APPROVED **[2025] IEHC 34**

THE HIGH COURT

2016 1419 S

AIB MORTGAGE BANK

PLAINTIFF

AND

HUGH KELLY
ANNE-MARIE KELLY
PAMELA HEAPES
AMANDA SCANLON AND GERARD HEAPES
(AS LEGAL PERSONAL REPRESENTATIVES OF BRENDAN HEAPES DECEASED)

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 28 January 2025

INTRODUCTION

1. This judgment addresses an aspect of the allocation of the legal costs of the within debt collection proceedings. Two of the defendants had been joined in the proceedings as the executors of the estate of one of the debtors. The claim as against the estate has since been resolved in favour of the plaintiff bank.

2. The executors have applied for an order directing that they may recover the legal costs incurred by them in relation to the proceedings as against the estate. This

order is sought in circumstances where the estate is insolvent. The perceived benefit of a court order is that the executors' legal costs will then have priority as "*administration expenses*" under the First Schedule of the Succession Act 1965. See, generally, *Gilvarry v. Naylor* [2024] IEHC 688.

3. The costs application is made pursuant to the provisions of section 168(1)(b) of the Legal Services Regulation Act 2015. The principal creditor of the estate, AIB Mortgage Bank, has been put on notice of the costs application.

PROCEDURAL HISTORY

4. To put the costs application in context, it is necessary to rehearse briefly the procedural history. These proceedings were issued by way of summary summons and seek to recover a liquidated debt. The debt is said to arise pursuant to loan agreements entered into by a number of individuals with AIB Mortgage Bank ("*the plaintiff bank*"). One of the borrowers had been the late Brendan Heapes. Mr. Heapes died prior to the institution of the proceedings. Mr. Heapes will be referred to hereinafter as "*the deceased*". The proceedings have been constituted against the deceased's executors, Amanda Scanlon and Gerard Heapes. The grant of probate had been taken out on 8 July 2016.

5. The proceedings had been pursued by way of an application for summary judgment in circumstances where the case is a documents case. The plaintiff bank has put before the court, by way of exhibits, documentation which evidences the entering into of two loan agreements together with certain guarantees. Having regard to the documentary evidence, there is no credible defence to the proceedings (save in respect of the position of one of the debtors/guarantors). Notwithstanding this, one of the other defendants to the

proceedings had, initially, advanced what might be described charitably as "*creative*" grounds for resisting the claim. More specifically, the first named defendant had alleged that, as a result of changes to the manner in which the ECB had structured its interbank lending rates, there ceased to be any reference or index rate under the defendants' loan agreements by which the interest payable could be calculated. This was said to have resulted in a situation whereby there ceased to be any contractual obligation to repay the principal sum.

6. The initial approach adopted to the proceedings by the executors had been to seek time to allow them to consider whether there might be any defence open. In the event, the executors were not in a position to put forward any substantive defence on the part of the deceased's estate. This is because the documentation exhibited by the plaintiff bank established the debt and the executors were not able to offer any contrary evidence. Notwithstanding this, the executors were reluctant to consent to judgment against the estate lest the first named defendant might prove to be successful in his defence of the proceedings. To put the matter colloquially, the executors sought to preserve the possibility that the estate could "*piggyback*" on the first named defendant's argument if it proved successful and the loan agreements were declared to be void.

7. The executors' position had been set out as follows in a letter dated 5 March 2020:

> "We have now had the opportunity of taking our clients instructions arising from the issues raised in the Defence by the first named Defendant. The difficulty our clients now have is that they can neither consent or object to the allegations made by AIB or indeed the counter allegations now made as they are complete strangers to this matter. As we have stated previously neither our clients or their mother have any knowledge of the business dealings of the late Brendan Heapes and in particular have no knowledge of the allegations now being made against a certain AIB official.

> Therefore, in light if the Defence that has now been raised we must now await the outcome of the above litigation but we will of course abide by any direction or Order of the Court in that regard to any aspect of this litigation. Please note that our clients are not trying in any way to delay the finalisation of this matter but based on the points that have been raised they cannot consent to Judgement being issued against the estate if ultimately it proved that the first named Defendant was successful in the defence of the proceedings."

8. Thereafter, the consistent position of the executors, in correspondence with the plaintiff bank, had been that whereas they would not consent to judgment against the estate, they did not intend to oppose the proceedings. See, for example, the following statement in a letter from the executors' solicitors dated 22 June 2022:

> "As we would have stated previously, our clients would have no personal knowledge whatsoever of the business dealings of the deceased and are therefore not in a position to contest any of the details provided by Mr. Coleman in his Affidavit. Therefore, in so far as they can and in taking into consideration their lack of knowledge or understanding of the deceased interactions with the Plaintiff they are not in a position to, and do not intend to oppose the application made on foot of said Notice of Motion."

