THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 261

Appeal No. 2019/267

Whelan J.
Haughton J.
Binchy J.

BETWEEN/

ALLIED IRISH BANKS PLC

RESPONDENT

-AND-

MICHAEL KING AND DENISE KING

APPELANTS

Judgment of Ms Justice Máire Whelan delivered on the 30th day of September 2020

Introduction

1. This is an appeal against an order of the High Court (Barrett J.) of 31 May 2019 made in the exercise of his discretion granting Allied Irish Banks plc ("the Bank") discovery in aid of execution pursuant to O. 42, r. 36 of the Rules of the Superior Courts ("RSC").

2. The order was sought on foot of a prior judgment obtained by the Bank on 12 July 2018 in summary proceedings against the appellants jointly and severally in the sum of €1,038,867.08 together with costs granted subject to a stay of execution as follows:-

> "AND IT IS ORDERED that execution on foot of the said judgment be stayed for a period of three months from the date hereof".

3. Both sides were represented by solicitor and counsel when the stay was granted. There is no evidence that the Bank opposed either the granting of the stay or its three-month duration.

The Bank did not appeal against the said order. It was due to expire by effluxion of time on or about 12 October 2018. No application was made to the court by the Bank to vary or vacate the stay nor was leave sought of the court during its operation to issue the motion for discovery in aid of execution. The appellants contend that for its duration the stay operated to disentitle the Bank from issuing a motion for discovery in aid of execution pursuant to O. 42, r. 36 RSC.

The Bank's notice of motion for discovery in aid of execution

4. The Bank issued the discovery motion on 5 October 2018, about seven days prior to the expiration of the stay of execution. It sought orders directing the appellants to attend court and be orally examined as to their ability to satisfy the judgment debt obtained against them; directing the production of books, memoranda and writings relating to their ability to satisfy the judgment debt; and, to make discovery by way of affidavit of all relevant evidence including in relation to a transfer by the appellants of the lands comprised in Folio 20670F Co. Meath.

5. The grounding affidavit of 1 October 2018 of Peter Kelly affirmed as follows:-

> "7. I say that at the date of affirming the Defendants have failed, refused and/or neglected to satisfy the judgment as Ordered or at all."

High Court judgment

6. The Bank's motion came on for hearing on 29 April 2019 and was fully contested. In his judgment, [2019] IEHC 287, delivered on 3 May 2019, Barrett J. found that the Bank was not entitled to issue its motion before the expiration of the stay but nonetheless granted the Bank's application pursuant to O. 42, r. 36 RSC.

7. The trial judge considered two judgments relied on by the appellants and the Bank, respectively, namely *White, Son & Pill v. Stennings* [1911] 2 K.B. 418; and, *Sucden Financial Ltd. v. Fluxo-Cane Overseas Ltd.* [2009] EWHC 3555 (Q.B.).

8. He also considered Finlay Geoghegan J.'s dictum in *Allied Irish Banks plc v. O'Reilly* [2015] IECA 209 which the Bank contended supported its position:-

> "…A person who has obtained a judgment which the judgment debtor leaves unsatisfied appears to me *prima facie* entitled to orders which may be made pursuant to O. 42, r. 36…" (para. 18)

The trial judge held that, in circumstances where no satisfaction is required for the period of a stay, one cannot be said to have left a judgment debt unsatisfied for its duration.

9. Despite the trial judge's indication that the Bank was not entitled to issue its motion before the expiration of the stay, he concluded at para. 4:-

> "…AIB's 'rush' to make application came, in truth, but seven days before the expiry of the period of the stay. Additionally, the said period has now long elapsed, and the factual position presenting is akin to that contemplated by Finlay Geoghegan J. in *O'Reilly*, para.18, rendering AIB *prima facie* entitled to (and the court considers that in all the circumstances now presenting it should and will be granted) the order it has come seeking."

