



# THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 77

Court of Appeal Record Number: 2019/246

High Court Record No. 2017/823S

**Haughton J.**

**Murray J.**

**Pilkington J.**

**BETWEEN/**

**ALLIED IRISH BANKS PLC**

**PLAINTIFF/RESPONDENT**

**- AND -**

**THOMAS O'CALLAGHAN AND MARY O'CALLAGHAN**

**DEFENDANTS/APPELLANTS**

**Costs Judgment of Mr. Justice Robert Haughton delivered electronically the 19th day of March, 2021**

1. This judgment is supplemental to the judgment delivered herein on 19 November 2020 (“the principal judgment”), and should be read with it. This judgment deals with the outstanding issues of interest and costs.

## Interest

2. In the principal judgment the court dismissed the appeal stating:

“66. I am not satisfied that the appellants have made out any *bona fide* or credible defence. As the figure in respect of which judgment should be entered now changes by reason of the respondent’s waiver of surcharge, I would direct that the respondents file and serve an affidavit setting out the recalculated principal and interest exclusive of surcharge in accordance with the comments set out in the preceding paragraph. This should be done within 21 days from the date of delivery of this judgment. Should the appellants wish to contest the contents of this affidavit or file any further affidavit in response thereto, they will have 21 days to file such affidavit or file further submissions in the Court of Appeal Office. If required the court will then determine the amount in respect of which judgment is to be ordered against the appellants unless it considers that a further hearing is required. I would therefore dismiss this appeal and affirm the order of the High Court save insofar as adjustment to the amount of the judgment is required by the deduction of the surcharge interest.”

3. Pursuant to this direction an affidavit was sworn on [redacted] by Marie Moylett, a manager of AIB, and this sets out a recalculation arising not only from waiver of surcharge but also waiver of the compound interest attracted by the surcharges that had been applied to the various accounts. I would observe that this is precisely what the court envisaged; in paragraph 65 of the principal judgment I stated that the verification on affidavit should be –

“...sufficient to demonstrate where the surcharges were made, and where they are now being deducted, and sufficient to discharge the onus of proof on the respondent to satisfy the court that not only is there no surcharge included in the final figures in respect of which judgment is sought, *but also that the surcharges did not lead to further compounding of interest.*” [Emphasis added]

4. Ms. Moylett's affidavit sets out in paragraph 5 the amounts due and owing on the three relevant accounts, in respect of only two of which surcharge interest was applied, in the amounts of €19.15 and €381.74 respectively. In the ensuing paragraphs she sets out the compound interest referable to these surcharge amounts, in the sums of €1.35 and €479.48 respectively. Ms. Moylett gathers these deductions together in paragraph 11:

“11. Therefore the revised judgment amount for which the Defendants are now jointly and severally liable less the surcharge interest amount of €400.89 (€19.15 plus €381.74) and less the compounding interest amount of €480.93 (€1.35 plus €479.48) in respect of the surcharge interest is the amount of €465,875.91.”

5. On 15 December 2020 Mr. Herbert Kilcline solicitor for the appellants swore a replying affidavit on their behalf, although it was not filed until 15<sup>th</sup> March, 2021. In this he refers to issues to do with the degree of particularity in the Summary Summons, the terms and conditions applicable to the accounts and the power to levy surcharge, the previous assertions of entitlement to surcharge, and the power of AIB to charge compound interest. None of these issues arises at this stage, where the sole issue is the correct amount of the judgment when surcharge, and compound interest arising from surcharges, are deducted following AIB's waiver. Mr. Kilcline does not, on behalf of his clients, dispute Ms. Moylett's figures.

6. In these circumstances I am satisfied that the court can and should rely on Ms. Moylett's recalculated figures, and the figure of €465,875.91 will be substituted for the figure of €466,757.63 in respect of which judgment was entered against the defendants/appellants in the High Court, and in all other respects the High Court order will be affirmed.

### **Costs**

7. In their written submission AIB seeks its costs of the appeal on the basis that the appellants failed in “the event”, save in respect of the surcharge aspect which resulted in a modest reduction of the total claim, and the court is asked to exercise its discretion under O.99

r.2(1) accordingly. They also rely on s.169(1) of the Legal Services Regulation Act, 2015, which provides that “a party who is entirely successful in civil proceedings is entitled to an award of costs against the party not successful in those proceedings...”.

**8.** In a reply submission, filed on 15 March, 2021 which was long after the time allowed by the court’s direction, the appellants suggest that they should be awarded their costs, or alternatively that there should be no order as to the costs of the appeal. It is suggested that the appellants “had to raise” the particularisation issue, and that the surcharge issue was not resolved until there was waiver before this court, and that in that respect AIB was not “entirely successful”. It is submitted that the appellants raised, and the court decided, matters of exceptional public importance in relation to the definition of “consumer”, and reliance is placed on *Hanafin v Minister for Environment & Ors* [1996] 2 I.R. 321 and *Bacik and Ors. v. An Taoiseach & Ors* [2020] IEHC 313 for the proposition that in such circumstances the court can exercise its discretion to grant cost even if a party is unsuccessful, or make no order as to costs.

**9.** Further in his affidavit Mr. Kilcline suggests that there should be an apology for overcharging, or that the court should express its tangible disapproval of “the Respondent’s methods and ...behaviour by making no order as to costs.”

**10.** The appellants did not “have to” raise the “particularisation issue”, the “consumer” issue, or any of the issues canvassed in their written and oral submissions; they chose to raise these matters, and lost.

**11.** I am not satisfied that this appeal raised any issue of exceptional public importance such as would justify the court exercising its discretion in favour of the appellants.

**12.** The surcharge issue was, in the context of the overall size of the appellants’ indebtedness, a very minor issue, and was not even raised in the Notice of Appeal or in the appellants’ written submissions to this court. As I recall it was in fact the court that raised this issue, and the

waiver by AIB was quickly forthcoming, and it did not add materially to the length of the appeal hearing. Nor am I persuaded that there was anything in the conduct or behaviour of AIB that would have warranted AIB giving an apology to the court in this case.

**13.** As Murray J. held in *Higgins v. Irish Aviation Authority* [2020] IECA 277, at paragraph 10, a party who is partly successful in proceedings may nonetheless obtain all its costs if, having regard to the matters iterated in s.169 of the 2015 Act, it is appropriate to do so. I have had regard to those matters, and it is appropriate to award to AIB all its costs. In particular it was virtually “entirely successful”, the only scratch on the paint being the waiver of a very small sum in respect of surcharges, and I am not satisfied that there was anything with which AIB could be reproached in the manner in which it conducted the appeal.

**14.** Accordingly I am satisfied that AIB is entitled to its costs of the appeal, including the costs of AIB’s Submission on costs, such costs to be adjudicated by a legal costs adjudicator in default of agreement. I exclude from this all costs associated with the preparation and filing of Ms. Moylett’s affidavit as to surcharge and compounded interest.

*Mr. Justice Murray and Ms. Justice Pilkington have confirmed their agreement with this judgment and orders.*