



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 49
High Court Record Number: 2012 375SP
Court of Appeal Record Number: 2019/27

Haughton J.
Power J.
Murray J.

BETWEEN/

ADM MERSEY PLC

FIRST NAMED RESPONDENT

- AND -

AIDAN FLYNN

SECOND NAMED RESPONDENT

- AND -

ALLIED IRISH BANKS PLC

CLAIMANT/APPELLANT

COSTS JUDGMENT of Mr. Justice Robert Haughton delivered on the 19th day of February, 2021

1. This judgment addresses costs and final orders, and is supplemental to the judgment delivered herein by me on 29 September 2020 ("the Principal Judgment"). It should be read with it, and in particular alongside paragraphs 115 to 130 where I considered and proposed orders (subject to considering further submissions) in respect of costs of sale, the distribution of monies in court, and costs in the High Court and on this appeal.
2. The court has now considered the Submissions of the relevant parties ("AIB" and "ADM" respectively) on the orders proposed in the Principal Judgement, including supplemental Submissions requested by the court related to the costs of sale and figures considered in paragraphs 116-117 of the Principal Judgment.
3. As the parties have been unable to agree on any outstanding matters, issues now arise under seven headings:

- (i) Costs awarded to ADM under the Order of Feeney J. dated 3 December 2012 (“the Primary Order”).
- (ii) Costs of sale, which I define to include costs, expenses and outlays (including VAT and Stamp Duty) properly and reasonably incurred by ADM in relation to accounts and enquiries before the Examiner, securing vacant possession of the property, and securing and completing the sale.
- (iii) Costs of AIB and ADM in respect of the 0.55 r.50 Motion in High Court.
- (iv) The Appeal costs in respect of the 0.55 r.50 Motion.
- (v) Measurement of the Costs of Sale.
- (vi) The proportion of the net proceeds of sale over which AIB and ADM respectively enjoy priority by virtue of their respective charges.
- (vii) The costs related to this ruling.

(i) and (ii) Costs of the primary order ordered by Feeney J, and Costs of Sale

4. These two issues can be conveniently addressed together. AIB object to the proposed order at paragraph 129(b) which would have the effect that all costs awarded to ADM under the Primary Order together with the Costs of Sale, would be distributed to ADM’s solicitors from the gross proceeds of sale, and hence in priority to any distribution to AIB from the net proceeds of sale on foot of its registered charge.
5. AIB submit that this would have the effect of impermissibly varying the order of Feeney J, and would “create a wholly undesirable precedent” by giving ADM priority over AIB’s prior registered charge in circumstances where ADM incurred the costs of obtaining the primary order knowing that AIB had a prior charge. It is pointed out that AIB had no involvement in the well charging proceedings, only later becoming involved at the accounts and enquiries stage.
6. It will be recalled that the Mortgage entered into between AIB/AIB Mortgage Bank and Mr. Flynn on 18 January 2007 extended to part only of the land described in Folio WD684F. Of the total area of some 13.005 acres (5.2179 hectares in the Folio), an identifiable “Green” part comprising 2.24 acres, approximately 1/5th of the overall area, was excluded. What led to this is unclear, but it must have been a commercial decision by AIB. It resulted in the 2.24 acres being unencumbered, and ADM’s judgment mortgage enjoying priority over that part. This complication, which meant that AIB could only enforce security over part of the lands, may explain, at least in part, the subsequent actions of AIB.
7. Mr. Flynn defaulted on his loan. AIB could then have appointed a receiver, or otherwise sought to enforce their security, for example, by bringing proceedings for possession and if necessary for partition/sale on foot of the registered legal Mortgage. Instead, AIB sought, and on 20 April 2011 obtained, a judgment against Mr. and Mrs. Flynn jointly for €551,169.12, presumably with the intention of registering this against Mr. Flynn’s interest

in the entirety of the lands in Folio 684. Inexplicably, AIB did not register it as a judgment mortgage until 15 February 2013. In the meantime, on 28 June 2011, ADM obtained judgment against Mr. Flynn for €150,000, and promptly registered it as a judgment mortgage on 25 August, 2011 over the entire Folio, thus affording ADM priority in respect of (approximately) that 1/5th of the land that had been unencumbered.