Grounds of Appeal

10. The appellants contended, *inter alia,* that the trial judge erred in law and in fact by:

i. exercising his discretion to grant the reliefs sought by the Bank notwithstanding that he had found in favour of the appellants regarding the correct interpretation, meaning and effect of the stay;

ii. finding that the Bank was "[a] person who has obtained a judgment which the judgment debtor leaves unsatisfied" (*per* Finlay Geoghegan J. in *Allied Irish Banks plc v. O'Reilly*, para. 18) and *prima facie* entitled to the reliefs sought, contrary to the principles established in *White, Son & Pill v. Stennings* which the trial judge had found applied in this jurisdiction concerning the meaning and effect of a stay; and,

iii. rejecting the appellants' argument that the circumstances of the instant case did not indicate a level of complexity which warranted the making of an order of discovery in aid of execution in light of the principles set out by Clarke J. (as he then was) in *Moorview Developments Ltd. v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615 as approved by the Court of Appeal in *Allied Irish Banks plc v. O'Reilly*.

Submissions of the Appellants

11. The appellants emphasised the definition of "stay" in *Black's Law Dictionary* (8th edn., Thomson West, 2004):-

> "1. The postponement or halting of a proceeding, judgment, or the like.
>
> 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding…"

They contended that, in light of that definition, the effect of the stay granted in this case was to suspend, until its expiration, further operation of the proceedings including the judgment granted.

12. The appellants argued that, having regard to the heading of O. 42 RSC and the sub-heading and plain language of O. 42, r. 36 RSC, the process of discovery in aid of execution is an integral part of the process of execution and, as such, came within the scope of the stay of execution ordered on 12 July 2018.

13. They submitted that the decision in *Sucden Financial Ltd. v. Fluxo-Cane Overseas Ltd.* did not represent the law in this jurisdiction. They argued that the trial judge had concluded that the decision in *White, Son & Pill v. Stennings* represents the law in this jurisdiction, noting that the Bank had not cross-appealed that finding and therefore it must stand for the purposes of this appeal.

14. The appellants also argued that the trial judge erred in holding that the Bank was *prima facie* entitled to the reliefs sought in light of the decision in *Allied Irish Banks plc v. O'Reilly* and that he erred in finding that the judgment debt was "unsatisfied" in circumstances where he had accepted *White, Son & Pill v. Stennings* as an authority for the proposition that a judgment debt cannot be "unsatisfied" while a stay of execution operates.

15. They contended that, insofar as the trial judge exercised an equitable jurisdiction to grant the reliefs sought, notwithstanding his finding that the Bank was not entitled to issue its motion when it did, he was in error.

16. The appellants further submitted that, in any case, the instant case is relatively straightforward and, as such, discovery for the purposes of preparing for an oral examination of the debtors was not warranted. They relied on para. 59 of Clarke J.'s (as he then was) decision in *Moorview Developments* (as approved by the Court of Appeal in *Allied Irish Banks plc v. O'Reilly*):-

> "…A person who does not have significant assets (or at least many types of assets) and a relatively straightforward income, may well be easily required to reveal all relevant information without any advance disclosure."

Submissions of the Bank

17. The Bank contended that it had satisfied the test in *Allied Irish Banks plc v. O'Reilly*, being a judgment creditor where the judgment debt remained unsatisfied and that fact was dispositive of the issue of its entitlement to the reliefs sought.

18. It submitted that the appellants' reliance on the stay "was, and is, wholly artificial" in circumstances where it had expired before the application was heard by the High Court.

19. The Bank argued that the appellants' reliance on the decision in *White, Son & Pill v. Stennings* was misplaced and disputed the contention that the trial judge had accepted that *White* represented the law in this jurisdiction. The Bank contended that *White* is distinguishable

from the instant case; in *White* the relevant order did not require the defendant to pay the amount of the judgment until fourteen days after costs had been taxed, thus it was not correct to say that the amount was "still unsatisfied" before that time. By contrast, in the instant case the appellants were at all times required to pay their judgment debt, as can be seen by the fact that interest continued to accrue and they were liable to have a judgment mortgage registered against their property.

20. The Bank, relying on Finlay Geoghegan J.'s decision in *Allied Irish Banks plc v. O'Reilly,* submitted that an application for leave to cross-examine a judgment debtor in relation to his or her capacity to pay is not *per se* execution. It contended that such an order is a method of identifying assets against which a judgment creditor may seek to execute a judgment in the future but is not *per se* a process of execution.