9. The motion seeking summary judgment came on for hearing on 31 October 2024. The executors, consistent with their previously stated position, were not represented at the hearing. The first and second named defendants consented to judgment on that date. The matter was adjourned for a number of weeks until 28 November 2024 to allow counsel for the executors to attend to address the issue of costs. On the adjourned date, counsel for the plaintiff bank took the court through the formal proofs for summary judgment against the deceased's estate in circumstances where the executors were not consenting to judgment. The court, being satisfied that the proofs were established, entered judgment against the deceased's estate in the sum of €2,176,445.65. A costs order was made in favour of the plaintiff bank.

10. Counsel for the executors applied for an order allowing the executors to recover out of the property of the estate the legal costs incurred by them in relation to the proceedings. The costs application was adjourned to allow the executors' side to file a legal costs accountant's report in circumstances where the court had indicated that it intended to measure costs. The costs hearing resumed on 14 January 2025. Judgment was reserved to today's date.

MEASURING COSTS IN GROSS

11. The general approach which the High Court takes to costs orders is to confine itself to determining which party should bear the costs, and to leave over the measurement of the quantum of those costs to the Office of the Chief Legal Costs Adjudicator in accordance with the provisions of Part 10 of the Legal Services Regulation Act 2015. In some instances, the High Court will provide instructions as to the extent to which costs are to be recovered, e.g. the court might direct that certain costs are to be disallowed or might direct that a party only recover a specified percentage of its costs. The detailed quantification of those costs is then left to the Chief Legal Costs Adjudicator.

12. The High Court does, however, retain jurisdiction to measure costs itself. More specifically, Order 99, rule 7(2) of the Rules of the Superior Courts (as recast in 2019) provides as follows:

> "In awarding costs, the Court may:
>
> (a) direct that a sum in gross be paid in lieu of adjudicated costs;
>
> (b) in determining the amount of any such sum, of its own motion or on the application of the parties, appoint an independent legal costs accountant to report on the work to which the costs relate and shall

> direct that the parties be furnished with copies of any such report, and
>
> (c) direct that the costs of preparing a report referred to in paragraph (b) be added to the sum in gross awarded or be paid by another party."

13. The language used under the rule suggests that there is a distinction between the exercise to be carried out by the High Court in measuring costs itself, and that which would be carried out by the Chief Legal Costs Adjudicator. The fact that a "*sum in gross*" is to be paid "*in lieu of*" adjudicated costs suggests that the former is to be calculated on a less granular basis. Had it been intended that the High Court would merely exercise the same jurisdiction as the Chief Legal Costs Adjudicator, then the rule would simply have stated that the High Court may adjudicate the costs itself.

14. The interpretation of the equivalent rule under the pre-2019 version of Order 99 had been considered in detail by the High Court (Kearns P.) in *Taaffe v. McMahon* [2011] IEHC 408. The judgment suggests that, in simple and straightforward cases, most judges are well capable of making an appropriate assessment of costs. The judgment does not expressly address the significance, if any, of the distinction between a "*sum in gross*" and "*taxed costs*".

15. The nature of the function to be exercised by the High Court in measuring costs has been considered by the Court of Appeal in *Landers v. Dixon* [2015] IECA 155, [2015] 1 IR 707. Hogan J. stated the position, in respect of the pre-2019 version of the rule, as follows at paragraph 20:

> "I quite agree with the sentiments contained in that passage [in *Taaffe v. McMahon* [2011] IEHC 408]. It is, of course, implicit in this approach that the judge must have some evidential or other objectively defensible basis for the manner in which costs are measured. The power to measure costs must, of course, be exercised judicially. It would, after all, be unjudicial for a judge to clutch 'a figure out of the air

> without having any indication as to the estimated costs' (*Leary v. Leary* [1987] 1 W.L.R. 72 at p. 76, *per* Purchas L.J.) This is not to suggest that the judge must hear evidence regarding costs or even invite detailed submissions on this issue before electing to measure costs in any given case. It may be that a judge will have personal knowledge of the sums likely to be allowed in straightforward cases of the type presently before him or her. This would certainly have been the case in *Taaffe v. McMahon* [2011] IEHC 408, (Unreported, High Court, Kearns P., 28th October, 2011) where Kearns P. – with his vast knowledge and experience of judicial review practice and procedure – could readily have made an 'educated estimate' of the level of costs in a straightforward uncontested judicial review case of that kind."

16. The judgment of the Court of Appeal suggests that the exercise to be carried out by the High Court in fixing a gross sum need not be as extensive as that which would be carried out by the Chief Legal Costs Adjudicator. Nevertheless, the exercise must be carried out judicially, and the trial judge must have material available which would enable them to make an appropriate assessment of the gross sum.