8. AIB could still have moved first and brought proceedings to enforce their security, but they did not do so. ADM then did what they were fully entitled to do to realise their security – they initiated these proceedings, obtained the Primary Order, including an order for sale within three months from the date of service on Mr. Flynn of the order. As is the norm for the moving party obtaining an order for sale, ADM’s solicitors had carriage of sale. In due course, they attended to accounts and enquiries before the Examiner, obtained possession (by order dated 19 May 2014) and secured a sale. At any stage during the process it would have been open to AIB to have brought a motion asking the court, in light of the priority enjoyed by its legal mortgage over 4/5ths of the land, to take over the carriage of sale, but that did not occur.
9. It would be unjust if this singular inactivity on the part of AIB were to mean that it should benefit from the actions and endeavour of ADM in securing possession and a sale, yet deprive ADM of any of the proceeds of sale notwithstanding that ADM enjoys priority by virtue of its judgment mortgage over 2.24 acres. The work done by ADM, its legal team and other agencies involved in achieving the sale, ensured for the benefit of all encumbrancers - AIB as well as ADM – a fact acknowledged by AIB’s solicitors in a letter sent by Barry C. Galvin & Son to Michael Nugent & Co on 14 February 2017. Whilst it is true that the Costs of Sale will deplete the proceeds, this would have occurred in any event if AIB had carriage of sale, so it cannot be suggested that there is any injustice in ensuring that ADM recovers these essential costs and expenses before any distribution to encumbrancers. As I stated at paragraph 123 of the Principal Judgment:

“...As the party taking these proceedings and having the responsibility for securing possession and selling the premises, [ADM] had no alternative but to attend before the Assistant Examiner and in due course before the High Court and this Court as the party having carriage of sale and also as *legitimus contradictor* in respect of AIB’s motion. Its position in this regard is to be differentiated from that of an incumbrancer who does not have carriage of proceedings, but who appears before an Examiner in response to advertisement pursuant to accounts and enquiries ordered by the Court.
10. Having said this, I do accept, in principle, that the court should not interfere with the costs as ordered by Feeney J., and that to this extent the proposed order should not be made. Under the Primary Order ADM was awarded its costs of the well charging proceedings up to that point against Mr. Flynn, “when taxed and ascertained in equal priority with their demand”. That standard wording meant that such costs ranked with equal priority with the debt secured by ADM’s judgment mortgage - which in turn carried the costs of ADM obtaining judgment against Mr. Flynn “in the sum of €157,303.63 for Principal together

with interest from the 28th day of June 2011 and the Plaintiff's costs when taxed and ascertained". That primary order should not be disturbed. This means that the costs of ADM in these proceedings up to and including the primary order made on 3 December 2012 (which fall to be taxed in default of agreement as between ADM and Mr. Flynn), are part of the debt of Mr. Flynn owed to ADM and secured against Folio WD 684F but ranking after AIB's charge on 10.7 acres. To the extent that these costs may in fact exceed ADM's equity in the balance of the funds available for distribution, this is a cost that ADM must bear unless it can recover it by other means from Mr. Flynn. It would not be appropriate for any shortfall to be discharged out of that proportion of the net proceeds of sale over which AIB enjoys priority.

11. However, to be clear, this consideration does not in my view apply to the Costs of Sale incurred by ADM after 3 December 2012. ADM is entitled to have the Costs of Sale discharged out of the proceeds of sale *before* any distribution to charge-holders. The measure of these costs will be addressed later in this judgment.