21. Without prejudice, the Bank submitted that if an examination pursuant to O. 42, r. 36 RSC is deemed to constitute execution, no form of execution takes places until such examination is conducted. No such examination having yet occurred in the instant case, the now expired stay of execution is of no relevance.

22. In response to the appellants' submission that this is a straightforward case where discovery in advance of the examination on oath is inappropriate, the Bank relied on *Moorview Developments* in which Clarke J. (as he then was) emphasised that such advance discovery prevents the waste of valuable court resources. The Bank submitted that Clarke J. merely allowed for the possibility that advance discovery would be unnecessary in some straightforward cases. The Bank submitted that it was open to the trial judge in the instant case to find that prior disclosure of documents was desirable and that the appellants have not demonstrated any basis on which he could be said to have fallen into error. It objected to the characterisation of this case as "straightforward" in circumstances where the first appellant had

disposed of potentially valuable property six months before the application for judgment was listed for hearing.

23. The Bank submitted that this appeal was moot since the stay of execution had expired and if it were to bring a fresh application now for leave to examine under oath pursuant to O. 42, r. 36 RSC, it would be entitled to such an order as of right.

The law

24. The role of an appellate court in reviewing the exercise by a High Court judge of his discretion was considered by McMenamin J. in *Lismore Builders Ltd. (in receivership) v. Bank of Ireland Finance Ltd.* [2013] IESC 6 and the later decision of this court in *Collins v. Minister for Justice* [2015] IECA 27.

25. Because an appeal is not a rehearing of an interlocutory application this court should afford significant deference to the decision of the High Court. Where this court identifies a clear error in the approach of the High Court judge it is free to interfere with that decision. Additionally, even if the appellant cannot identify such an error, the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by doing so.

26. In *McDonald v. O'Driscoll* [2015] IEHC 192 Barton J. noted at para. 25 that the court is possessed of an inherent jurisdiction to control its own procedures and that this jurisdiction extends to granting a stay of execution on a judgment, as was held by Fitzgibbon L.J. in *Earl of Desart v. Townsend* (1887) 22 L.R. Ir. 389. It does appear that the order in the instant case was granted pursuant to the High Court's inherent jurisdiction to grant a stay of execution.

27. For so long as a judgment is subject to a stay it will not be regarded as final and conclusive. A judgment only becomes effective when the bank is free to levy execution. The court will not treat a judgment as final and conclusive so long as a stay is in place. This is so since the money, the subject matter of the judgment, for the duration of the stay cannot be said to be a debt presently due and payable.

28. It is a well-established practice in this jurisdiction that when a stay of execution is granted matters proceed on the basis that no step in the nature of an action or process can be taken by the successful plaintiff to enforce the judgment in the absence of an application to vary or set aside the order.

29. It is and has been the practice in this jurisdiction to accord significant deference to orders of the High Court particularly when, as the order of 12 July 2018 was here, they are made on notice and not appealed against.

30. As of 5 October 2018, when the motion issued seeking relief pursuant to O. 42, r. 36 RSC, the judgment was still subject to a stay of execution. The existence of same constituted a bar to any action being brought upon the judgment for its duration. By the time the motion came on for hearing before the High Court the stay had expired. That fact does not afford the Bank an answer to the issue.

31. The judgment only became final and conclusive at the expiration of the stay on or about 12 October 2018. The Bank was precluded for its duration from enforcing the judgment whether by levying execution against the appellant or otherwise, since the stay in substance operated against the Bank's right to levy execution on the appellants' property until termination of the stay or further order of the court. No such order was ever sought.

32. During the period of the stay and prior to the issue of the notice of motion, the Bank at no time saw fit to apply to the High Court to vary the terms of the stay or to seek leave to issue the motion notwithstanding the subsisting order of the High Court staying the proceedings. No specific reason was identified to justify instituting the application without leave of the High Court a week prior to the expiration of the stay. Nor was it indicated whether this occurred through inadvertence.