17. The import of this case law appears to be as follows. First, the power of the High Court to assess costs should be confined to straightforward cases. Secondly, the parties must be given an opportunity to address the court as to the appropriate sum to be awarded. Thirdly, whereas the exercise of assessing costs need not be as elaborate as that which would be performed by the Chief Legal Costs Adjudicator, there must nevertheless be material before the High Court which allows it to make an informed decision. This material might include, for example, estimates of costs submitted by the parties or a legal costs accountant's report commissioned by one or more of the parties. Under the 2019 version of Order 99, the High Court now has an express power to appoint an independent legal costs accountant.

18. Having regard to the wording of the recast Order 99, and the case law on the equivalent rule under the pre-2019 version, I am satisfied, for the reasons which follow, that this is an appropriate case in which to direct the payment of a sum in gross in lieu of adjudicated costs.

19. First, the proceedings meet the criteria of being straightforward. The proceedings were instituted by way of summary summons, and, in the absence of there being any credible defence, were ultimately resolved against the deceased's estate by way of a motion for summary judgment. The exercise which the court had to engage upon in determining whether to enter summary judgment is similar to that which will have taken up the lion's share of the work carried out by the solicitor and barrister retained by the executors. It involved the careful consideration of the affidavit evidence and exhibits. This is not a case where the lawyers will have been involved in reviewing a greater tranche of documents than will have come before the trial judge. In particular, the lawyers will not have had to consider any discovery documents nor witness statements. It should, of course, be acknowledged that the lawyers will have had to undertake other work, not seen by the court. The lawyers will, for example, have expended time and effort in taking instructions from the executors and in preparing written advice on the options open to the executors in respect of their possible participation in the proceedings. These tasks will not, however, have involved a significant amount of work in circumstances where, as explained in the correspondence cited earlier, neither the executors nor the deceased's widow had any personal knowledge whatsoever of the business dealings of the deceased and were therefore not in a position to contest any of the details provided by the plaintiff bank.

20. Even allowing for the additional work which the lawyers will have to have done, this court had a good appreciation of the nature and extent of the work carried out by virtue of having to review precisely the same affidavits and exhibits as the lawyers. Put otherwise, this is not a case where there will have been significant work "*behind the scenes*", as it were, in respect of which the trial judge will have had little visibility. This puts the court in a good position to assess costs.

21. Secondly, as discussed in more detail under the next heading below, the court has sufficient material before it to allow it to make an informed assessment of costs. In particular, the court has the benefit of a report from a legal costs accountant engaged on behalf of the executors.

22. Thirdly, having regard to the fact that the estate is insolvent, it is in the interests of justice that *further* costs not be incurred unnecessarily in measuring the costs. Were the assessment of costs to be referred for formal adjudication, this would entail additional expense, and this would divert further funds from the insolvent estate to the detriment of the creditors and beneficiaries.

DISCUSSION

23. Section 168(1)(b) of the Legal Services Regulation Act 2015 provides, relevantly, that where proceedings before the court concern the estate of a deceased individual, the court may order that the legal costs of one or more parties to the proceedings be paid out of the property of the estate. Neither the executors nor the plaintiff bank have sought to argue that this provision is confined to what might be described as probate litigation. Rather, the parties

appear to accept that the court has, in principle, jurisdiction to make an order directing that the executors' legal costs be paid out of the property of the estate.

24. The qualifying words "*concern the estate of a deceased individual*" under section 168(1)(b) ensure that the section is not confined to probate proceedings but extends to proceedings which involve a claim brought against a deceased individual's estate through his personal representatives. The section confirms that the court has jurisdiction to make an order directing that the legal costs of one or more party be paid out of the property of the estate (rather than make a costs order against the personal representatives as individuals). Of course, if the estate is insolvent, it may be that not all of the legal costs will be recovered in practice.

25. In an appropriate case, the court may make an express order that the personal representatives are to recover their legal costs against the property of the estate. In many cases such an order will be unnecessary in that there will be no challenge to the legal costs ranking as administration expenses. In certain cases, where the estate is hopelessly insolvent, it may be prudent for the executors to seek a court order.

26. One of the functions of the executors of a deceased person's estate will be to address any litigation against the deceased. The executors will have to make an informed decision as to whether or not litigation should be defended. To this end, it is legitimate for executors to incur reasonable costs in obtaining legal advice.

27. Here, the executors were confronted with a straightforward claim against the deceased's estate. The claim was to the effect that the deceased had entered into commercial loan agreements with a well-known financial institution. The

paperwork was all in order and there was nothing on the face of it to suggest that there might be any reasonable grounds for resisting the motion for summary judgment. The scope of the executors to mount a defence was circumscribed by the obvious fact that the one person who might, in theory at least, have been in a position to give oral evidence which might contradict the documentary evidence was dead. There was, therefore, no reasonable basis upon which the executors could defend the proceedings.