(iii) Costs of O.55 r.50 Motion in High Court

12. In the High Court ADM was awarded its costs against AIB, and that order was appealed by AIB. For reasons given in the Principal Judgement it was proposed that this court should, in the exercise of the discretion that it has under O.99 r.1 R.S.C. (the rule that governed the awarding of costs at the time of the High Court order), make an order that both parties be entitled to their costs of the motion to be paid out of the funds standing to the credit of action.
13. Those reasons, in brief, were –
 - 1) that the O.55 r.50 application and the consideration of 'special circumstances' by the High Court would not have been necessary but for AIB's delay and failure to avail at an earlier point in time of making legal submissions to the Assistant Examiner or the court based on the s.31(1) of the Registration of Title Act, 1964, and
 - 2) ADM, having regard to its prior judgment mortgage over part of the property and the fact that it had carriage of sale, would have had no alternative but to attend before the Assistant Examiner or the court and incur costs.
14. AIB in their Submission address the costs of the Appeal, but do not appear to make any submission specifically directed to the High Court (Quinn J.) costs order. In particular AIB do not address the reasons suggested for the proposed order in the Principal Judgment at paragraphs 121-124. I take their position to be that the normal rule should apply, and that as they were successful on appeal the costs in the High Court should follow the event and ADM should not be entitled to its costs. However, in circumstances where ADM had carriage of sale and were entitled to appear on the motion it is far from clear that the normal rule would exclude them from being awarded their costs out of the proceeds of sale.

15. ADM in their Submission, while agreeing generally with the proposed orders, do argue that if, for the reason identified in para.124 of the Principal Judgment, AIB is to get its costs out of the security, this is "generous to AIB", and they submit that that AIB should have to bear ADM's costs of the motion. Their argument is that AIB's conduct resulted in the O.55 r.50 application, ADM were necessary parties as *legitimus contradictor*, and that the proposed costs order would adversely affect the funds (if any) available to distribute to ADM notwithstanding that the costs were incurred due to AIB's conduct.
16. While it is true that ADM had to attend the High Court motion, the difficulty with their argument is that, late though AIB were in bringing their application, some form of application was at that stage required in order to correct the significant legal error in the Examiner's certificate, and the logical consequence of the Principal Judgment is that AIB should have succeeded and should have been awarded at least some costs in the High Court. It would be reasonable to expect that such costs as might have been awarded would have been directed to be paid out of the proceeds of sale rather than awarded against ADM, as the error that occasioned the application was that of the Examiner, not ADM.
17. Having considered all of the Submissions I am now of the view that, rather than award the parties their costs of the motion in the High Court, to be adjudicated in default of agreement, the court should vacate the order as to costs made by Quinn J, and should substitute it with 'no order as to costs', for the following reasons.
18. The most recent Submission on behalf of ADM now suggests that there are greater Costs of Sale which should be paid to ADM out of the proceeds of sale than was previously thought to be the case. In paragraph 116 of the Principal Judgment my calculations suggested this figure came to €57,628.50, which fell to be deducted from the sum of €107,250 held to the credit of the action; but ADM's supplemental Submission at paragraph 8 now suggests that the sum to be paid on account of such costs is €79,956.79. To the extent that this includes any legal costs arising up to 3 December 2012 when the Primary Order was made (as it appears to do), as clarified earlier in this judgment these are due by Mr. Flynn and are not deductible as part of the Costs of Sale. Even when this is taken into account it now appears that there may be as little as €30,000 left after the costs of sale are discharged. In these circumstances it is desirable that this court should try to avoid costs orders that would lead to further adjudication of legal costs where this can reasonably be avoided, so as to protect the limited funds available for distribution to encumbrancers.
19. Whilst this, taken in isolation, might be said to disadvantage ADM, it should be viewed in the context of the overall decision in relation to costs, in which this court has sought to do justice between the parties in all the circumstances, and has sought to avoid further depletion of the modest funds standing to the credit of the action by ordering avoidable adjudications of legal costs. As will be seen in the next section, it is my view there should be no order as to the costs of both parties in respect of the appeal, and this might be said to be to the advantage of ADM as it was not the successful party.

(iv) Appeal costs

20. In the Principal Order it is proposed that there be no order as to the costs of the appeal. In pursuing costs, AIB submits that as it was the winning party the 'normal rule' as laid down by Denham J in *Grimes v. Punchestown Developments Company Limited* [2002] 4 I.R. 515 means that AIB should be entitled to its costs unless the court for special reasons otherwise directs. Reliance is placed on the affirmation of this principle by Clarke J., as he then was, in *Veolia Water UK Plc v. Fingal County Council (No.2)* [2007] 2 I.R. 81, where he said:

"2.5 The overriding starting position should remain that costs should follow the event. 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 had found to be unmeritorious proceedings".

