Insofar as it may be necessary to do so, I direct that such costs should be adjudicated in default of agreement.

10. The Agents next seek a stay on any orders for costs as well as a consequential stay on any order directing payment out to the Owners of the monies lodged with this Court as security for the Owners' costs of the appeal. A number of grounds are advanced by the Agents for seeking a stay to which it is not necessary to refer. Any stay is opposed by the Owners.
11. The Agents are entitled to seek leave to appeal to the Supreme Court. At the same time, the making of such an application does not, in itself, operate to stay the judgment and order of this Court from which it is sought to appeal. The interests of the Owners must also be considered.
12. Balancing as best as I can the different interests here, I have come to the view that it is appropriate to grant a limited stay in the following terms:
  - There will be a stay on entry and/or execution on foot of the orders for costs made by the High Court and by this Court (i) for a period of 21 days from the perfection of this Court's order; (ii) if within that period an application for leave to appeal is made to the Supreme Court, that stay will continue until the Supreme Court's determination of that application for leave and (iii) in the event that leave to appeal is granted, the stay will continue until the determination of the appeal, subject to any contrary order that may be made by the Supreme Court.

A stay in these terms will not prevent the Owners from drawing up a bill(s) of costs and (should they see fit) proceeding to adjudication of such costs but no further steps can then be taken while the stay remains in place.

- The Court will make an order for the payment out to the Owners of the monies lodged by way of security but that order will be stayed on the same basis.

*In circumstances where this judgment is being delivered electronically, Binchy and Pilkington JJ have authorised me to record their agreement with it.*