33. The order which had granted the stay for a limited period of three months operated for its duration to defer the right of the bank to take steps to execute the judgment unless leave of

the court was sought. For so long as the stay continued to be operative the appellants did not have a personal and enforceable liability to pay on foot of the judgment. As such it was not a final judgment upon which an action could be brought.

34. It is well settled that a stay of execution prevents a plaintiff from putting into operation the machinery of the law to enforce a judgment but does not prevent the successful plaintiff from exercising any remedy or right available, provided same operates outside and apart from the processes of the court.

The nature of an application pursuant to O. 42, r. 36

35. O. 42, r. 36 RSC provides:-

> "When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, or that any other person be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court shall appoint; and the Court may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

36. The Bank characterised its motion seeking discovery in aid of execution as its attempt to address "an informational deficit on the part of the judgment creditor" and placed reliance on Collins, *Enforcement of Judgments* (1st edn., Round Hall, 2014) in support of that contention. It also relied on the decision of the Court of Appeal in *Allied Irish Banks plc v. O'Reilly* where Finlay Geoghegan J. held at para. 10:-

> "…whilst the order is referred to as an order for discovery 'in aid of execution' it is more precisely an order made in aid of a proposed examination pursuant to O. 42, r. 36."

37. Those arguments were advanced by the Bank in the High Court and were rejected by Barrett J. (against whose clear determination it did not appeal) at para. 3 in the following terms:-

> "…Yes, one can view an O. 42, r. 36 application/order as a preliminary to enforcement. However, once application is made under O. 42, that application becomes a chain in the link of the post-judgment enforcement process, the very process in respect of which the court has granted a stay. Faced with the introduction of such a link it seems to the court to be entirely unrealistic that one would disregard that one link in what will be a continuous chain from the issuance of judgment through to the payment of the debt and pretend that that link in fact enjoys a separate un-linked existence. It is important also to recall the practicalities of when and why a stay of execution is granted. Typically it comes about because counsel stands up in court when summary judgment issues and offers a reason why her client needs a little time to get his affairs in order. For that 'breathing-space' to be interrupted by the commencement of an O. 42, r. 36 application seems to the court, certainly in the circumstances here presenting, to be the very opposite of what a stay on execution is intended to achieve."

38. The Bank failed to identify any clear authority in this jurisdiction for the proposition that the existence of a stay of execution granted by order of the High Court in pursuance of its inherent jurisdiction is not a bar, during the operation of the stay, to an application for discovery in aid of execution.

39. The Bank's contention that, since by the date the motion came on for hearing the stay had elapsed, the issue was moot and any non-compliance with the terms of the stay is not material is not a sound argument and is not supported by any authority advanced on its behalf. A core prerequisite to support the valid issuance of the notice of motion on 5 October 2018 seeking reliefs pursuant to O. 42, r. 36 RSC was that, at that date, there was in existence a

present obligation on the part of the appellants to pay the debt forthwith, as the Bank's own grounding affidavit at para. 7 erroneously asserted.

40. Although the Bank contended in written submissions that the appellants were at all times required to discharge the debt and that the order was effective from the date it was made, I consider that contention unsound insofar as it undermines the purpose and intended effect of a stay of execution and further it is not supported by authority. The stay, for its duration, precluded the Bank from bringing an application in pursuance of enforcement since enforceability is central to the issue of the finality and conclusiveness of the judgment. Moreover, it is clear from the opening line of O. 42, r. 36, that it is only when a party is entitled to enforce an order that it may make an application to court. The Bank was not such a party until the expiration of the stay, and it follows therefore that its application was made prematurely.

White, Son & Pill v. Stennings

41. The appellants placed reliance on the decision of the English Court of Appeal in *White, Son & Pill*, delivered in April 1910. It concerned analysis of the County Court Rules of 1903 and in particular O. 26, r. 1.