21. AIB also cite Finlay C.J. in *SPUC v. Coogan (No.2)* [1990] 1 I.R. 273, where he held that it "was necessary for very substantial reasons of an unusual kind to exist before this Court should probably depart from the general principle that costs follow the event on the hearing of appeals before it."

It is argued that at the date of registration of its judgment mortgage, and at the date it instituted well charging proceedings, ADM was aware of the prior registered legal Mortgage of AIB, that the refusal of the Assistant Examiner to admit AIB's claim on foot of the Mortgage was wrong, and that as the lands were not sold until September, 2018 there could be no distribution to creditors prior to that date.

22. These submissions are correct so far as they go. However, the Submission does not address s.169 of the Legal Services Regulation Act, 2015, subsections (1) and (2) of which are set out in the Principal Judgment and now govern the granting of costs where one party is entirely successful. The considerations that may lead a court to make an order other than awarding costs to a successful party are now set out in ss. (1) at (a) to (g). While I accept the validity of arguments made by AIB, and the authority on which they are made, the court is entitled, indeed obliged, to balance against those, counter-arguments arising *inter alia* from "the particular nature and circumstances of the case" (the first limb of ss. (1)), the conduct of AIB (s s.(1)(a)), and the reasonableness of ADM in contesting the appeal.

23. When this balancing exercise is carried out I remain of the view, for the reasons that I have identified in paragraphs 126, 127 and 128 of the Principal Judgment, that AIB is not entitled to be awarded its costs of the appeal against ADM. I do not propose to repeat those reasons verbatim here – as I have said at the start of this judgment those paragraphs fall to be read with this judgment - but they can be summarised as being:

i) ADM had carriage of sale, had an interest in the net proceeds of sale, and was a *legitimus contradictor*;

- ii) by its conduct, in particular its own delay, AIB was forced to pursue a different procedure, namely, to bring an O.55 r.50 application, and hence brought upon itself the obligation to show 'special circumstances' to justify variation, and that issue had to be considered in some detail on the appeal;
- iii) having regard to the legal and factual uncertainty over whether AIB could show 'special circumstances', it was reasonable for ADM to contest the appeal, particularly as the judgment of Baker J. in *Tanager*, which had an important bearing on the appeal did not come to hand until shortly before the hearing before Quinn J., and does not seem to have been brought to his attention and does not feature in his judgment;
- iv) in all the circumstances it would not be just that ADM, which had carriage of sale, be penalised to the point of having to make net payments to AIB by virtue of a costs order against it – something that would now be a distinct possibility having regard to the level of funds, if any, likely to be available for distribution.

24. In addition to these reasons, as I have already explained in this judgment, the court in its overall approach to costs in this case has sought to achieve justice in all the circumstances. The making of no order as to AIB's costs of the appeal must be seen in the context of the decision to make no order as to ADM's costs of the motion in the High Court, and the court's reasoned desire to avoid costs adjudications that could further deplete the funds in court.

(v) Measurement of ADM's costs of attending before the Examiner, securing vacant possession and securing the sale.

25. Following receipt of submissions on costs/final orders, which did not adequately address the figures tentatively put forward at paragraph 117 in the Principal Judgment, the court requested the parties to address these figures and indicate "whether and to what extent (if any) there is agreement on the figures", and if not agreed to identify "where the difference lies and what process is suggested for resolution", and afforded the parties 28 days (email sent for the Court of Appeal Office on 7 January, 2021).
26. It is unfortunate, in light of the small sum held to the credit of the suit relative to the size of the debts due to parties, and the extent of their relative security given the priorities, that the parties have not reached any agreement whatsoever. There was some "without prejudice" correspondence, but they have not reached agreement on any of the figures or items of expenditure or outlays. Even the proportion that their respective charges bear to each other over the property, and hence the net proceeds of sale, has not been agreed.
27. In fairness to ADM, their supplemental Submission (29 January, 2021) does seek to address the figures in considerable detail, giving new figures with breakdowns, and annexing invoices, receipts, and the breakdown of work done including three detailed Time Recording Sheets setting out the work done and time spent. I caveat further reference to this by acknowledging that none of this is deposed to on affidavit. Paragraph 13 records that ADM's solicitors –