28. The approach taken by the executors had, initially, been to seek time to allow them consider the options in relation to the defence of the proceedings. Thus, the *inter partes* correspondence from the period 2017 to 2018 involves them seeking time from the plaintiff bank. Thereafter, the executors adopted the position that they would not be participating in the proceedings. The executors are entitled to recover, as against the estate, the reasonable legal costs incurred up to this point.

29. The executors are also entitled to recover the reasonable costs incurred in addressing the two motions subsequently issued in the proceedings, namely the application to amend the summary summons and the application to re-enter the proceedings (which had been adjourned generally). In each instance, the executors incurred modest costs in obtaining advice as to whether they should contest the motions. In each instance, they did not oppose the respective motion.

30. The executors are not entitled to recover any costs in relation to the substantive hearing fixed for 31 October 2024. There was no reason for the executors to attend and be represented at the hearing in circumstances where they were not opposing the reliefs sought. Similarly, the executors are not entitled to the costs of the affidavit filed on their behalf on 27 November 2024. There was no

necessity for the executors to file any affidavit in the proceedings in circumstances where they were not opposing the reliefs sought. It was certainly not necessary to file an affidavit for the first time *after* the trial date.

31. The executors are entitled to recover a modest fee in relation to the two costs applications, i.e. the application in respect of the costs as between the plaintiff bank and the executors, and the application to recover the executors' own costs from the estate. These were straightforward applications and this should be reflected in the fees allowed. The appropriate aggregate fee for counsel in this regard is €500 (exclusive of VAT).

32. The executors filed a report dated 3 January 2025 prepared by Lowes Legal Costs Accountants ("*the legal costs report*"). The legal costs report provides a detailed breakdown of the work carried out by counsel. It indicates that counsel was involved in reviewing the papers, advising as to the approach which might reasonably be adopted on behalf of the executors to the proceedings, and settling *inter partes* correspondence. Counsel was again involved in advising on the motions to amend the summary summons and to re-enter the proceedings.

33. The legal costs report sets out counsel's fees item by item. These fees are, for the most part, reasonable and appear to have been calculated by reference to an hourly rate of €150. Subject to the following adjustments, the fees are allowed.

    (a). The costs of the replying affidavit are disallowed for the reasons already explained.

    (b). The brief fee on the hearing of the application to enter judgment is disallowed. However, counsel is entitled to an aggregate brief fee of €500 in respect of the costs applications.

(c). The costs of moving three adjournment applications before the Master's Court (claimed at €150 each) is disallowed. There is no suggestion that the adjournment applications had been opposed. In the circumstances, they could have been dealt with, by consent, by the plaintiff bank's representative.

34. Counsel's fee will, therefore, be allowed in an aggregate amount of €4,750 (exclusive of VAT).

35. In contrast to the breakdown provided in relation to counsel's fees, there is no detail provided in relation to the solicitor's fees. The general instructions fee is claimed in the sum of €13,000. At the hearing on 14 January 2025, the solicitor was offered an opportunity if he desired to put in further material in this regard. The solicitor elected to have the matter dealt with without further material.

36. Having regard to the fact that the legal services were counsel-led in the sense that counsel was providing advice in relation to litigation and settling draft correspondence, the fees allowable in respect of the solicitor should not exceed those of counsel. The general instructions fee will, therefore, be allowed at €4,750 (exclusive of VAT). The solicitor is also entitled to recover the amounts claimed in respect of postage & sundries (€800) and scheduled items (€350).

CONCLUSION AND FORM OF ORDER

37. For the reasons explained, an order is made, pursuant to section 168(1)(b) of the Legal Services Regulation Act 2015, directing that the legal costs (as measured by the court) of the executors of or incidental to these proceedings be paid out of the property of the estate of the late Brendan Heapes.

38. An order is made pursuant to Order 99, rule 7(2) of the Rules of the Superior Courts (as recast in 2019) directing that the following amounts be paid in gross in lieu of adjudicated costs:

    (a). Counsel's fee of €4,750 (exclusive of VAT).

    (b). Solicitor's general instructions fee of €4,750 (exclusive of VAT). The solicitor is also entitled to recover the amounts claimed in respect of postage & sundries (€800) and scheduled items (€350).

39. The executors are entitled to recover VAT in accordance with Order 99, rule 2(4).

40. An ancillary order is made declaring that legal costs, in the amount allowed above, constitute "*administration expenses*" under the First Schedule of the Succession Act 1965. This will ensure that the legal costs have priority.

Appearances

Brian Conroy SC and William Hamilton for the plaintiff instructed by G. Ó Nuailláin & Co.
Declan Whittle for the executors instructed by O'Sullivan Hogan