42. At issue in that case was the issuance of a garnishee summons prior to the date specified for payment of the amount of the judgment on the face of the order. The Court of Appeal had concluded that the judgment creditor was not entitled to commence proceedings for the payment of the money before the time given by the order for payment of the said money had expired. Whilst in some material respects *White, Son & Pill* is distinguishable from the instant case, the judgment of Vaughan Williams L.J. did emphasise the clear distinction between the contention that a debt remains unsatisfied and the obligation to satisfy a court under the relevant rules under consideration in that case that the judgement was still unsatisfied. It is significant that the trial judge's determination that it is good law in this jurisdiction was not appealed from.

Sucden Financial Ltd. v. Fluxo-Cane Overseas Ltd.

43. The Bank relied on this decision of the English High Court where judgment was obtained on 13 November 2009 with enforcement of the judgment stayed until 4 December 2009. The purpose of the stay was expressed on the face of the order as follows: "…to give the second defendant opportunity to apply to the Court of Appeal for permission to appeal and a further stay." Some days later an application was made by the plaintiff to the High Court pursuant to the Civil Procedure Rules Part 71.1 which provides:-

> "This part contains rules which provide for a judgment debtor to be required to attend court to provide information, for the purpose of enabling a judgment creditor to enforce a judgement or order against him."

There was evidence that the second defendant, Mr. Garcia, a resident of Brazil, would be within the jurisdiction on 26 November 2009 to give evidence in an unconnected law suit and was liable to leave the jurisdiction for Brazil shortly thereafter.

44. Teare J. rejected submissions advanced seeking to set aside an order made requiring Mr. Garcia to attend court and provide information for the purpose of enabling enforcement of the judgment against him, observing at para. 7:-

> "…That means that it is an order which puts the judgment creditor into a position where he might thereafter be able to enforce the judgment but it does not seem to me to be part and parcel of the process of enforcement."

The ambit of the stay was narrower in *Sucden* and the evasive conduct of Mr. Garcia who was fleetingly within the jurisdiction before returning to Brazil may have influenced the trial judge. In the instant case there was no such limited purpose imposed on the stay.

45. The *Sucden* judgment was opened by the Bank to the trial judge and the issue was fully argued before him. Barrett J. reached a different conclusion in his analysis of O. 42, r. 36 RSC

and, whilst accepting that one can view such an order as preliminary to enforcement, he preferred the conventional analysis that:-

> "…once application is made under O. 42, that application becomes a chain in the link of the post-judgment enforcement process, the very process in respect of which the court has granted a stay."

46. From that determination the Bank did not cross-appeal. Neither was there a close analysis or comparison between the language of the respective rules and procedures in both jurisdictions. The rationale in *Sucden* derived from the specific wording of the Civil Procedure Rules 1998, Part 71 and that is a factor to be taken into account. It therefore falls to be determined on another occasion as to whether the reasoning of Teare J. in *Sucden Financial Ltd.* is of any relevance to the issue.

47. The inescapable fact remains that the Bank did not cross-appeal the key determination of the trial judge that an application pursuant to O. 42, r. 36 was a link in the chain of the post-judgment enforcement process, which finding stands uncontested.

Judgment Mortgage

48. The Bank contended that its entitlement to register the judgment as a judgment mortgage pursuant to the Judgment Mortgage (Ireland) Acts 1850 and 1858 during the operation of the stay supported its contention that it was likewise entitled to issue the motion seeking relief pursuant to O. 42, r. 36 RSC prior to the stay's expiration. However, I am satisfied that that is not a sound argument. It is well settled that the entry of a judgment mortgage constitutes a charge upon the lands subject to it and its registration is not a breach of an operative stay of execution. In *In re Lambe's Estate* (1869) 3 Ir. Eq. 286 the Lord Chancellor held at p. 294 that registration of a judgment mortgage was "merely attaching the debt on the lands, leaving it to the creditor to realise it by the other processes of the Court." That decision

was followed by the old Irish Court of Appeal in *Barnett v. Bradley* (1890) 26 L.R. Ir. 209 where Fitzgibbon L.J. explained the reasoning for the court's conclusion thus:-

> "The registration of a judgment now has the same effect as if the defendant had at the time of the registration executed a deed of mortgage of his lands, and the execution of such a deed would manifestly not be a *realisation* of the debt; it would amount only to a *security* for it. …it secures priority for the demand without making it presently enforceable." (emphasis in original, pp. 215 to 216)

Legal effect of stay of execution

49. As stated above, the granting of an order by the High Court staying execution of a judgment has historically been accorded a very high degree of deference in this jurisdiction. That is illustrated by the fact that notwithstanding the clear jurisprudence, including the decision in *Barnett v. Bradley*, referred to above, in the century following that judgment, creditors, in deference to the court order, whenever a stay of execution had been granted, generally refrained until after expiration of the stay from applying for registration of a judgment as a judgment mortgage.