"...have charged professional fees to [ADM] at an agreed rate of €280 per hour plus VAT for all work done by a solicitor, but no charge is made for work done by a legal executive or apprentice or other support staff. As such, the work of legal executives, apprentices and other support staff is largely not recorded. All work done and time recorded was actually and necessarily and reasonably incurred. It is submitted that this rate of charge is reasonable and proportionate for the work done. It is to be noted that [ADM]'s solicitor represented the Plaintiff before the High Court when resisting the application of AIB Bank without the assistance of counsel, thereby saving some element of costs. It should also be noted that, notwithstanding the agreed rate of charge, a significant discount was applied to the fees charged by [ADM]'s solicitor when the total balance of the first time sheet was transferred to the opening figure on the second time sheet, so the amount actually charged is somewhat less than the hourly rate agreed."

28. While no judge can claim expertise in costs adjudication, in my experience of addressing costs claims when sitting as the High Court judge in the Examiner's List, and also deciding legal costs claims in pre-2014 Companies Acts list of liquidation cases requiring 'Further Consideration', this appears to me to represent reasonable and proportionate charging. I also note that the detail given is such that it is possible to separate out the costs claimed by ADM which were awarded by Feeney J. against Mr. Flynn and which do not fall to be deducted from the funds in court, as this judgment now makes clear.
29. ADM invite the court to measure costs rather than admit them to adjudication, for reasons of expedition, and to save costs. It is observed, at paragraph 6 –

"[ADM] has been seeking recovery of this debt for over a decade, and these well charging proceedings already stretch back nine years. The costs incurred by the Plaintiff already will exceed its recovery. As any further adjudication of costs or assessment process can only add further costs and delay, it is submitted the fairest and most expedient manner for these issues to be resolved is for this Honourable Court to fix the amounts."

Also while not going into the "without prejudice" correspondence, it is stated that "...no specific ground of objection, or specific difference between the parties has been openly stated...".

30. AIB's supplemental Submission in reply (3 February 2021) inappropriately reiterates arguments related to the Primary Order, and then in paragraph 4 takes the stance that as all figures claimed "represent untaxed costs...Absent a taxation or similar process it is not possible to know whether the figure is appropriate, albeit that it is submitted that the figures claimed are very high in the context of those usually payable in such situations". In paragraph 5 it is submitted that "Taxation of Costs is a complex matter, it would require a perusal of the files held and details of the work done, which is not available. A very simplistic explanation has been given as to the basis on which the costs are calculated." AIB suggest "it might be possible to arrive at a realistic figure if the file was submitted to an independent Cost Accountant" but say there would be no prospect of agreement unless AIB have the

“information as to how same were calculated.” Given the level of detail and back-up documentation in ADM’s supplemental Submission, this is a surprising statement.

31. The court had a reasonable expectation that the parties would engage in a meaningful way with a view to agreeing the residual issues after delivery of the Principal Judgment. Regrettably, such agreement has not been reached.
32. This court now has a number of options. Firstly, it could leave the matter of measurement to the Examiner. Were it to do that it would be for the Examiner to determine the costs, expenses and outlays ordered by this court to be paid out of the proceeds of sale. Insofar as legal costs are concerned the Examiner could measure them, or could refer them for adjudication, or could refer the matter to the further consideration of the High Court judge. In my view this is likely to be the most expensive and least expeditious option. However, it must be borne in mind that the matter will in any event have to be re-entered before the Examiner or Assistant Examiner after this appeal so that a revised Final Certificate can issue and a final distributions of funds held to the credit of the action approved.
33. The second option would be for this court to refer the relevant costs to adjudication, or – as a hybrid of the first and second option – to remit the matter to Examiner with a direction that the costs be adjudicated.
34. The third option would be for this court to measure the Costs of Sale. This option appears to be contemplated by AIB when it refers in its Submission to submission of the file “to an independent Cost Accountant”.

O.99 r.7(2) of the Rules of the Superior Courts, 1986 (as inserted by S.I. No.584 of 2019, with effect from 3 December, 2019) provides that –

“(2) 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 claim, 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.”

