APPROVED **[2023] IEHC 385**

THE HIGH COURT
CIRCUIT APPEAL

2022 No. 112 CA

BETWEEN

JOHN BERRILL
DENIS McCARTHY
JEREMIAH McCARTHY

PLAINTIFFS

AND

KENMARE PROPERTY FINANCE DAC

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 15 May 2023

1. This court delivered a written judgment in this matter on 13 April 2023: *Berrill v. Kenmare Property Finance DAC* [2023] IEHC 174. In brief outline, this court refused an application, brought by way of motion, to have the proceedings dismissed on the basis that they were bound to fail and/or represent an abuse of process. That judgment contained, as is now standard practice, a provisional or indicative view in relation to costs and the parties were invited, if

they wished to contend for a different form of costs order, to file written submissions.

2. The court received a written submission on behalf of the plaintiffs on 9 May 2023. There was a written submission filed on behalf of the defendant that, for various reasons, did not make it to the attention of the court, however, the court was given a copy this morning and has had an opportunity to read same. Both sides were agreed that the application for costs could be dealt with today on the basis of the written submissions and the oral submissions made by the parties.

3. The position in relation to the costs of an interlocutory application is dealt with under Order 99, rule 2(3) of the Rules of the Superior Courts (as recast). In brief outline, that rule indicates 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 the liability for costs on the basis of the interlocutory application. In other words, the default position is that the High Court, having dealt with an interlocutory application, should attempt to allocate those costs rather than leave them over by way of reserving them to the trial judge or, alternatively, by making them costs in the cause. The logic of that approach is explained by the judgment of the Supreme Court in *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 (at paragraph 8). As I will come to in a moment, that judgment dealt with the previous version of Order 99. Clarke J. (as he then was) stated that the purpose of the new rule was to allow the costs to be dealt with by the judge hearing the interlocutory application.

> "The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of

> where the costs of that motion should lie. This will especially be so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by motion."

4. Clarke J. then gives the example of the costs of an application for discovery.

5. As I have said, the form of rule that I am dealing with is slightly modified in that, following the enactment of the Legal Services Regulation Act 2015 and the commencement of its provisions on 7 October 2019, Order 99 was recast. There is a similar provision in relation to interlocutory costs but, relevantly, the rule also provides that the court is to have regard to the provisions of Section 169 of the Legal Services Regulation Act 2015 in dealing with costs.

> "The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."

6. One of the factors expressly identified under Section 169 is the conduct before and during proceedings of a party; another is whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

7. Applying that to the facts of the present case, I have decided that the plaintiffs are entitled to their costs. The motion that I have dealt with was a motion to dismiss the proceedings. It should be emphasised that a motion of that type is exceptional: it is not an ordinary motion to bring and can only be brought in circumstances where a case clearly will fail. The jurisprudence in relation to those applications makes it clear that the default position is that parties are entitled to a full hearing on oral evidence, following a process of discovery and the exchange of pleadings. Of course, in some cases where proceedings are an

abuse of process there is this exceptional remedy of striking out or dismissing the proceedings, but it is very much the exception.

8. It is also relevant, and this is set out in some detail in my judgment refusing the application to dismiss, that I was ultimately unsatisfied as to the extent of the documentation which had been laid before the court. As explained in my principal judgment, the reason that I refused the application was, *inter alia*, that I could not be satisfied on the evidence as to the precise status of a particular email in relation to the overpayment of funds. It seems to me that, in all of the circumstances, it was unreasonable to bring the application.

9. It should be emphasised that no criticism is intended of the legal team acting on behalf of the defendant: rather, as explained by Collins J., writing for the Court of Appeal in *The Lady Magda* [2021] IECA 51 (at paragraphs 5 and 6), reasonableness has a particular meaning in the context of a costs application.

10. It seems to me that this was a case that, if not compromised amicably, would require a full plenary hearing. I have nothing to say one way or the other as to what the ultimate outcome of the case may be but it is a case which clearly requires discovery and requires oral evidence and cross-examination. Against that background, the application to dismiss should not have been brought and, in circumstances where the application was unsuccessful, the party bringing that application must bear the costs. I am satisfied that that is consistent with the approach in *ACC Bank plc v. Hanrahan*. *Hanrahan* was specifically concerned with a summary summons and Clarke J. makes the point that there will be some revisiting of the merits, but the position is subtly different in relation to an application to dismiss. Whereas it is correct that the court in considering the application to dismiss will, to some extent, look at the merits of a case, it does

so for a very specific purpose: to see whether the proceedings represent an abuse of process. The fact that the defendant may ultimately be successful at trial does not mean that it was correct to have brought the application to dismiss. There is a different lens to be applied to that application and, as I say, in the very particular context of costs, it was *unreasonable* to bring that application.

11. For those reasons, I am going to endorse the provisional view in relation to costs set out in my written judgment. As the plaintiffs are, at the High Court level, representing themselves as litigants in person, those costs will be confined to the allowable costs which I understand are confined to their expenses and outlay. They did have the benefit of a legal team at the Circuit Court hearing and, therefore, they are entitled to those legal costs in the ordinary way under the Legal Services Regulation Act 2015. The costs are to be adjudicated in default of agreement under Part 10 of that Act.

12. I have also been asked to put a stay on the costs order. I am not prepared to do that. It seems to me that as the proceedings before the High Court have come to an end, that part of the case has come to a conclusion, and the plaintiffs are entitled to recover their costs incurred in relation to this.

13. I turn then to deal with the costs of the application to take up the DAR. The defendant, as it is perfectly entitled to do, has brought an application under Order 123 of the Rules of the Superior Courts to take up a copy of the transcript of the digital audio recording ("*DAR*") of the hearing before me in April 2023. I acceded to that application, and I note that none of the plaintiffs objected to the transcript being taken up. In dealing with that application, I specifically did not interrogate the purpose for which the DAR was being taken up. In the context of a costs application, however, it is relevant to understand why the DAR was

being taken up and I am told that the DAR was being taken up because it is considered to be relevant to the substantive merits of the case. As I understand it, there may be a desire to cross-examine the plaintiffs in relation to the submissions that they made to this court and, in particular, what their precise attitude to the proceedings is. That is a legitimate purpose. However, in terms of costs, it is very unusual to take up a copy of the transcript of a motion. It seems to me, to use the language of the older case law, that that represents a "*luxury* "in terms of costs or to use the new language under the Legal Services Regulation Act 2015 that it is not a cost which is "*reasonably incurred*". See also Order 99, rule 3. That does not mean that the defendant is not entitled to take up the DAR—it is—but it is not entitled to visit the costs so incurred on the other side.

14. As I say, it is not normal that there would be a transcript taken up in relation to a motion. The taking up of the transcript does incur costs and I am not prepared to allow those costs to be visited on the other side. Therefore, I simply make no order in relation to the costs of the motion to take up the DAR.

15. Finally, I reiterate the point made on a previous occasion that the parties should consider whether these proceedings should be referred to mediation. The costs of the proceedings to date are likely to exceed the value of the claim.

Appearances

The plaintiffs appeared as litigants in person
Eoin Martin for the defendant instructed by Maples and Calder (Ireland) LLP