50. The situation was considered by the Law Reform Commission in its Consultation Paper on *Judgment Mortgages* (L.R.C. C.P. 30-2004) which observed at p. 7, fn. 2 that:-

> "In this regard, the judgment mortgage process can, it would appear, be availed of notwithstanding that the court imposes a stay on execution: *Barnett v Bardley* [*sic*] (1890) 26 LR Ir 209. The better practice currently is to request that the plaintiff be permitted to register a judgment mortgage notwithstanding a general stay on execution."

51. Thus it was envisaged that, pending legislation to regularise the position, prior to registration of a judgment mortgage during the period of operation of a court ordered stay of execution, a judgment creditor would seek permission of the court granting the stay before

proceeding with such registration. The Consultation Paper recommended at p. 43 that the right of a judgment creditor to register a judgment mortgage during the operation of a stay should be put on a statutory footing:-

> "4.21 It should be confirmed that the judgment creditor can apply for registration of the judgment mortgage notwithstanding that the judgment debtor has obtained a stay on the execution of the judgment by order of the court. In the Commission's view this should apply irrespective of the reason for which the stay is granted (*eg* to give the judgment debtor time to pay, or to enable the judgment debtor to bring an appeal)."

This recommendation was reiterated at p. 65, para. 7.19 of the Consultation Paper.

52. That recommendation and the decision in *Barnett v. Bradley* was given statutory effect by s. 116(3) of the Land and Conveyancing Law Reform Act 2009. It provides, insofar as relevant:-

> "(3) For the avoidance of doubt it is and always has been the case that-
>
> (a) …
>
> (b) a judgment mortgage may be registered-
>
> (i) notwithstanding that the judgment debtor has obtained an order of the court granting a stay of execution, unless the court orders otherwise…"

53. The authors of *Delany and McGrath on Civil Procedure* (4th edn., Round Hall, 2018) note at para. 25-24:-

> "A stay on a judgment or order has the effect of suspending the judgment or order. It can be granted in whole or in part or on any particular terms or conditions that the court thinks fit."

They cite *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 1 I.R. 699 in support of that proposition.

54. In *Farrell* Denham C.J., having considered various definitions of a stay, observed at pp. 713 to 714:-

> "59. It is clear that a stay order is not an order terminating proceedings. It is an order staying, postponing or suspending the proceedings. It is an order maintaining the *status quo*. Thus, the proceedings being stayed… are to be maintained in a holding pattern, the *status quo*, until the termination of the application for judicial review.
>
> 60. …a stay leaves the proceedings in being but prevents the proceedings from progressing in any significant way. To the extent that it might be suggested that it was appropriate that some progress might be made in the proceedings, notwithstanding a stay, then that is a matter to be addressed to the judge granting the stay. An application can be made to that judge to make the stay subject to terms which would permit whatever progress might be considered desirable. In the absence of such terms, a stay will prevent the proceedings from significantly progressing. That does not, however, mean that any orders necessary to allow the proceedings to continue in being, albeit in a 'holding pattern', cannot be made.
>
> Thus the real question is as to whether any order sought to be made is one which is consistent with or contrary to the fact that the proceedings are stayed. Orders which are a necessary part of keeping the proceedings in being are entirely consistent with a stay for they do not progress the proceedings in any material way but simply allow the proceedings to continue in their holding pattern. On the other hand different types of orders which would have the effect of materially progressing the proceedings are contrary to a stay and cannot be made in the absence of a specific provision in the stay order qualifying the terms of the stay in such a way as to permit orders of the type in question to be made." (emphasis added)