35. The courts clearly have the power to measure costs “in gross”, but have generally been slow to do so – the measurement of costs by the court has been the exception rather than the rule. Order 99 r. 7(2)(b), which now expressly empowers the court to appoint an independent legal costs account to report to the court, is a useful tool in assisting the court in deciding what sum in gross may be reasonable.
36. In my view this would be the least expensive and most expeditious way to proceed, and in light of the limited funds in court I would adopt this option and appoint an independent legal costs accountant to report to the court on the Costs of Sale, as that term is defined in

paragraph 3(ii) of this judgment, which fall to be discharged from the funds standing to credit of the suit. I would further direct that the costs of such report be discharged out of the said funds.

I will afford the opportunity for the parties to agree the name of the independent legal costs adjudicator to be so appointed, and in default of agreement the parties have liberty to apply. ADM/its solicitors must of course submit their file for review by the costs accountant, in addition to copies of the Principal Judgment and this supplemental judgment and all other relevant documents. To further regularise matters ADM's solicitors must file an affidavit exhibiting the materials referred to in their Supplemental Submission in seeking measurement of the Costs of Sale by the court. They should also prepare amended materials that exclude all elements of costs that properly fall within the costs awarded by Feeney J. I would direct that these preliminaries be attended to within 14 days of electronic delivery of this judgment.

(vi) The proportion of the net proceeds of sale over which AIB and ADM respectively enjoy priority by virtue of their charges.

37. This is not addressed in the original Examiner's Certificate, presumably because it was not relevant if ADM enjoyed priority over the entire Folio. It is now relevant as a result of the Principal Judgment. It has not been addressed in any of the submissions, and while strictly speaking it is an issue that may not properly be before this court on this appeal, it is a loose end that demands some clarity. I would give the parties a further opportunity to agree the proportions, and to inform this court accordingly before the court determines the Costs of Sale. If it cannot be agreed in my view the court will have no alternative but to leave the issue to be decided by Examiner (or the High Court), a process which may involve Valuers and will doubtless entail further costs and expense which is avoidable.

(vii) Costs of this costs determination

38. As to the costs attendant on this costs determination and judgment, I would again make 'no order as to costs'. The issues around the costs orders proposed in the Principal Judgment were not straightforward, and entailed the exercise of discretion and deviation from application of the normal rule that might otherwise have benefitted AIB. It could not be said that either party had a clear win. Further I am very conscious of the dwindling pool of funds available to discharge costs and expenses, let alone result in a distribution to encumbrancers, and it would be inappropriate to add further to the costs burden.

39. Accordingly -

- (i) The court confirms the Primary Order of Feeney J. made on 3 December 2012 whereby ADM was awarded its costs of the well charging order against Mr. Flynn, to be taxed in default of agreement. Such costs now fall to be adjudicated by a legal costs adjudicator in default of agreement should ADM decide to pursue them. In the interests of clarity, the court confirms –
 - a. that such costs have equal priority with ADM's judgment debt, interest and costs,

- b. that as AIB's charge enjoys priority in respect of a portion (approximately 4/5ths) of the property described in Folio WD684F these costs cannot be paid out of proceeds of sale that fall to be distributed to AIB.
- (ii) ADM's Costs of Sale (insofar as not paid out to date) shall be paid out of the funds held to the credit of the suit in priority to any distribution to encumbrancers.
- (iii) further to the directions in paragraph 36 of this judgment, pursuant to O.99 r.7(2) the court appoints an independent legal costs accountant (to be agreed by ADM and AIB, or in default of agreement to be named by the court) to report to the court on the work to which the Costs of Sale relate, and the measurement of such Costs of Sale in gross will be determined by this court when the independent legal costs accountant's report is to hand.
- (iv) the order of Quinn J granting costs of the motion in the High Court to ADM will be vacated and substituted by 'no order as to costs' in respect of ADM and AIB in the High Court.
- (v) there shall be no order as to the costs of this appeal.
- (vi) there shall be no order as to the costs of this costs determination.
- (vii) the court also leaves over for agreement the question of the proportion of the net proceeds of sale over which AIB and ADM respectively enjoy priority by virtue of their charges.

In the circumstances both parties will have liberty to apply limited to these orders and directions.

Murray J and Power J having read this judgment are in agreement with it.