55. The *Farrell* judgment clarifies the import of a stay and confirms that for its duration it precludes any application being made by a party subject to it which might in any sense materially progress the proceedings, save as may be necessary to allow the underlying proceedings continue in being, unless an application is first made to the judge who granted the stay for leave to take the proposed step. That decision is entirely consistent with normal practice in this jurisdiction, as can be inferred from the Law Reform Commission's Consultation Paper on *Judgment Mortgages* (L.R.C. C.P. 30-2004). Legislation was required in 2009 to provide legal certainty that the registration of a judgment mortgage - a step which did not require a court application - against the property of a judgment debtor was outside the ambit of the operation of a stay of execution notwithstanding that there was clear authority predating independence supporting that approach.

56. The authors of *Delany and McGrath* observe at paras. 25-28 to 25-29:-

> "In the case of a judgment requiring the payment of a debt or damages, statutory provision is made for the grant of a stay on execution by s. 21(1) of the Enforcement of Court Orders Act 1926 which provides for the grant of a stay on execution for such time and upon such conditions as it thinks reasonable, where the court is satisfied, at the time of giving judgment: (a) that the debtor is unable to immediately pay in full the sum and all costs payable; (b) such inability is not occasioned by the debtor's own conduct, act or default; and (c) there are reasonable grounds for granting the debtor an extension of time within which to pay the judgment sum and costs…
>
> Where a stay is granted on the execution of a judgment, this will not prevent the judgment [creditor] from taking some steps to protect his position."

They cite the entitlement to register a judgment mortgage, pursuant to s. 116(3)(b)(i) of the Land and Conveyancing Law Reform Act 2009, as an illustration of a step a judgment creditor

may take during the operation of a stay, by reason that it is "not considered to be an act of execution."

57. The authors also note at para. 23-135:-

> "Clarke J. suggested in his judgment in *Danske Bank v. McFadden* [[2010] IEHC 119] that where an appeal is genuine, the court should conduct a process analogous to the balance of convenience test applied in determining whether to grant or withhold an interlocutory injunction. He stated that it is clear that a successful party may lose out to a greater or lesser extent as a result of having a stay placed on any order obtained. Equally, an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may also suffer to a greater or lesser extent."

Conclusions

58. The trial judge having reached the views he did, that the Bank was not entitled to issue its motion before the expiration of the stay, fell into error insofar as he purported to exercise his discretion based on the decision of this court in *Allied Irish Banks plc v. O'Reilly.*

59. I am satisfied that the absence of any stay having been granted in the case of *Allied Irish Banks plc v. O'Reilly* or the earlier case of *Moorview Developments Ltd. v. First Active plc* renders both fundamentally and materially distinguishable from the facts in the instant case. It will be recalled that in *O'Reilly* a stay of execution had been refused on the judgment for the liquidated sum, as the judgment noted at para. 2. Similarly in *Moorview*, the motion for relief under O. 42, r. 36 had not been brought during the operation of an order staying execution. The decisions are thus distinguishable in a key material respect.

60. At para. 18 Finlay Geoghegan J. observed in *O'Reilly*:-

> "…A person who has obtained a judgment which the judgment debtor leaves unsatisfied appears to me *prima facie* entitled to orders which may be made pursuant to O. 42, r. 36 and the connected orders envisaged by *Moorview* pursuant to the inherent

jurisdiction of the court. The obligation is on the judgment debtor to pay the amount due under the judgment. If there is proof he has not done so, there is no further evidential obligation on the judgment creditor to establish a *prima facie* entitlement to the order."

61. By contrast, on 5 October 2018 the appellants, by virtue of the operation of the stay of execution, were not judgment debtors under a present obligation to pay the amount due under the judgment. Since the Bank was unable to demonstrate a present entitlement to effect immediate enforcement at the date of issuing the motion, it was not entitled to issue same without leave of the court.

62. The stay took effect in accordance with its tenor. It continued in full force and effect on 5 October 2018 and on that date the appellants were not persons who were judgment debtors leaving a judgment unsatisfied. Nor was the respondent a party entitled to enforce a court order for the purpose of O. 42, r. 36, by reason of the stay. I am satisfied that the judgment only became final and conclusive as a matter of law in the circumstances of this case at the expiration of three months, in accordance with the tenor of the order of 12 July 2018 granting the stay. The motion was issued prematurely.

63. As the decision of the Supreme Court in *Farrell v. Governor of St. Patrick's Institution* made clear, it is necessary to accord deference to a court order granting a stay for its duration and seek leave of the court before taking a litigation step during its operation.

64. The granting of a stay has real, substantial and potentially significant adverse consequences for the successful party who is bound by its terms for its duration. It is not open to such a party, without making a prior application for leave to the court which granted the stay, to take steps invoking court processes such as pursuant to O. 42, r. 36. To do so is fundamentally inconsistent with the clear terms of the unappealed order.

65. The observations of the trial judge suggested that stays are granted in cases of this kind as a matter of routine and without any proper evaluation of the merits of the application. As the authors of *Delany and McGrath* note at para. 23-129:

> "It has been stated that the overriding consideration in deciding whether to grant a stay is to maintain a balance so that justice will not be denied to either party."

66. Without expressing any view as to the correctness or otherwise of the trial judge's observations concerning the quotidian manner in which stays are granted, implicit in the exercise of the inherent jurisdiction which resulted in the granting of the stay in the instant case is that the court was satisfied that it was necessary and appropriate in the interests of justice to grant the stay of the kind, in the terms and for the duration made in the first instance.

67. It is noteworthy that O. 42, r. 33 RSC provides:-

> "An award may, with the leave of the Court, and on such terms as may be just, be enforced at any time, though the time for moving to set it aside has not yet elapsed."

Explicit in that provision is that it is envisaged that leave of the court should be sought where a step towards enforcement is being taken prior to expiration of a stay.

68. Given the potentially significant adverse implications such a stay may have for the judgment creditor in certain instances, every application for a stay on a judgment for a liquidated sum calls for due consideration of its purpose and merits and also given the delays that are in any case intrinsic to the process of enforcement, which, in practical terms, very often serve to operate as a stay. Once granted, a stay of execution must be accorded full force and effect throughout its duration. If a party who has obtained a judgment, which is the subject of an application for a stay, wishes, during the period of the stay, to take procedural steps only towards enforcement, so as not to be delayed in enforcement following the expiration of the stay, that party should consider seeking leave of the court for liberty to do so when the application for a stay is moved. It would be further desirable that the Superior Court Rules

Committee give consideration to the operation of O. 42, r. 36 and whether its operation ought to be reviewed.

69. In the instant case, I am satisfied that the terms of the stay required that the *status quo* be maintained for its duration. Prior to its termination the judgment could be entered but otherwise the matter was to be maintained in a holding pattern. The issuing of the motion by the Bank constituted a significant step. It was inconsistent with the stay and contrary to its clear intent. In the absence of an application for leave to issue the motion, its issuance was premature, inconsistent with the terms of the judgment and breached the stay. Therefore, the motion ought to be struck out.

70. The relevant date for the determination of whether an application is good or bad is the date of issuance of the notice of motion rather than any other date such as the first return date or indeed the date of hearing and the trial judge erred in concluding otherwise. To come to a contrary view would be to undermine the order pronounced in open court in the presence of the parties on 12 July 2018 which calls for solemn compliance with its terms.

71. In light of the above findings, it is not necessary to address the parties' submissions on whether an order of discovery in aid of execution was warranted or not in the first instance.

72. I would accordingly allow the appeal and set aside the order of the High Court.

73. In the circumstances on the issue of costs, I am of the view that the appellants, having succeeded in their appeal, are entitled to their costs in this court and in the High Court. The Bank is hereby granted liberty to file written submissions if it seeks to oppose the said order as to costs, same to be submitted within 28 days of electronic delivery of this judgment, the appellant being afforded a like period within which to respond. In either case written submissions not to exceed 1,000 words.

74. As this judgment is being delivered electronically Haughton J. and Binchy J. have indicated their concurrence with same.